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ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

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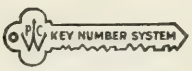
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VOLS. 11, 12, & 13, SOUTH CAROLINA REPORTS



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1916

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REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XI

FROM NOVEMBER, 1877, TO NOVEMBER, 1878, INCLUSIVE

BY ROBERT W. SHAND

STATE REPORTER

JERSEY CITY, N. J.
FREDERICK D. LINN & CO., LAW PUBLISHERS AND BOOKSELLERS
1880

ANNOTATED EDITION

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. A. J. WILLARD.

ASSOCIATE JUSTICES.

HON. HENRY McIVER. HON. A. C. HASKELL.

CIRCUIT JUDGES.

FIRST CIRCUIT.

HON. J. P. REED. HON. B. C. PRESSLEY.

SECOND CIRCUIT.

HON. P. L. WIGGINS. HON. A. P. ALDRICH.

THIRD CIRCUIT.

HON. A. J. SHAW.

FOURTH CIRCUIT.

HON. C. P. TOWNSEND. HON. J. H. HUDSON.

FIFTH CIRCUIT.

HON. R. B. CARPENTER. HON. J. B. KERSHAW.

SIXTH CIRCUIT.

HON. T. J. MACKEY.

SEVENTH CIRCUIT.

HON. L. C. NORTHROP. HON. W. H. WALLACE.

EIGHTH CIRCUIT.

HON. T. H. COOKE. HON. THOS. THOMSON.

ATTORNEY-GENERALS.

HON. JAMES CONNER. HON. LEROY F. YOUMANS.

SOLICITORS.

1st Circuit.—W. ST. J. JERVEY.
2d Circuit.—F. H. GANTT.
3d Circuit.—M. J. HIRSCH.
4th Circuit.—W. W. SELLERS.
5th Circuit.—JOHN R. ABNEY.
6th Circuit.—T. C. GASTON.
7th Circuit.—B. W. BALL.
8th Circuit.—J. S. COTHRAN.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

LIST OF ATTORNEYS

ENROLLED IN THE SUPREME COURT OF SOUTH CAROLINA DURING THE YEAR 1879.

ANSEL, MARTIN F.....Greenville.
BARRON, J. T.....Richland.
BLEASE, JAMES L.....Newberry.
BOLGER, H. R. P.....Charleston.
BRYCE, J. H.....Spartanburg.
CALHOUN, ORVILLE T.....Abbeville.
CASON, SAM'L C.....Abbeville.
COLCOCK, FRANCIS H.....Charleston.
CONNOR, A. B.....Barnwell.
CREIGHTON, C. W.....Edgefield.
DENDY, S. P.....Oconee.
EARLE, JOS. H.....Sumter.
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FRIESE, PHILIP C.....Maryland.
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GARY, EUGENE B.....Abbeville.
GRACE, C. M.....Colleton.
GRAHAM, G. T.....Edgefield.
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MCGOWAN, W. C.....Abbeville.
MULLER, J. S.....Richland.
O'NEALE, ROBT. G.....Charleston.
PERRY, JAMES M.....Abbeville.
PITCHFORD, J. H.....Oconee.
POLITE, J. W.....Charleston.
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TALBIRD, THOS.....Beaufort.
TERRY, EDWARD S.....Colleton.
TIEDEMAN, C. G.....Charleston.
TOWNSEND, BELTON O'NEAL.....Darlington.
VERNER, JNO. S.....Oconee.
WAIT, W. L.....Greenville.
WESTMORELAND, GEO.....Greenville.
WILLIAMS, G. W. M.....Barnwell.

TRIBUTE OF RESPECT

TO

HON. J. S. G. RICHARDSON, STATE REPORTER

At the opening of the Supreme Court on Wednesday, January 14th, 1880, Hon. E. W. M. Moise, of Sumter, submitted the following tribute on behalf of the bar of Sumter to the memory of their late associate, the Hon. J. S. G. Richardson.

The members of the Sumter bar, feeling the loss they have sustained in the death of their loved associate, James S. G. Richardson, desire to offer a tribute of their respect and regard to his memory.

They, unitedly and individually, bear testimony to the nobility of his character, the unsullied integrity of his life, the attractive refinement of his nature. Their memories, running back over the years that have gone by, rest upon no act of his which mars the pleasant remembrance of their association with him. His wise counsel, his kindly sympathy, his efficient aid, were always at their command. Great as were his abilities and attainments, so modest and amiable, and gentle, so considerate and sympathetic was he that the exhibition of his stores of learning, the revelation of his powers of thought, which almost daily were elicited by some one or more of his younger brethren, forced upon them no painful consciousness of inferiority. His knowledge was so thorough and accurate, his reasoning faculties so just and logical in their action, his power of expression so perfect in its force and simplicity, that whatever was the subject of discussion its obscurities disappeared, its principles were made clear, and the mind of the inquirer was gratified with the ease with which he too could discern and comprehend.

Companionship with him was a true pleasure to his associates. So naturally and thoroughly was he a gentleman that all were at ease with him. He sought to make others appear to advantage. Too noble to give place in his heart to envy or jealousy, he was always ready to construe favorably the motives and conduct of others, to be pleased at their successes, and to feel for them in their failures or errors; and his genial, kindly nature attracted irresistibly the affection of all who were brought into contact with him. It may well be doubted if the bar of this or any other country can present another instance of one so able and learned, and pure and noble, who was yet so modest and simple, and unaffected and genial, and to whom his brethren were so greatly and sincerely attached. As we remember the long years of physical suffering he endured, the troubles through which he passed, the distortion of his frame from intense and protracted pain, the crippling of his bodily powers, the isolation of his life from recreation and amusement, he seems a marvel of patience and fortitude, of evenness of temper, of amiability and kindness. But his gentleness did not degenerate into weakness. No one could be firmer in adherence to principle, or more courteous in the vindication of the just and right, and from no one would have sooner come a rebuke to what was unjust or low or mean. His whole nature was so transparently honorable that unworthy motives could not venture into his presence.

What he would have become if the health and vigor of body common to man had been vouchsafed to him, we cannot say. His abilities were equal to any position or station. His nature was perhaps too reflective and philosophical in its bent to have found an active political life congenial, though no one could be more truly patriotic, more ardently alive to the best interests of his country. If he had gone into political life he would have been a true, unselfish, patriotic statesman. But cut off by bodily infirmities from other pursuits, he found in his profession a solace for his sufferings and an occupation worthy of his high aims. When, in his young manhood, he was stretched upon his bed, a weary prisoner of pain, for many months his firm will fought off suffering with severe study, and all his after life showed that his mind was superior to sufferings even as great as his, and when others would have rested he studied and labored on.

He was not content with anything short of thoroughness. His first aim was to master the great principles of the law and then to follow them in all their ramifications and developments. He, perhaps, had not his equal in the department of real estate law. But he was a genuine lover of his profession, and no department of it was neglected; and he went beyond our systems of jurisprudence to trace in other systems the same great principles as our own, and find in them, if not authority, yet the materials of copious illustration. Sometimes in his legal arguments, but oftener in his conversational discussions

with his brethren, his frequent quotations from the civil law, and his clear expositions of its analogous principles would show his admiration of that great system and his estimate of its value in the elucidation of important legal questions.

His memory was remarkably ready and accurate, and little, if anything, seemed ever to be lost or to be unavailable to him which he had committed to its keeping. A result at which he had arrived, an opinion which he had formed, was laid away until its use was needed. The dicta of learned authors and the decisions of the various courts he could generally refer to by name and volume, and all his knowledge was at his command. If he failed of success or erred in any of his conclusions it would generally be found to be the result of his nice perceptions discovering distinctions which others could not see. But such instances were infrequent, and as an expounder of the law, either upon the bench or as an author, he would have made important contributions to legal learning.

To the bar of this whole state he has been indirectly a valuable instructor in his labors as state reporter for so many years. The world may be challenged for more just, accurate and complete abstracts of the principles of decisions than are to be found in his reports.

He was a native of this county and lived all his life amongst us. He was born on the 17th day of April, 1815, and died on the 11th day of August, 1879, in the 65th year of his age. That one suffering from such infirmities and complications of diseases should live so long was often the subject of wondering remark. That so many years were so well spent, and were filled with such valuable labors and worthy deeds, is deserving of still greater admiration.

Resolved, therefore, That we cherish the memory of our departed friend; that we hold up his life as an example of high aims and well-directed efforts, and present to ourselves and our successors his industry, his patience, his gentleness, his firmness, his generosity, his high sense of honor, his integrity of life as a model for the formation of individual and professional character.

Chief Justice Willard responded and united in the tribute on behalf of the Supreme Court as follows:

The court unites with the bar in the sentiments expressed in the resolutions that have been presented at the bar commemorative of the virtues and public services of the late reporter of this court, the Hon. J. S. G. Richardson, and in the expressions of respect and admiration that have been called forth by the occasion of which these resolutions are a fitting expression. Since the close of the session of this court for the last April term that worthy man and excellent public officer has been removed from the sphere of his public labors, from the endearments of domestic life, and from association with the bench and bar, ripened by long years of intercourse into a tie having more strength and tenderness than is common to relations having their foundation in active business pursuits.

Mr. Richardson's name is a part of the judicial history of the state. It recalls the flow of a pure administration of justice through more than the life of an entire generation of man. During these many years it was his office to gather up the utterances of the good and able men that have guided the course of justice, and embody them in a literature destined to live through countless ages, carrying the impress of the legal learning of his time down to the latest generations. The labors of the reporter are so interwoven with those of the bench and bar that his industry and learning, his fidelity and skill, have a conspicuous part in these great results that flow from the published history of judicial procedure. It cannot be doubted that the strength of civil institutions lies in the wise and impartial determinations that proceed from the courts of justice. To gather these materials from the archives of the courts, to illuminate and expand the results reached by judicial investigation, by arranging around them the circumstances from which they derive their reason and force, and to transmit them in a striking form to the general current of legal thought, from which all enlightened systems of jurisprudence are invigorated and enlivened, is the province of the reporter. We may well unite in congratulating our state in having possessed a public officer capable of performing these important public duties, through so many years, in a manner commanding the admiration of all who are familiar with the elements that constitute the merit of the best administration in this department of judicial labor.

It is unnecessary to recall to the bar the excellencies of Mr. Richardson's labors, running down through thirty-nine volumes of reports. His power of statement is familiar to all. No lawyer of experience hesitates to place his opinion of the proper force of any judgment reported by Mr. Richardson upon the accuracy and completeness of the statement of all matters essential to a right understanding of the force of such judgment, nor to accept, as standing upon the highest ground of certainty, matters of historic interest appearing in his elucidations. In the loss of such a public officer every citizen is concerned; but it is chiefly the members of the bench and bar, who, by their studies and associations, are familiar with the value of the life that has ebbed from these shores of time to flow in other realms, who can appreciate the full measure of the loss we have sustained. As we take down the volumes of our current reports and miss the name of Richardson, we shall feel that a household

word has gone from us. His clear text and competent statement, rendering conspicuous the principles of the decisions reported by him, belong to history.

We cannot, without the profoundest feeling of sympathy, recall his labors during the latter years of his life, performed under the disadvantages of physical prostration and bodily pain. It was but as yesterday that we saw the undimmed light of his fine intelligence beaming with warmth and animation through the half-closed portals of sense, charming us with the order and composure of his mind, calmly pursuing the course of professional duty, while waging the battle of life near to its utmost barrier. It was a noble spectacle, eloquent with the lessons of immortality. We have all been deeply impressed by it, and have found in its example and teachings strength to oppose with hearty courage all those obstacles that bodily and moral weakness create in the path of duty.

It is fitting that we should suspend the ordinary avocations that interest our minds, to contemplate so exalted a character and the nature of that event that has translated him to the bosom of that Justice that he has loved and studied from afar, through all his years of labor and of suffering. It is fitting that this court, whose labors he has adorned, should, with more than ordinary care, offer these remarks of respect that custom has established and sanctioned. It is, therefore, ordered that the resolutions that have been presented at the bar shall be inscribed upon the records of this court, and a copy transmitted, under the seal of this court, to his bereaved family. And, as a further token of respect, it is ordered that this court do now adjourn.

Mr. Richardson was elected State Reporter by the legislature of South Carolina in December, 1844, and held his office until December, 1846, during which period were published three volumes of law reports and two volumes of equity reports. After an interval of four years he was again elected in December, 1850, and continued to hold his office until the new government was inaugurated in the summer of 1868. During this period he published Richardson's Law Reports, Vols. IV. to XV., inclusive, and Richardson's Equity Reports, Vols. III. to XIV., inclusive. A successor was appointed in 1868, who, discharging none of the duties of the office, was himself succeeded by Mr. Richardson, who continued in office until his death in August, 1879. His labors during this term will be found in the series of reports known as South Carolina Reports, containing ten volumes. He also published in 1853 a volume of unreported cases—Richardson's Equity Cases.

In the American Law Review for January, 1870, in a notice of 14 Richardson's Equity Reports and 15 Richardson's Law Reports, the editors say, page 374: "These volumes conclude the labors of one who has filled the office of official reporter of decisions in South Carolina for nearly a quarter of a century with an ability never excelled and rarely equaled."

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. A. J. WILLARD, CHIEF JUSTICE.
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. A. C. HASKELL, ASSOCIATE JUSTICE.

11 S. C. *1

*(Case No. 590.)

GOURDIN et al., Executors of Mrs. Moultrie, v. EDWARD C. SHREWSBURY, J. B. ADGER and Wife, Mrs. A. H. SMITH and Mrs. ANNA M. BROWN, et al.

(November Term, 1877.)

A testator bequeathed and devised his residuary estate to his executors to sell and reinvest proceeds in stock, which stock was given to testator's two daughters, C. and L., during their natural life, and the share of the daughter first dying was to go to her surviving children, their heirs, &c.; but if such daughter first dying left no child surviving, but a husband surviving, then "said husband shall have such a proportion thereof as the law gives of the wife's estate in case of intestacy under the legislature of this state," and the remainder to the surviving sister, her heirs, &c., forever. And upon the death of the surviving sister "the stock and property hereby immediately bequeathed to such survivor, or which she may take at the death of her sister" was to go to her surviving chil-

*2

dren, their heirs, &c.: *but if she left "no child living at her death, and shall leave a husband surviving her, then the husband shall have such a proportion of the said stock and property as the law gives of the wife's estate in case of intestacy, under the act of the legislature," and remainder to child or children of predeceased sister, if any, then living, "and if there be no child of her deceased sister, then the said remainder shall go to my legal representatives in fee simple."

C. died first, leaving a husband surviving but no children, and half of the property given to C. by the words above recited, passed to L., the surviving sister. Afterwards L. died without issue and left no husband surviving. *Held*—

[1. *Wills* ⇐634.]

That the property received by L. immediately from her father's estate under the residuary clause of his will, passed at L.'s death to the "legal representatives" of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. ⇐634.]

[2. *Wills* ⇐593.]

That the one-half of C.'s share of the stock and property, which passed to L. after C.'s death under the directions of testator's will, passed at L.'s death to testator's "legal representatives" under the terms of this will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1306; Dec. Dig. ⇐593.]

[3. *Wills* ⇐524.]

That "legal representatives," as used in this will, meant such persons as answered the description of legal representatives of testator at the time of the happening of the contingency that vested the estate; and therefore C. and L. having died before such vesting, their legatees and representatives were excluded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1116; Dec. Dig. ⇐524.]

[4. *Wills* ⇐601.]

By a clause in a will, an estate was devised in fee, but by a subsequent clause the same estate was devised for life. *Held*, that a life tenancy only was intended.

[Ed. Note,—For other cases, see Wills, Cent. Dig. § 1341; Dec. Dig. ⇐601.]

Before Reed, J., Charleston, March, 1875.

Stephen Shrewsbury died in 1815, leaving of force a last will, which was admitted to probate in the same year. That clause of his will which the court construes in this case, is set out in full in the Circuit decree and again in the opinion of the Chief Justice.

At the time of his death the testator left surviving him two daughters, Caroline O., (afterwards Mrs. Dickinson,) and Sarah Louisa, (afterwards Mrs. Dr. Moultrie,) and

two brothers, Edward and Jeremiah, and one sister, Mary Rogers. Caroline O. Dickinson died before her husband, in 1833, without issue, and one-half of her property was transferred to her husband, and one-half to the trustees of her sister, Sarah Louisa Moultrie, under the will of her father and her marriage settlement. Sarah Louisa Moultrie survived her husband and died without issue in 1874, and leaving of force a last will and testament, whereby, after some trifling legacies, she gave her property to Mrs. Sarah Lee. Mrs. Lee claimed the property under

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the will of Mrs. *Moultrie, as Mrs. Moultrie's absolute property. Mrs. Dickinson's administrator claimed that the testator died intestate as to the remainder of that portion which passed immediately to Mrs. Moultrie under testator's will, after the determination of her life estate therein; and that such intestate remainder vested at testator's death in his two daughters.

Edward Shrewsbury, the brother, died before Mrs. Moultrie, and his children, who were alive at the death of Mrs. Moultrie, are the defendants, Edward C. Shrewsbury, Anna H. Smith and Elizabeth K. Adger. Mrs. Rogers died before Mrs. Moultrie, and her child, who survived Mrs. Moultree, is the defendant, Anna H. Brown. And the defendants, Edward C. Shrewsbury, Anna H. Smith, Elizabeth K. Adger and Anna H. Brown, claim to be the only "legal representatives" of testator.

Jeremiah Shrewsbury, the brother, had one daughter and one son; but all died before Mrs. Moultrie. This son and this daughter left issue who survived Mrs. Moultrie, but being grand nieces and nephews, are not parties in this action and have filed no claim.

The decree of the Circuit judge is as follows:

Decree.

Stephen Shrewsbury died in 1815, leaving of force his will, which contains the following residuary clause: "All the rest, residue and remainder of my estate, of what nature or kind soever and wheresoever the same may be, I give, devise and bequeath unto my executors, hereinafter named, or to such of them as shall qualify and act under this will, and to the survivor of them, his heirs, executors, administrators and assigns forever, in trust, nevertheless, to sell and dispose of the same, except as hereinafter excepted, for cash or credit, and on such terms as they may deem best, and to invest the proceeds of such sale in stock of the United States, stock of this state, or any bank stock of this state, which said stock of the United States, stock of this state, or bank stock of any bank in this state, I give, devise and bequeath to my dearly beloved daughters, Louisa Shrewsbury and Caroline Shrewsbury, share and share

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alike, to *them and each of them during the term of their natural life, and from and after the death of either the said Louisa or Caroline, then if my daughter aforesaid first dying shall leave a child or children living at her death, I give, devise and bequeath her share of the stock aforesaid to such child or children, his, her or their heirs, executors, administrators and assigns forever, but if she shall have no child living at her death, but a husband surviving her, then my will is that her said husband shall have such a proportion thereof as the law gives of the wife's estate in case of intestacy, under the act of the legislature of this state, and the remainder I give to her sister, her heirs, executors, administrators and assigns forever.

"And it is further my will, that at the death of the survivor of my said daughters, Louisa and Caroline, the stock and property hereby immediately bequeathed to such survivor, or which she may take at the death of her sister, shall go to such child or children as she may leave living at her death, his, her, or their heirs, executors, administrators, or assigns forever. But if she shall leave no child living at her death, and shall leave a husband surviving her, then the husband shall have such a proportion of the said stock and property as the law gives of the wife's estate in case of intestacy, under the act of the legislature, and the remainder shall go to the child or children of her deceased sister, if any be living at the death of my said daughter so surviving as aforesaid, his, her, or their heirs, executors, administrators, or assigns forever, and if there be no child of her deceased sister, then the said remainder shall go to my legal representatives in fee simple.

"And I do hereby empower my executors, or such of them as shall qualify, to make good and sufficient titles to all purchasers of the property or estate sold under this will."

At his death the testator left two daughters as his sole heirs and next of kin—Sarah Louisa and Caroline. Caroline (afterwards Mrs. Jeremiah Dickinson) died in 1833, before her husband, and under the residuary clause quoted, and her marriage settlement, one-half of her property was transferred to her husband, and one-half to the trustees of

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her sister. Sarah Louisa *married Dr. James Moultrie, in 1818, and, having survived him, died without issue in 1874. The property she took under the above residuary clause was settled on her on the terms of the will, and that which she took under her mother's settlement, on such terms as to give her an absolute estate in case she died without issue living at her death and surviving her husband. The part she derived from her sister is not embraced in the settlement.

At his death the testator left, also, two brothers and one sister. These died before Mrs. Moultrie, and their children (the nephews and nieces of the testator) who were alive at her death, claim the property de-

rived by Mrs. Moultrie from her father, as the testator's legal representatives and next of kin at the death of Mrs. Moultrie, to the exclusion of Mrs. Moultrie's estate, and of the testator's great nephews and great nieces.

The executors of Dr. James Moultrie and his legatees are parties to the suit.

The life estates given by the will of Stephen Shrewsbury to his daughters, Louisa and Caroline, were to vest in remainder in the "legal representatives" of the testator on the happening of two contingencies as to each of said daughters, to wit, dying without issue and leaving a husband surviving them. With Caroline both these contingencies happened, and her share of the estate, therefore, became vested. On her death without issue, but leaving a husband surviving her, such portion of her estate as the statute of distributions gave him went to her husband, and the other part to her surviving sister, "her heirs, executors, administrators and assigns forever," under the will of her father, and following the statute of distributions.

With Louisa (Mrs. Moultrie) the case was different. She died without issue, but also without leaving a husband surviving her. Only one of the two contingencies, on which the estate given her for life by her father, would have vested in the remaindermen having happened, she took that portion of her estate derived immediately from him, not under the will, but as the portion of the estate which came to her as his heir-at-law and legal representative, her sister having died

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without leaving *issue surviving her. The other portion of her estate she took in fee from her sister, as before stated.

This construction creates an intestacy as to the portion of his estate which it was contended the testator gave by will to his surviving daughter for life, with remainder over; and yet the result is, as I take it, in perfect harmony with his intentions. He directs that if one of his daughters die without issue, but leaving a husband surviving her, the husband shall take such share of her estate as the statute gives him, and the remainder shall go to her surviving sister in fee simple forever. Both of these contingencies having happened to Caroline, her estate passed under her father's will. But the same contingencies as applicable to Mrs. Moultrie did not happen. She died, it is true, without issue surviving her, but she also died without leaving a husband surviving her. If her husband had survived her, both contingencies—and I hold both to be necessary—would have happened that were necessary to carry the estate over. Her husband would have taken the share to which he was entitled under the statute, and the residue would have gone to the legal representatives of the testator as the remaindermen under his will. This, I think it clear, is in accordance with the intentions of the testator. His purpose was to direct, unmistakably, what should go with her estate, if she left no child, but a husband surviving her. He intended the husband to take what the statute would give him—no more—and the balance, if the predeceased sister left no child, should return to his "legal representatives." Not referring to the probability that she might never marry, or marrying, that the husband might die before her, and making no further disposition of the estate, the inference is irresistible that he intended, if his last surviving daughter had neither child nor husband, to leave the estate in her hands, to be enjoyed and disposed of as she might elect. Hence, I hold that the estate of Mrs. Moultrie, at her death, passed under her will.

The above result, viz., that the testator's daughter and distributee-at-law shall not be disinherited of her portion of her father's estate, except by express provision of his will,

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or neces*sary implication; and that the absolute gift to her of the half of her sister's portion "shall not be divested, except on the happening of the precise event, or events [in this case her death without children, and with a husband surviving,] upon the happening of which the substituted gift was made by the testator to depend," (White v. Baker, 2 DeG., F. & J. 61,) is supported by numerous authorities, but I do not think it necessary to do more than refer to Fulham v. Wicket, Willes 309; 1 Jarman on Wills, 465; Notes 2 and 3, 750; 2 Jarman on Wills 741; Gordon v. Blackman, 1 Rich. Eq. 61; Crossby v. Smith, 3 Rich. Eq. 244; Harrison v. Foreman, 5 Ves. 209; Thornhill v. Hall, 2 Cl. & Fin. 35; Roper on Leg. 479, 481, 603, 609, 624; Lowry v. O'Bryan, 4 Rich. Eq. 262 [57 Am. Dec. 727]; Shaw v. Monefeldt, 6 Rich. Eq. 240; Ketchin v. Beaty, 5 Rich. Eq. 83. Any other result would have been making a new will for the testator, and that, too, when he has not acted "capriciously, without any intelligible motive contrary to the ordinary mode in which men in general act in similar cases," and when his language is "unambiguous," and does not admit of "two constructions." This is impossible. Gordon v. Gordon, L. R., 5 H. of L. 284; Hall v. Warren, 9 H. of L. Cas. 427, 428; Glover v. Adams, 11 Rich. Eq. 264.

The estate derived by Mrs. Sarah Louisa Moultrie from her mother, it is conceded, passed by her will, and it is so decreed.

Leave to apply for any order deemed necessary for the settlement of the estates of Dr. and Mrs. Moultrie is reserved.

From this decree, the defendants appealed upon the following grounds:

1. That Mrs. Moultrie at the death of her sister, Mrs. Dickinson, took nothing by the intestacy, either of her father or her sister, but the share of Mrs. Dickinson, at her death, passed under the will of Stephen Shrewsbury,

one-half to her husband and the other half to Mrs. Moultrie, for such interest and estate therein as her father's will gave her.

2. That that portion of the testator's property which, under his said will, passed to Mrs. Moultrie at the death of her sister, was, by the terms of his said will, given to her

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for the same *estate, and subject to the same limitations over as that portion which she took under her father's will directly—as he declares in these words: "And it is further my will that at the death of the survivor of my said daughters, Louisa and Caroline, the stock and property hereby immediately bequeathed to such survivor, or which she may take at the death of her sister, shall go to such child or children," &c. That in accordance with this view, the share she took at the death of her sister was assigned to the trustees of her marriage settlement made upon the terms of her father's will.

3. That as to the whole property given by the testator to Mrs. Moultrie, it must have passed under the residuary clause to the legal representatives of the testator as a valid disposition of the residue, or the testator must have died thereof intestate at the time of his death, at which time Mrs. Dickinson was equally entitled with Mrs. Moultrie to every part of his estate whereof he died intestate, and therefore that the decree is inconsistent with itself in declaring that Mrs. Moultrie took the whole, whereas Mrs. Dickinson took one-half, which half must go to her administrator for the benefit of her legal representatives, of whom her husband, who survived her, was entitled to one-half of her estate.

4. That the ultimate remainder over of the residue of the testator's estate, took effect upon the death of Mrs. Moultrie without issue, the provision for the husband being only a provision for him if he survived her, but not a condition or contingency, upon which the ultimate gift over depended to take effect.

5. That these defendants, and these only, are the legal representatives as designated in the will, at the time Mrs. Moultrie died, and are entitled to take under the ultimate limitation of the will.

The appeal was heard by the Supreme Court, November Term, 1875. On the 20th of June, 1876, it was ordered to be re-argued, "so far as may be necessary for the proper determination of the following question, which covers one of the points raised in it. In the event the estate is to vest in his "legal representatives," and assuming that the said

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words are to be taken *and accepted in the sense of distributees under the statute, in the devise of this testator, who are to be comprehended in the term?

It was re-argued on February 15th, 1877. The changes soon after occurring in the personnel of the court made a third argument necessary, which was had at November Term, 1877, when it was argued in full upon all the points made in the case.

Messrs. McCrady & Son, Brewster & Burke, Augustine T. Smythe and Henry A. M. Smith, for appellants.

I. Is the limitation over to the legal representatives of the testator good?

The great rule of equity that overrides all considerations in the construction of wills, is to ascertain, first, the intent of the testator, and then to carry it into effect, if it be legally possible. In arriving at what a testator's intent was, it is sometimes important to know what his intent was not. It is submitted that the Circuit judge erred in holding that the testator "intended, if his last surviving daughter had neither child nor husband, to leave the estate in her hands to be enjoyed and disposed of as she might elect," and "that the estate of Mrs. Moultrie, at her death, passed under her will." Because—

First. It was testator's manifest intention here to make provision first for his daughters, then his grandchildren, if he should have any; failing these, for his nearest blood relations.

Second. The daughters are expressly given only a life estate; the gift, absolute in terms, to the surviving sister, being in the next clause reduced to a life estate.

Third. That while provision is made for the husband surviving either or both of his daughters, such provision is only a proviso, and in no way a condition affecting the devise over.

Fourth. That to hold the immaterial incident of the survivorship of the husband a condition precedent to the limitation over taking effect, will be to make the testator stultify himself, and to render his intentions of none effect.

Fifth. That the contingency of the husband's survivorship is a mere immaterial incident, affecting only the portion of the estate devised to them, and in no way a condition

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precedent to *the taking effect of the devise over to the testator's grandchildren, or next of kin. 1 Doug. 63; 1 Cowp. 40; 1 Durn. & East 346; (March, 1876,) Eng. L. R., 2 Ch. Div. 348.

Sixth. That the devise to the husbands, in case of their survivorship, makes the limitation over a conditional one, * * * but the contingency of such survivorship is not such a condition precedent as without which the devise fails. Moore 486; 1 Eq. Cas. Abr. 245; 1 Atk. 422. "The solid, substantial distinction is whether the testator meant it as a condition." Lord Loughborough in 1 Bro. C. C. 301; 5 Burr. 2703; Hutton 118; 3 Atk. 782.

When a devise is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to

any preceding estate, if that preceding limitation or contingent estate never should arise or take effect, the remainder over will, nevertheless, take place, the first estate being considered only as a preceding limitation, and not as a preceding condition, to give effect to a subsequent limitation. This doctrine, as particularly applied to contingent remainders, is fully discussed by Mr. Fearne, in a former part of his work. See ch. I., § 10, p. 233. 1 Fearne on Remainders 508; 2 Strange 1092. Words of condition may be taken as words of limitation where there is a remainder over. 1 Eq. Cas. Abr. 245, fol. 10; 1 Ves. 420; 2 Vern. 151; 2 Wils. 356; 1 Wils. 105; 1 Atk. 386; 12 Mod. 128; 1 Sir W. Bl. Rep. 638.

Seventh. That the substantial intention of the testator is to provide for his own blood relations, and in such cases the courts will disregard words that may apparently import a condition, provided the substantial intent of the testator be carried out. 4 DeG. & J. 194; 1 Fearne on Remainders 509.

Eighth. If the survivorship of the husband was a condition precedent to the taking effect of the limitations over, then the death of either daughter after her husband would cause an intestacy of her father's estate as to the portion of the stock devised to her for life, and the court will not so construe a residuary clause as to cause an intestacy. 2 Mer. 385; M. R. in 4 Ves. 400, 407; 4 DeG.

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& J. 194; 1 Russ. 220, 10 Sim. 45; *Hall, V. C., in E. L. R., 2 Ch. Div. 348; 1 Bailey 103; 4 Rich. Eq. 265.

Ninth. To construe the will so as to allow Mrs. Moultrie to dispose of this property after the termination of her life estate therein, would be to disinherit the testator's next of kin, or "distributees-at-law," living at his daughter's death, and that shall not be done "except by express provision of his will or necessary implication." Circuit decree and cases cited. 1 Jar. 465. The position of Circuit decree and of respondents is, that Mrs. Moultrie took some interest which could only be "divested upon the happening of the precise event or events, upon the happening of which the substituted gift was made by the testator to depend." These are the words in which the rule is laid down in White v. Baker; but the rule requires three things to be found in the will. 1st. A gift vested by the terms of the will which may be defeated. 2d. A contingency of event or events to defeat it. 3d. A substituted gift, made to depend upon the happening of the event or events. There is no vested gift in Mrs. Moultrie. 1 Jarman on Wills 411, 412; 1 Hill Ch. 360. The cases relied on by respondents differ widely from the case here, in this: that the estates vested in the donees in this case were not absolute estates, to be curtailed or defeated, but life estates, to be followed by other estates and interests. In this case the legal representatives do not seek to defeat a vested interest; they claim that provision is made for them after the vested interests have ceased and not before. See language used by the judges in 1 B. & A. 137.

Tenth. As the property was in hands of trustees, after Mrs. Moultrie's death they held for the legal representatives of testator, so that she, being dead, could not be included. 6 Ves. 45; McM. Eq. 231.

II. Who are to be comprehended in the term "legal representatives?"

They are here to be understood in the sense of "next of kin," or "rather the persons taking the personal estate under the statute of distributions." 2 Jar. 39; 1 Coll. 6; 2 Beav.

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70. The *context shows that the testator never meant to apply the words "legal representatives" to his daughters; they are applied only after his children and grandchildren, and daughters' husbands have been provided for, and they can only mean his collateral relations, living and to be ascertained at the time of his surviving daughter's death. 1 Desaus. 237; Bailey Eq. 517. The rules applicable to this subject are different according to the class to which the cases are referable.

(1.) When it is a devise of realty.

In such cases the rule has been laid down, that where real property is limited over to a class after a prior life estate, although the remainder be contingent, yet the class shall be referred to the death of the testator, and that the circumstance that the life tenant was of that class at that time, shall not prevent him taking under the latter description. 3 Bro. C. C. 234; 3 East 278; 2 Myl. & K. 800; 4 S. C. 16; 2 Jarman on Wills 59. The working of this tendency is strikingly exemplified in the old rule of law, whereby a fee might be limited over on a fee in personalty, although not in realty.

(2) When the bequest is of personalty, but the limitation over is a simple vested remainder upon a life estate. In these cases, the subsequent estate being certain, must vest immediately upon the testator's death. 4 Bro. C. C. 207.

(3.) Where the bequest is of personalty, and the limitation over is contingent. Here, since the event on which the estate is to vest is contingent and uncertain, the vesting cannot take place until the contingency occurs on which the estate is to vest; and where there is a limitation over upon contingency to a class, the persons to take cannot be ascertained until the contingency happens. Jones v. Colbeck, 8 Ves. 38; Coop. Ch. R. 272; 3 Myl. & K. 232; 1 Ves., Sr., 111; 1 Bro. C. C. 293, and note; 3 Ves., Jr., 486; 13 Sim. 52; 13 Sim. 290; 2 Jarman on Wills 56; 3 DeG., F. & J. 113. Where the remainder upon a contingency is to persons "thereto entitled according to the statute of distributions," a reference to the statute prima facie refers to the period of testator's death. The

words "legal personal representatives" are more flexible than the words "next of kin." 23 Beav. 169.

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*Our state courts have adopted same rule. And where an estate is to be distributed at some future day amongst a class, and not to persons by name, all who can bring themselves within the description at the period of distribution are entitled to participate. 2 McC. Ch. 214; 2 McC. Ch. 440; 1 Hill Ch. 311; 9 Rich. Eq. 470; 4 Strob. Eq. 37; 4 Rich. Eq. 413. Glover v. Adams, 11 Rich. Eq. 264, although upon a deed, is cited as in harmony with other cases. The case of Seabrook v. Seabrook, 10 Rich. Eq. 495, is strongly relied on by respondents, but it has no application to present case, because—

(1.) It is a devise of realty.

(2.) The testator directed that realty should "revert to his estate" if contemplated limitation over did not take effect. Not so in this case. Again, Seabrook v. Seabrook was one of the most contested, and is still one of the most doubted cases that has ever been decided by our courts. See note of reporter, 10 Rich. Eq. 495.

The rule laid down in Cole v. Creyon is recognized throughout the courts of this country. 1 McCarter 32; 3 Jones Eq. 167; 15 N. Y. 322.

Mr. H. E. Young, for executor of Mrs. Moultrie and for Mrs. Lee.

I. The part originally given to Mrs. Moultrie she takes as next of kin to her father, and cannot be divested of it without the happening of the very case which the will declares shall disinherit her. This constitutes two-thirds of the present estate.

The heir cannot be disinherited, except by express devise or necessary implication. Willes 309; 2 Jarman on Wills 741. It prevails in America, and embraces personal as well as real estate. 1 Jarman on Wills 465, notes 2, 3; Redf. on Wills 433, 435; 6 Paige 612, and is fully sustained in our own cases. 1 Rich. Eq. 61; 4 Strobh. Eq. 203; 3 Rich. Eq. 244; 2 Desaus. 454.

II. The portion taken after her sister's death is given to Mrs. Moultrie absolutely, and can be divested only as above, viz., by

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*the happening of the very case which the will declares shall divest such absolute gift.

III. The very and only case in both instances under this will, is that she shall "have no child living at her death, and shall leave a husband surviving her." She left no child, but she also left no husband surviving. The rule, embracing above propositions, is thus expressed by Sir R. P. Arden (Lord Alvanley): "It is perfectly clear that where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened in which it is declared that their interest shall not arise." 5 Ves. 209. See, too, 1 Jarman on Wills 639; 2 DeG., F. & J. 61. Instances of the above are found in 5 Ves. 209, supra; 9 Ves. 233; 3 Mod. 410; 4 Mod. 411; 1 Phil. 303; 2 Coll. 124; 2 Russ. & M. 577. See, too, 7 Sim. 86; 8 Beav. 578; 21 Beav. 31; 25 Beav. 417. A benefit bestowed in one part of an instrument by terms clear, unambiguous and liable to no doubt, can only be taken away by express and unambiguous words in another part. 2 Cl. & Fin. 35. See 1 Jarman on Wills 950, ss; Roper on Leg. 479, 481, 603, 619, 624; 2 Redf. on Wills 603, 649; 2 Williams on Ex'rs 1267–1274. Our cases sustain the rule. 4 Rich. Eq. 262; 5 Rich. Eq. 202; 6 Rich. Eq. 240. Particular attention is directed to our cases of Ketchin v. Beaty, 5 Rich. Eq. 83, and to Haynsworth v. Haynsworth, 12 Rich. Eq. 121, which are very like to the case before us, and also to the English case of Boyce v. Boyce, in 16 Sim. 476.

Appellants rely upon the following positions on these propositions:

(1.) That the clear intention of the testator was to benefit them as his next of kin. The best reply to this is in words of Lord Caines in L. R., 5 H. of L., p. 284. See, too, remarks of Lord Chancellor Campbell in 9 H. of L., at pp. 427, 428, and 1 Redf. on Wills, pp. 435, 436.

(2.) That it clearly was not intention of the testator to make a double provision for his daughter, Mrs. Moultrie, viz., for life, and then also in fee. This is conclusively an-

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swered by Glover *v. Adams, 11 Rich. Eq. 264. See 1 Strob. Eq. 114; Buist v. Dawes, and Hicks v. Pegues, 4 Rich. Eq. 413; 7 Rich. 311; 10 Rich. Eq. 561—all of which cases involved the construction of a will, and 14 Rich. 146, when a deed was under consideration.

(3.) That the word "remainder" in the clause, "the said remainder shall go to my legal representatives," is a technical word, and means the whole estate, except the few trifling legacies mentioned in the first part of the will. This is not the meaning, as its use throughout the clause shows: in the sentence quoted, it can only mean the remainder which sisters' children (if any) would have taken.

(4.) That the double contingency upon which the estate is to arise, applies to the estate limited to her husband and sister's children only, and not to that claimed by the nephews and nieces. Counsel then comments upon cases cited by appellants' counsel, and says: There is an essential difference between the cases cited by the appellants on this point and the present one.

(a.) In none of them was either the heir disinherited or a vested estate divested by the decrees.

(b.) They all refer to conditions precedent and not conditions subsequent. See 2 Williams on Ex'rs 1267, 1269, 1272.

(c.) Their inapplicability to present case

is best shown by full quotation of rule as stated by Mr. Jarman. 1 Jarman on Wills 753.

(5.) That inasmuch as the testator was dealing with the "rest, residue and remainder" of his estate, it is clear that he did not intend to die intestate as to any part of his estate, and that therefore, such a construction as prevents an intestacy is absolutely required of the court. They rely on Booth v. Booth, Leake v. Robinson, Lett v. Randall, and Oddie v. Brown. But see 3 Bro. C. C. 474; 14 Beav. 461; 2 De G., M. & G. 110; 2 Redf. on Wills 616; 1 Roper on Leg. 363; 1 Hill Ch. 97; 1 Strob. Eq. 96.

IV. That the final bequest of the testator being to his "legal representatives in fee simple," in other words, to "his distrib*utees under the statute," even if the above propositions are not sustained, still the distributees which take, are those who were such at the testator's death, viz., his daughters, Mrs. Moultrie and Mrs. Dickinson.

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This seems clear under the cases adjudged in this state. 1 Strob. Eq. 114; 4 Rich. Eq. 413; 7 Rich. Eq. 311; 10 Rich. Eq. 561; 1 Rich. Eq. 264; 14 Rich. Eq. 146. See, too, 2 Jarman on Wills 2; 2 Redf. on Wills 414; 1 Vern. 35; 2 Keen 230. The case in 13 Sim. 613, is strikingly apposite. In the United States, the rule seems to be generally adopted; 2 Wall., Jr., C. C. 368; 25 Ind. 63; 1 Jones (N. C.) 221; 7 Watts & Serg. 288.

The cases in this state thus establish beyond controversy that a devise or bequest to one's heirs, distributees-at-law or next of kin, is a gift to those who at the instant of the testator's death are his hœredes facti under the statute of distributions; in other words, to his next of kin, including husband or wife, as the case may be. In this particular case the next of kin and "distributees under the statute" of the testator, at his death, were his two daughters; and these only can take under the designation of legal representatives (distributees under the statute) in the clause under discussion; and, as said, Mrs. Dickinson has already had her half.

Appellants say that where there is a bequest to A, remainder to B, with limitation over upon contingency to a class, the class to take is to be ascertained at the time the estate vests. This is discussed by Mr. Jarman in his 2d volume, *52 and *53, and cases cited by appellants are reviewed and doubted at pp. 54–68. See, too, 2 Williams on Ex'rs 1123, and 16 Beav. 507. Three of appellants' cases deserve particular notice. Minter v. Wraith, 13 Sim., is an exception to the general rule, because of certain peculiar features therein. Cooper v. Denison, 13 Sim., is also a case very different from ours. These last two cases were regarded by Sir Lancelot Shadwell as exceptions from the general rule, as will be seen by reading his decree made only a year or so later in Urquhart v. Urquhart, 13 Sim. 613. Appellants' third case, Lees v. Massey, 3 DeG., F. & J., was decided because testator could not mean his only

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daughter by using the plural *word "relations," and by using the words "share and share alike." Lord Chancellor Campbell held that the general rule was well settled in Bullock v. Downs, 25 Beav. 55. This general rule is that "where there is a bequest to one for life, and after his decease to the testator's next of kin (by virtue of the statute of distributions,) the next of kin to take, are the persons who answer that description at the death of the testator." 9 H. of L. Cas. 12. In England there has been a long contest in this matter, which does not exist in this state. Next of kin, without further, does not there mean under statute of distributions, but the nearest in blood relationship—e. g., a child and a father—are equally near, and would take equally under such a gift. 10 Cl. & Fin. 215. Stephen Shrewsbury's will refers, at almost every step, to the statute of distributions and in this state "next of kin" means "next of kin under the statute," and never anything else. Bullock v. Downes, 9 H. of L. Cas. 1–31, is worthy of special notice. Appellant's position, that daughter, would not be called "legal representatives," seems inspired by remarks of Sir William Grant in Jones v. Colbeck, 8 Ves. 38; but see this case commented on in 2 Jarman on Wills *55.

Counsel for appellants shun Ketchin v. Beaty, Haynsworth v. Haynsworth, and Seabrook v. Seabrook. In not one of the cases cited by them, from Myers v. Myers down to Wessinger v. Hunt, is there a single word about gifts—by will or by deed—of personalty or of realty, to next of kin; and so they have no application. But Ketchin v. Beaty, 5 Rich. Eq., does apply, and is earnestly commended to the attention of the court.

V. Mrs. Dickinson having already, as distributee, received one-half of the entire estate, her next of kin cannot take a share of what is now the subject of contention. This is the corollary from the above. The bequest is to the testator's legal representatives or next of kin—his daughters—and, consequently, they take not under the will, but as in case of intestacy. 1 Wm. Bl. 187; 4 Kent 506–7; 10 Rich. Eq. 504; 4 S. C. 18.

Mrs. Dickinson can only take what she would have taken had there been no will—that is, one-half; and this she has already had. This half has, at her death, been again

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distributed, and as *her hœredes facti, her husband took half of her share and Mrs. Moultrie the other half. Can Mr. D.'s children by a second wife now claim more than he, in right of his wife, could claim at her death? The point seems too plain even for illustration.

Messrs. Simonton & Barker, for the administrator of Mrs. Dickinson, made no claim to so much of testator's estate as was received by Mrs. Moultrie as survivor of her sister; but contended that in the one-half of the estate given immediately to Mrs. M. for life, there is a remainder undisposed of, as to which testator died intestate, and one-half of which descended under the statute to Mrs. D. The following authorities were relied on in support of this position; 1 Jarman on Wills 702; Amherst v. Lytton, heard in the House of Lords March 11th, 1729, quoted by Lord Hardwicke in 3 Atk. 286; 1 Rich. Eq. 61; 3 Rich. Eq. 244.

April 13th, 1878. The opinion of the court was delivered by

WILLARD, C. J. The question before us involves the construction of the will of Stephen Shrewsbury. The respondents have obtained a decree establishing their right on the ground of intestacy, as it regards that portion of the estate claimed by them, under the will of Mrs. Moultrie, a daughter of the testator. The appellants deny the existence of intestacy, contending that the provisions operate as a devise to them. The clauses of the will pertinent to the question are as follows: "I give, devise and bequeath to my dearly beloved daughters, Louisa Shrewsbury and Caroline Shrewsbury, share and share alike, to them and to each of them, during the term of their natural life, and from and after the decease of either the said Louisa or Caroline, then if my daughter aforesaid first dying shall leave a child or children living at her death, I give, devise and bequeath her share of the stock aforesaid to such child or children, his, her or their heirs, executors, administrators and assigns forever; but if she shall have no child or children living at her death, but a husband surviving her, then my will is that her said husband shall have such a proportion thereof as the law gives of the wife's estate in case of intestacy, under the legislature of this state; and the re-

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mainder *I give to her sister, her heirs, executors, administrators and assigns forever.

"And it is further my will, that at the death of the survivor of my said daughters, Louisa and Caroline, the stock and property hereby immediately bequeathed to such survivor, or which she may take at the death of her sister, shall go to such child or children as she may leave living at her death, his, her or their executors, administrators or assigns forever. But if she shall leave no child living at her death, and shall leave a husband surviving her, then the husband shall have such a proportion of the said stock and property as the law gives of the wife's estate in case of intestacy, under the act of the legislature, and the remainder shall go to the child or children of her deceased sister, if any be living at the death of my said daughter, so surviving as aforesaid, his, her or their heirs, executors, administrators or assigns forever; and if there be no child of her deceased sister, the said remainder shall go to my legal representatives in fee simple."

Louisa and Caroline survived the testator and took equal life estates. Caroline (Mrs. Dickinson) died before her sister without issue, and leaving surviving her a husband, who received, at her death, a proportional part of Caroline's share of the estate, according to the provisions of the will. The residue of Caroline's share went by way of remainder to Louisa (Mrs. Moultrie) as surviving sister. So far the undisputed objects of the will were accomplished.

The present controversy arises out of the fact that Mrs. Moultrie, the surviving life tenant, left, at her death, neither husband nor child. She left, however, a will, under which the respondents claim. The appellants are the children of the brother of the testator, and claim that they were, at the time of the death of Mrs. Moultrie, the persons entitled to take under the description of "my legal representatives," contained in that clause of the will that disposes of the remainder in fee after the life estate of the surviving daughter, on the contingencies of there being no child or husband.

The first question to be considered is, whether there is a devise of the remainder after the life estate of the surviving daugh-

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ter, *on the contingency of there being living at that time neither child nor husband? If there is such a disposition of that remainder, then it will become necessary to fix the sense of the terms "my legal representatives," as those terms describe the persons who are to take such remainder, and it will be necessary to ascertain the nature and extent of the estate thus devised by way of remainder. These questions will be separately considered in the order stated.

Is there, then, a devise of the remainder after the life estate of the surviving daughter, that can take effect in the case of the death of such surviving daughter, without leaving living either a child or the descendants of a child or a husband?

This proposition is disputed by the respondents. They contend that the only devise by way of remainder, to take effect in the event of the death of the surviving daughter without issue, is made contingent on the further event of the survivorship of her husband. That no such contingency has happened, inasmuch as Mrs. Moultrie, such surviving daughter, left no husband living at her decease, consequently the remainder is undisposed of, so far as it regards the will, and must be disposed of under the statute of distributions.

The words of the will, as affecting such remainder, are as follows: "But if she shall leave no child living at her death, and shall

leave a husband surviving her, then the husband shall have such proportion of the said stock and property as the law gives of the wife's estate in case of intestacy, under the act of the legislature, and the remainder shall go," &c.

The opposing constructions of the appellants and respondents have just this difference between them, that the respondents read this clause as intending nothing more than a devise contingent on the event of there being a husband living at the decease of the surviving daughter, while the appellants read it as intending a provision for continuing the estate in the lineage and family of the testator, saving merely that which, under the statute of distributions, would have been the rights of a surviving husband.

It may be conceded at once that it is not sufficient for the purposes of the appellants to merely interpret the language in question. A resort must be had to construction. The case expressed embraces a devise of some-

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thing left—of the remainder *after something is taken out of it, viz., a provision for a surviving husband. If this expressed intent is not to be enlarged by anything whatever implied, then it must be assumed that the intention of the testator in framing these expressions was influenced by one or the other of two considerations; either that the case of his surviving daughter's death without leaving living a husband, could not or would not arise, or in case of happening, that there is no such surviving husband, there would be neither necessity or propriety for making the provision for the family intended on the event of there being a husband surviving.

If such an intention is reasonable in itself and consistent with the general provisions of the will, then the language of the devise ought to stand as we find it, and its expressed intent ought to prevail without yielding to enlargement on the principles of construction.

On the other hand, if such intention is not reasonable or consistent with the general scope of the testator's intentions, as elsewhere expressed or necessarily to be implied, then it is proper to resort to construction to find the intention of the testator in an enlarged reading of his language.

It is clear that such an intent as that just noticed cannot reasonably, or consistently with his known intentions as disclosed by the will, be ascribed to the testator. He could not have supposed the case of his surviving daughter's death without leaving a husband living, as unlikely to occur.

The survivorship of a wife, as it regards her husband, is an ordinary contingency that must be assumed to have been, as such, before the mind of the testator. Then the testator is brought into the position of contemplating the death of both of his daughters, the first dying leaving children, the survivor dying without issue.

Now, on the death of the survivor of his daughters without child, he wishes that part of the estate devised to her to pass to the children of his sister first dying, but contemplating the possibility of such surviving daughter dying without leaving surviving a husband, he determines that the provision made for his grandchildren, the children of his daughter first dying, shall depend wholly on the contingency of there being such a sur-

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viving *husband of his daughter last dying, so that if there shall be no such husband the grandchildren shall not take under such devise. Such a state of mind on the part of a testator contradicts experience and reason and cannot be assumed. It follows, therefore, that we must resort to construction in order to find the intent of the testator in an enlarged sense of the terms employed by him.

To what extent, then, can the words employed yield, without denying to them their proper force and effect, and what is the force of the considerations that compel the enlargement of their import?

The construction contended for by the appellants is not contradictory of anything expressed in the language under consideration. It leaves in full force the expressions of the devise as it regards the contingencies uppermost in the mind of the testator, as evinced by his express language. Nor does that construction seek to undo the force of language expressly, or by necessary implication, creating a contingency, and making subsequent limitations dependent on it. The devise to the children of the daughter first dying, in the event of the death of the surviving daughter without issue, is necessarily contingent, that contingency being a death without issue, an event possible, but uncertain. This contingency is expressly created, and is signified by the expressive words "but" and "if."

But that the provision made for the children of the daughter first dying should be subject to the further contingency that there should be living, at the death of the surviving daughter, a husband of that daughter, so that if no such husband shall be in being at that time, the limitation to them should be defeated, is not declared as any part of the actual intention of the testator, and if found to exist must be inferred from the mere fact that the devise is silent as to what shall take place if that contingency does not arise.

It is said, however, that the events of the death of the surviving daughter without issue living and that of a husband surviving her, are coupled together by the conjunction "and," and both subjected together to the intention to create a contingency expressed under the words "but" and "if." Assuming such to be the proper import of the terms,

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still, would that which is in *terms made to

devisal upon such contingency, be altered or in any way impaired under the construction contended for by the appellants? Certainly it would not.

What was intended by the interposition of this contingency, and all that was intended, was to diminish the quantum of the remainder by taking from it a husband's portion, what follows, to wit, the devise to the children of the sister first dying, is of that which remains after the intention leading to the creation of the contingency is fully satisfied. In other words, the full force and effect of what is intended by the contingency, viewed in the light contended for by the respondents, is accomplished without necessarily affecting the limitations to the issue of the daughter first dying to any greater extent than diminishing the amount and value of the thing so limited.

But it is said that all the provision made for children of the daughter first dying, is that which remains after the events intended by the contingency have happened, and the direct purpose of creating the contingency is satisfied, namely a portion set apart for a husband, and that as this event has not happened they take nothing.

The question, whether words can be found sufficient to carry an intention, that the estate shall go to the children of the daughter first dying, even though the events that are contemplated by the contingency never occur, will be considered in another connection; at present the definite object is to show, as already stated, that the construction contended for by the appellants, will not undo the force of language expressly or by necessary implication creating a contingency, and making subsequent limitations dependent upon it.

The true question is, are those words in the will sufficient to disclose, with reasonable certainty, an intention that in the event that the surviving daughter should die without issue or husband, and there be living children of the sister first dying, that such children should take the estate? Although there were, in fact, no children of the daughter first dying living at the death of the surviving daughter, yet the provisions made for such children, if any there should be, is the proper test of intentions of the testator, as it regards the objects of his bounty standing next

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in *precedence to his daughters. It was intended as a provision for grandchildren. It was not for selected individuals, but for all his grandchildren. The devise to "legal representatives," contingent on the failure of lineal descendants, could not have so attracted the attention of the testator, as the provision made for his grandchildren. The last embraced the greater object of keeping his estate in the line of descent and of his strongest affections, the other the subordinate object of keeping it within the family. To test the mind of the testator, we must consider it in its connection with events which, at the time of settling the provision for his immediate family, were considered by him as most important, and not with the actual events that subsequently occurred. It is in this light that we refer to the effect of the various constructions contended for, upon the provisions intended for the children of the daughter first dying.

We must here ascertain the leading objects of the will. It is clear that the testator had it in mind that his estate should go in the direct line of descent as far as possible and without diminution, except to meet what he deemed to be the reasonable demands of any surviving husband of his daughters. Also, that, should there be a failure of descendants at the death of his surviving daughter, his estate should go to his collateral representatives, still keeping it within his family. He further intended that his children should stand on terms of equality as it regarded each other, and that his grandchildren should participate as representatives of their parents in the rule of equality applied to their parents. These conclusions, as to the intention of the testator, are apparent, and require no particular reference for their elucidation.

The particular object of the immediate devise under consideration, is next to be sought. It is clear that he intended, as a means of securing the general objects just stated, that if either daughter died without issue, the estate should go to the other daughter, or, if deceased, to her children, if any she had; and that, should there be a failure of descendants in the direct line at the death of the surviving daughter, the estate should go to the collateral line in the order prescribed by the statute of distributions. He also intended that a provision for the surviving husbands

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of *his daughters should be separated from his estate from time to time, as might be necessary.

To arrive at the results just stated, it is only necessary to read the devise with the idea in mind that equality was intended between his daughters. Equality is favored by law and will be assumed on principles of natural equity, unless there are expressions tending to show an opposite intent on the part of the testator. In the present case, all that is expressed favors the idea that strict equality was the rule intended.

The devise must be read with these objects in view, and so reading it there can be little doubt as to the actual intention of the testator. The opposite constructions contended for correspond to two theories of the intention expressed in the devise in question. According to the one, the language of the devise covers a single disposition, subject to defined contingencies, so that nothing can flow from such disposition except through events satisfying the intention of such contingencies.

According to the other theory, the language

of the devise covers two distinct intentions and dispositions, namely, a provision for grandchildren, dependent only on the condition of the death of a daughter without issue, and a provision for a surviving husband dependent on the further event of the survivorship of such husband as it regards his wife. The last named is the proposition of the appellants.

The order and sequence of the language of the devise favor the first reading, while the nature of the subject and the declared intentions of the testator support the last.

The primary sense of the words, "and the remainder shall," &c., would limit the thing intended so to go, to that which remained of the estate after taking therefrom a husband's portion. But this conclusion depends wholly on the force of the conjunction "and" preceding "the remainder." This is apparent, if the devise is read by simply omitting the word "and," and enclosing in parentheses that portion of the sentence which is assumed to relate specially to the case of a surviving husband. It would then read as follows: "But if she shall leave no child living at her death (and shall leave a husband surviving her, then the husband shall have such a proportion of the said

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stock *and property as the law gives of the wife's estate in case of intestacy, under the act of legislature,) the remainder shall go to the child or children of her deceased sister," &c. Omitting next the matter enclosed in parentheses, and it would read as follows: "But if she shall leave no child living at her death, the remainder shall go," &c. What remainder was intended is disclosed by the sentence of the will immediately preceding that above recited.

The whole question, as a grammatical question, is brought within these narrow limits: Is the force of the word "and" such as to defeat the manifest intention and produce a case of intestacy?

If the word in question had been used in an indisputable sense, it could find no sanction in the adjudicated cases, and the recognized principles of construction for an influence destructive of the scheme in the mind of the testator, and tending to take the estate out of his family, contrary to his clear intent. But "and" in the present case simply serves to connect successive dispositions in forming parts of a whole. In this respect it performs an office of no real importance; for by indicating, as has been done, that portion that was intended as parenthetical, the connection of the sentence is complete without the use of that word. Thus it appears that no insuperable grammatical difficulty precludes the application of the construction that comports best with the mind and objects of the testator, as indicated by the general outline of his purposes. That which really points the primary and uncorrected sense already referred to, is the connection of the words "and the remainder," for, taken together, they seem to point to a sequence between the provisions relating to a surviving husband and the provisions that follow in behalf of grandchildren. But it is a fair inquiry whether that apparent intention is real or accidental, and the fact that it is a reading that assumes the interest of a surviving husband of a daughter to stand in the mind of a grandparent before that of a grandchild, precludes the supposition that it was other than accidental.

It is less bold to assume that the ordinary flow of thought in the mind of the testator

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was disturbed, than that the course of *nature, as impressed upon the affections, was inverted in so unusual a manner.

It must be concluded, then, that the testator intended a provision for the children of his daughter first dying, in the event of the death of his surviving daughter, without regard to whether she did or did not leave a husband surviving her.

The very learned argument addressed to us in support of the proposition that a double contingency was intended, fails, because too exclusively resting on the nature of the expressions used, and unsupported by the nature of the subject and the general and particular end in the view and mind of the testator.

It will not be necessary to notice the various cases cited bearing on the points discussed, for the difficulties that were overcome in those cases, in order to reach the mind of the testator, do not occur in the present case.

Statham v. Bell, 1 Cowp. 40, will alone be noticed. In that case the devise in terms depended on a contingency that never happened, and yet, in that case, although no general words of the will are referred to as affording ground for enlarging the construction of the words of the devise, yet it did so enlarge them as to take the estate away from the heir-at-law and confer it upon the testator's wife, in conformity to the assumed intention of the testator.

In view of that case, it is not difficult to determine the present question, in which there are no words disclosing a more general intent than that declared by the particular limitations in question, and in which the effect of enlarging the sense of the devise is to continue the estate in the hands of the family of the testator, and to prevent its passing to one that must be assumed to be a stranger to his blood.

At the death of Mrs. Moultrie, the survivor of the daughters, without issue, there were no persons who could take under the devise to the children of Mrs. Dickinson, the daughter first dying. In that case the devise to the testator's "legal representatives in fee simple" became operative. Who are the persons entitled to take under this description?

At this point a question arises, whether the testator intended, by the expression "my le-

gal representatives," such persons of the

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*class entitled under the statute of distributions to take, who should be living at the death of the daughter last dying.

It is contended that no such intention existed or could be operative, but that the effect of this devise is to cast the estate on those who, at the death of the testator, were entitled to take under the statute, and upon their representatives, assigns or devisees. It is under this aspect of the case that the devisee of Mrs. Moultrie now claims the estate.

The question just stated is one of intention alone, and to be gathered from the whole will. The language employed to describe the persons intended to take is indecisive, and resort must be had to the scheme of the will to render its force determinate. The key of its interpretation lies in an intention already referred to, and which, more particularly stated, is this: After the direct line of descent was exhausted, during the lifetime of the two daughters, the estate should go to the collateral line. If the estate can pass under the will of Mrs. Moultrie, then the succession of the collateral line is defeated. This clearly is contradictory of the testator's intent. The only mode of reading the language of this devise so as to preserve the intention of the testator, is to limit the devise, &c., to "legal representatives," to such as were in being at the death of the daughter last dying. It is clear that the testator referred to the statute of distributions solely for the purpose of describing the class of persons to whom he intended his estate to go, and the relative order of succession as among that class; that in conferring a contingent remainder upon individuals of that class, he intended to select as his devisees such as should appertain to that class at the time the contingency happened that should vest the estate.

This would exclude persons coming in as devisees of a person entitled to the appellation "legal representatives," but who died before the happening of the contingency that vested the estate. It would exclude the devisee and representatives of Mrs. Moultrie, because survivorship and the happening of the contingency must occur, whereas the death of Mrs. Moultrie was the very event on which the future estate to "legal representatives" depended.

It follows that at the death of Mrs. Moul-

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trie the appellants *were the persons entitled to take under the devise to "legal representatives."

The next question is, what was the nature and extent of the estate that passed under the devise to legal representatives?

There can be no doubt on this point, as the language of the will is specific and clear. The thing devised is described under the words "stock and property." The devise in question is preceded by a statement of what is intended to be disposed of in the event of the death of the daughter last dying, namely, "the stock and property hereby immediately bequeathed to such survivor, or which she may take at the death of her sister."

It is true that by a previous clause of the will, that which the surviving daughter should take on the death of her sister without issue, was given by words importing a fee, but the subsequent clauses of the will, in terms, reduce that estate to a life tenancy. It follows, then, that what remained of the estate of her father, derived through his will in the hands of Mrs. Moultrie at her decease, passed under the will to the appellants, as devisees under the testator's will, designated by the description "my legal representatives."

The judgment must be set aside and the cause remanded to the Circuit Court for a judgment in conformity with the foregoing conclusions of this court.

Decree reversed.

McIVER and HASKELL, Associate Justices, concurred.

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11 S. C. 29

(Case No. 602.)

WILLIAM C. BARRETT, Trustee of Mrs. Jane M. Mackay, v. JAMES N. COCHRAN and JOHN M. MACKAY, Jr.

(April Term, 1878.)

[1. *Appeal and Error* ⟸1022.]

Where a referee's finding of a fact is confirmed by the Circuit judge, it will be regarded as conclusive, unless it is without any evidence to sustain it, or is against the manifest weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⟸1022.]

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[2. *Deeds* ⟸106.]

*A deed made to "A, trustee for B," and bond and mortgage executed at same time by and in the name of "A, trustee for B," with no further declaration of a trust, except that the condition of the bond is expressed to be for the payment of money "out of the estate which may be held by me as such trustee," &c., are not sufficient evidence to prove a previously existing trust in favor of B.

[Ed. Note.—Cited in Elliott v. Mackorell, 19 S. C. 238, 242; McDowall v. Reed, 28 S. C. 469, 6 S. E. 300; Wallace v. Langston, 52 S. C. 154, 29 S. E. 552; Bell v. Edwards, 78 S. C. 495, 496, 59 S. E. 535; Ivey v. Vaughan, 93 S. C. 208, 76 S. E. 464, 43 L. R. A. (N. S.) 377.

For other cases, see Deeds, Cent. Dig. § 292; Dec. Dig. ⟸106.]

3. Distinction drawn between this case and Mathews v. Heyward, 2 S. C. 239.

Before Ellis G. Graydon, Esq., Presiding Judge by special appointment, Abbeville, September Term, 1877.

John M. Mackay, Sr., of New York, contracted with James N. Cochran for the purchase of some lands and mills in Abbeville county,

for the price of $14,250, part of which was paid in cash and balance secured by bond and mortgage. By direction of said Mackay, the deed was made to William C. Barrett, trustee of Mrs. Jane M. Mackay, who was wife of John M. Mackay, Sr., and the bond and mortgage were executed by William C. Barrett, trustee of Mrs. Mackay. Cochran had no notice that Barrett was trustee of Mrs. Mackay, beyond the execution of these papers. Subsequently, Barrett brought his action in Abbeville against Cochran, to have the bond and mortgage reformed, and the amount thereby secured reduced, upon the ground of fraud and misrepresentation. Cochran answered, denied all fraud, &c., and prayed a foreclosure. After judgment of foreclosure was had, John M. Mackay, Jr., filed his petition, alleging that the payment on the land had been made with moneys of his mother, and that he was her sole heir-at-law, she having died since the execution of the deed to Barrett, trustee; and that petitioner was, therefore, the owner of the land, the real party in interest, and a necessary party to the proper determination of the case. This petition was refused by the Circuit judge, but on appeal to the Supreme Court was granted. See 8 S. C. 48. John M. Mackay, Jr., was then made a party defendant by amended pleadings served in behalf of Cochran.

Mackay, Jr., answered this amended pleading, of which answer only the first and second sections relate to matters involved in the appeal. They are as follows:

1. That on or about the —— day of March,

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1869, Mrs. John *M. Mackay, the mother of this defendant, was seized and possessed, in her own right, of certain real and personal property, and particularly was the possessor of $7000 in money, which said money, on or about the said date, she delivered to the plaintiff herein, in trust, to invest the same in her name, and for her sole use, benefit and behoof, at such time or times and in such manner as she should direct.

2. That subsequently thereto, and on or about the 5th day of April, 1869, said Barrett, as defendant is informed and believes, made an agreement with the defendant, James N. Cochran, to purchase of said Cochran the lands and premises in the complaint mentioned, in which agreement said Barrett assumed and pretended to act as the trustee of said Jane M. Mackay; and that thereupon a deed of conveyance of said premises was executed and delivered by said defendant, James N. Cochran, to said William C. Barrett, as trustee of said Jane M. Mackay, and simultaneously therewith, or as the consideration therefor, said plaintiff assuming to act as such trustee, but without the knowledge or authority of said Jane M. Mackay, paid to the said defendant, Cochran, a portion of the said trust fund, amounting to $6660, as this defendant is informed and believes, and also in the same character, subsequently thereto, executed and delivered the bond and mortgage mentioned in the complaint herein.

To these allegations Cochran replied as follows:

1. That this defendant is informed and believes there was no prior trust in regard to the money paid in part for the purchase of Douglass mills.

John M. Mackay, Sr., purchased the land for himself and with his own money, and directed the deed to be made to Barrett, trustee for Mrs. Jane M. Mackay, as a donation from her husband, as this defendant was led to believe.

2. That if there was a parol trust, such as alleged, in New York, where the parties resided, such trust was not in writing, not recorded, was kept secret and entirely unknown to James N. Cochran, who was informed by John M. Mackay, Sr., who made the contract of purchase, that the purchase was for himself, and not a doubt was suggested that the money with which he purchased was his own.

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*3. This defendant and John M. Mackay closed the contract in South Carolina, in February, 1869, and at the instance of John M. Mackay, Sr., titles were made to and mortgage simultaneously executed as part of the same transaction by William C. Barrett, "trustee for Mrs. Jane M. Mackay," April 7th, 1869. These papers were executed in the city of New York, where the parties resided, and both Mrs. Mackay and John M. Mackay, Jr., wife and son of John M. Mackey, Sr., as this defendant knows, were fully informed of the whole agreement and execution of the papers, and approved the whole matter.

4. That if a parol trust, such as alleged, existed in New York, John M. Mackay, Sr., was the agent of all the parties, the trustee of W. C. Barrett, and also of his wife, Jane M. Mackay, and his son, John M. Mackay, Jr.; and this defendant knows that they approved the purchase when made by him, and kept possession of the land, through said agent, until the land was about being sold to pay the purchase money, March 30th, 1875, when John M. Mackay, Sr., procured the petition in re to be filed in the name of his son, John M. Mackay, Jr.

Neither the petition nor his answer in this case, was sworn to by John M. Mackay, Jr., and this defendant charges that he did not swear to his answer, for the reason that the facts stated are untrue.

The questions at issue were referred to A. Burt, Esq., referee. Cochran introduced testimony, but Mackay, Jr., did not offer any. The referee, in his report, made the following findings of fact, inter alia:

1. That the treaty for the purchase of the

lands in controversy was conducted by John M. Mackay, Sr., and James N. Cochran, the vendor, without any disclosure or intimation that the said Mackay was an agent, or that the purchase was made for another.

2. That the $500 paid by Mackay to Cochran to bind the bargain, and the cash payment made when the deed of conveyance was executed to Barrett, were not the money of Jane M. Mackay in the hands of John M. Mackay, Sr., or of William C. Barrett.

3. That neither Cochran or his wife, at any time before or after the purchase, until pro-

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ceedings were instituted by John M. *Mackay, Jr., the defendant had notice or information that the cash payment of the purchase money was of the separate estate of Jane M. Mackay or funds of hers, to be invested by her husband, John M. Mackay, or William C. Barrett.

4. That the deed of conveyance is made to William C. Barrett, trustee of Jane M. Mackay, and that no trust for her, or for another, is declared in the deed.

Northrop, Justice, held court at Abbeville, September Term, 1877. Having been of counsel in this cause, Ellis J. Graydon, Esq., was commissioned specially to hear and determine the case. The referee's report was confirmed by Mr. Graydon, and a sale of the mortgaged premises was ordered.

Mackay, Jr., then gave notice of appeal to this court.

Mr. Ed. J. Maxwell, for appellant.

Mr. S. McGowan, for respondent, Cochran.

May 21st, 1878. The opinion of the court was delivered by

McIVER, A. J. The facts of this case are so fully and clearly stated in the report of the referee, that it is only necessary to advert to the precise question raised by this appeal. The fundamental allegation upon which this appeal is based is, that funds used to make the cash payment on the land mortgaged, were trust funds. It was incumbent upon the appellant to establish this allegation by proof, and this he has wholly failed to do, while on the other hand the testimony adduced by the respondent goes far to show the contrary. The referee having found the fact to be that the funds so used were not trust funds, and such finding having been confirmed by the decision of the Circuit judge, under the well-established rule of this court, it will be regarded as conclusive, unless it is without any evidence to sustain it, or is against the manifest weight of the evidence. So far from this being the case, it is very obvious, from the most casual reading of the testimony, that the finding of the referee is fully supported by the evidence.

It is argued, however, that while there was no evidence introduced in the usual way to

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establish this essential allegation on *the part of the appellant, yet that, inasmuch as such allegation was distinctly made in the answer of appellant, setting up a counter claim, and not denied in the reply filed by the respondent, Cochran, it must be taken as admitted. This argument rests upon two assumptions. 1st. That the portion of the answer in which this allegation was made, sets up a counter claim. 2d. That such allegation is not properly denied in the reply. It may admit of very serious doubt whether such portion of the appellant's answer can be regarded as setting up a counter claim.

It is manifest that the appellant could not have so intended it at the time the answer was prepared, for, after stating in the first five paragraphs the facts upon which he relied as constituting his defence, growing out of the assumption of the trust character of the funds used in making the cash payment on the land, he proceeds in the sixth paragraph to say: "This defendant further alleges, by way of counter claim," certain facts upon which he bases a charge of fraud, of which not a tittle of evidence was offered, and which was, therefore, very properly abandoned; and in the seventh paragraph he says: "That as a further counter claim," &c., setting up a misrepresentation in the quantity of the land sold, which was likewise abandoned. This mode of setting up defences was well calculated to induce the respondent, Cochran, to suppose that the appellant did not regard the allegations contained in the first five paragraphs of his answer as setting up a counter claim, for, when he sets up further defences of this character in the sixth and seventh paragraphs of his answer, he distinctly says that he sets up such defences by way of counter claim, plainly implying that his first defence was not of that character. Hence, we think that the appellant must be regarded as not intending the first five paragraphs of his answer as a counter claim, as, otherwise, the conclusion would be that he intended to mislead the respondent. But as we are satisfied that, even though the defence set up in the first five paragraphs of the answer be regarded as a counter claim, the allegations upon which such defence rests are sufficiently denied by the reply, we deem it unnecessary to enter upon the inquiry whether such defence can properly be regarded as a counter claim.

The appellant, for the purpose of showing

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that the funds used *in making the cash payment on the land were trust funds, relies also upon the fact that the land was conveyed to W. C. Barrett as trustee, and the mortgage given by him in that character. No copy of the deed or mortgage is set out in the "case" presented here, but on the argument we were referred to the "case" presented on a former hearing of this cause, when it came up in one of its earlier stages as Ex parte John M. Mackay, Jr.; In re W. C. Barrett, Trustee, v. James N. Cochran, where the

deed and mortgage are set out. The deed was to W. C. Barrett, trustee of Mrs. Jane M. Mackay, and not to him as such trustee, and the mortgage was given in the same way. No trusts whatever are declared or recited, and under the usual rule the words "trustee, &c.," appended to Barrett's name, might be regarded as mere descriptio personæ. It is true that in that part of the mortgage where the condition of the bond is recited, these words are used: "Conditioned for the payment of seven thousand six hundred and three dollars, out of the estate which may be held by me as such trustee," &c. These words, so far from going to show that any such trust estate previously existed, tend to show exactly the contrary. And, as was held by this court on the former hearing of this cause under the title above stated, it differs in this respect from the case of Mathews v. Heyward, 2 S. C. 239. For even if the addition of the word "trustee" to the name of Barrett should be regarded as sufficient to create a trust, this would be no evidence of the previous existence of such trust, as it might then, for the first time, have been raised; and such would be the natural inference if, as in the case now before the court, there was no evidence that such trust had previously existed. This inference is strengthened by the words used in reciting the condition of the bond, which are quoted above; the words "may be held," implying that no such estate was then held by the trustee.

The appellant having failed to establish the allegation upon which this whole appeal rests—in fact, having offered no evidence whatever to sustain it—can take nothing by his appeal.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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11 S. C. *36

*(Case No. 611.)

MARY A. HUGHEY v. WILLIAM H. EICHELBERGER, EFFIE W. EICHELBERGER, His Wife, JOB L. HUGHEY, et al.

(November Term, 1877.)

[1. *Witnesses* ⇐160.]

Under the proviso to Section 415 of the code of procedure, a witness in interest is not incompetent to testify to communications and transactions had between a person deceased and some third person. Roe v. Harrison, 9 S. C. 279.

[Ed. Note.—Cited in McLaurin v. Wilson, 16 S. C. 411; Colvin v. Phillips, 25 S. C. 232; Kennemore v. Kennemore, 26 S. C. 255, 1 S. E. 881; Moore v. Trimmier, 32 S. C. 525, 11 S. E. 548, 552; Sullivan v. Latimer, 38 S. C. 166, 17 S. E. 701; Brickle v. Leach, 55 S. C. 527, 33 S. E. 720; Merck v. Merck, 89 S. C. 349, 71 S. E. 969, Ann. Cas. 1913A, 937.

For other cases, see Witnesses, Cent. Dig. § 696; Dec. Dig. ⇐160.]

[2. *Appeal and Error* ⇐1008, 1022.]

The rule that the decision of the court below upon a question of fact is conclusive, except where there is no evidence to sustain it, or it is manifestly against the weight of the evidence, does not apply where such decision overrules the findings of a referee and is reached by a consideration of testimony taken in writing. Dewitt v. Atkinson, 6 S. C. 140, and Gee v. Hicks, Rich. Eq. Cas. 5, approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3965, 4018; Dec. Dig. ⇐1008, 1022.]

[3. *Descent and Distribution* ⇐99, 112, 117.]

Where land was conveyed by a father for the benefit of his daughter, by a deed purely voluntary, which reserved to grantor the right to use, occupy and enjoy the land, and even to revoke the gift, and the grantor did take possession of such land four years thereafter and kept it, and received all the rents and profits for fourteen years, and then died intestate, such land is an advancement to the daughter, but only as of the date of her father's death, to be estimated at its then value, according to its condition at that time.

[Ed. Note.—Cited in Cain v. Cain, 53 S. C. 356, 31 S. E. 278, 69 Am. St. Rep. 863.

For other cases, see Descent and Distribution, Cent. Dig. §§ 404, 421, 428; Dec. Dig. ⇐99, 112, 117.]

[4. *Deeds* ⇐143; *Descent and Distribution* ⇐106; *Parent and Child* ⇐8.]

But the father's estate is not liable to the daughter for the rents and profits of those fourteen years.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 466; Dec. Dig. ⇐143; Descent and Distribution, Cent. Dig. § 415; Dec. Dig. ⇐106; Parent and Child, Cent. Dig. § 101; Dec. Dig. ⇐8.]

[5. *Descent and Distribution* ⇐102.]

Slaves given to a child cannot, under our statute, be accounted an advancement in cases where the parent died after the abolition of slavery.

[Ed. Note.—Cited in Ex parte Glenn, 20 S. C. 68.

For other cases, see Descent and Distribution, Cent. Dig. § 412; Dec. Dig. ⇐102.]

6. The question whether the services of such slaves while in the child's possession would constitute an advancement, suggested but not decided.

[Ed. Note.—Cited in Wilson v. Kelly, 21 S. C. 537, 540.]

[7. *Gifts* ⇐49.]

A payment of money by a father to his daughter, *held*, from the evidence, not to have been a gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95–100; Dec. Dig. ⇐49.]

[This case is also cited and affirmed in Wilson v. Kelly, 21 S. C. 535.]

Before Northrop, J., Newberry, October, 1876.

By order of the Court of Common Pleas for Newberry county, all issues in this cause were referred to Thomas Thomson, Esq., whose report fully states all the facts of the case. It is as follows:

Daniel Hughey, late of the county of Newberry, died intestate on September 22d, 1868. His heirs-at-law and distributees are his widow, (the plaintiff,) who was his second wife,

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his daugh*ter, Effie W. Eichelberger, wife of William A. Eichelberger, of Winston county, State of Mississippi, and Job L. Hughey, a son of the plaintiff and a minor. Effie W. Eichelberger is a child by intestate's marriage with Mrs. Ruff, who was a widow.

On the 15th day of October, A. D. 1868, administration of the personal estate of the intestate was granted by the judge of the Court of Probate to the plaintiff. It is affirmed, or conceded by all parties, that the personal estate is ample for payment of debts.

William H. Eichelberger and Effie, his wife, who have for many years resided in the State of Mississippi, came, soon after intestate's death, to this state. On the 3d day of November, A. D. 1868, they filed a petition in the Court of Probate of Newberry county, praying partition of the lands of Daniel Hughey, deceased, and also of such personalty as could be divided—making as parties to the proceeding Mary A. Hughey and Job L. Hughey, alleged to be a minor about fourteen years of age.

Mary A. Hughey, on the 14th day of the same month, (November,) filed her answer in the Court of Probate and assented generally to the statements of the petition, but stated that the intestate in his lifetime had made considerable advancements in money, to wit, the sum of $3000, in A. D. 1854, to Effie W. Eichelberger, and also, to the best recollection of the defendant, (Mary A. Hughey,) five slaves. It was suggested in her answer, as a mode to equalize the shares between Job L. Hughey and Effie W. Eichelberger, that the alleged advancements should be a charge upon the land to be allotted to the latter.

Job L. Hughey, by Thomas M. Lake, his guardian ad litem, filed his answer the same day, (November 14th,) assenting to partition, but setting forth fully the alleged advancements to his sister, Effie W., and claiming they should constitute a charge on his sister's part of the real estate. Under these proceedings, John T. Peterson, Esq., judge of the Court of Probate, issued a writ for the partition of the lands. On the 7th day of December, A. D. 1868, the commissioners made return of the writ, dividing both tracts of land into several parcels, recommending a partition (but not compulsory) between the parties, or a sale. On the subject of advancements the commissioners were silent.

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*This return, it seems, was never confirmed.

William H. Eichelberger and Effie W., his wife, say they objected to the partition of the Sligh tract on the day the commissioners came on the land.

Mary A. Hughey, in the bill subsequently filed by her, alleges that William H. Eichelberger and wife obtained leave to amend their petition by alleging that four hundred and one and a half acres of the tract of land lying in Newberry county belonged to the separate estate of the said Effie W., by a deed made by Daniel Hughey, in his lifetime, to William J. Alston, as trustee; and that because of said amendment the judge of the court declined to entertain jurisdiction in the premises.

After the lapse of about one year, Mary A. Hughey, in turn, became a plaintiff, filed her bill in the court of equity for partition, on the 15th day of December, A. D. 1869, and, in addition to the heirs-at-law of her deceased husband, made David Murphy, John Murphy and Cuffy Tom Alston parties to the proceeding. Besides the questions in the pleadings in the Court of Probate, and restated in her bill, she charged that the title of Effie W. Eichelberger to the four hundred and one and a half acres of land was pretensive and unfounded, should be investigated and set aside by the court, and prayed partition.

William H. Eichelberger and wife filed their answer on the 4th day of March, A. D. 1870. They claimed the tract of four hundred and one and a half acres as being held in trust for Effie W. Eichelberger under a deed of which they alleged the consideration to be her interest in a part of the land described in the bill, which had belonged to her mother when she was married to the intestate.

On April 23d, 1872, Job L. Hughey, by his guardian ad litem, James F. Glenn, filed his answer, restating briefly his rights as heretofore set forth.

When the bill was filed, the interests of David Murphy, and of others, under leases or agreements, were existing and may have stood in the way of complete partition.

These rights, whether valid or otherwise, have ended by their own terms, and are no hindrance now. The referee regards the adjustment of these interests as matters be-

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tween the plaintiff and *the parties having had the use and occupation of the land, or for account under this proceeding when full information can be given of the state of such accounts.

The first subject which presents itself for consideration is the deed from Daniel Hughey to William J. Alston, trustee, and, if valid, its effect upon the rights of the parties.

On Friday morning, April 26th, 1872, it was agreed—Messrs. Baxter, Fair, Pope and Jones being present—that the deed of trust from Daniel Hughey to William J. Alston, trustee, and three deeds executed in Mississippi, viz., one from James Liddell and Francis Liddell, his wife, to P. A. Eichelberger, trustee for Effie W. Eichelberger, and two deeds from Joab Liddell and Anna Liddell, his wife, to P. A. Eichelberger, trustee for Effie W. Eichelberger, should be regarded

proved, as to their formal execution, without further proof. The referee did not understand the agreement to embrace the constitution or effect of the deeds. This mutual concession, not of rights, but of form, renders unnecessary the consideration of some technicalities connected with these papers.

William H. Eichelberger was the owner of lands in Newberry county, known as the Lyles (and Heller) tract, (or tracts) for which he paid, as he states, the sum of $5050. He was the owner of this land before his marriage with his wife, Effie W., and also at the time of his marriage. It appears he was in debt, and the land was sold by the sheriff and purchased by George Eichelberger, who wished to purchase it cheaply, with intent to befriend William H. Eichelberger. Under some arrangement William H. Eichelberger held an occupancy or use of this land for life. Daniel Hughey wished to purchase the land, and through the agency of W. H. Eichelberger became the owner of the whole estate, wife's dower excepted. According to Mr. Hope's testimony this transaction was at the instance of Mr. Hughey, and occurred about A. D. 1847 or 1848.

From the Lyles land W. H. Eichelberger and wife moved at the instance of D. Hughey to lands in Fairfield, known as the Thornton land. Effie W. Eichelberger testifies the land was once owned by her mother. William H. Eichelberger made improvements on the Thornton land whilst it was in his

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pos*session to the value of $500. This possession must have been brief, for again, according to the testimony of Mr. Hope, W. H. Eichelberger and wife, at the instance of Daniel Hughey, moved from the Fairfield land to the Sligh tract, in Newberry county.

At some period of time, not distant from their removal to the Sligh land, Daniel Hughey made the deed of trust to William J. Alston for the benefit of Effie W. Eichelberger and her issue surviving. The deed bears date the 5th day of February, A. D. 1850, and was recorded in the secretary of state's office the 3d day of May, A. D. 1850.

After this deed was made, houses were built and other improvements made upon the Sligh land of the value of $1500. W. H. Eichelberger testifies the improvements were by the labor of the slaves of his wife, Effie, and through her means.

Another removal awaited William H. Eichelberger and his wife, which was from the Sligh land to Winston county, State of Mississippi. This removal was commenced from Newberry county about the beginning of November, A. D. 1854, and terminated in Mississippi about the 11th day of December of same year.

The trust deed by its terms retains the land in the power of the grantor. He reserved the land, or so much as he pleased, for his own use. If he sold, the trustee was to convey according to his sale and reinsert as he directed. He retained power to revoke the deed by his own deed or will. He gave Effie W. Eichelberger a life interest. He could permit her to remain on the Sligh land for such time as he wished and again resume possession of it. During his lifetime Daniel Hughey could, by an exercise of his reserved power, have destroyed the interest of his daughter. Even when menaced by a letter from Mississippi claiming the land he forbore to exercise his power, strengthening the statement of P. A. Eichelberger at the parting in A. D. 1854, that Effie would get the land after his death.

The referee is of opinion that the deed contained a gift of the land in presenti, to be enjoyed in presenti, unless the grantor changed the possession and use by the exercise of his reserved power; and when the use was so changed again to take effect, unless destroyed by the exercise of the reserved power.

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*The referee is of opinion that the trust deed took effect according to its terms and is a valid paper. The referee can find no distinct act of Effie W. Eichelberger intended to relinquish or destroy her interest under the trust deed. And much doubt might be entertained whether any act of hers (until of late) could have had such effect.

The next question relates to the advancements in money alleged to have been made to Effie W. Eichelberger.

There can be no doubt when E. W. Eichelberger left the state she received a considerable sum of money from her father—about $3000. Was this money a gift or advancement, or was it a payment?

The transactions between D. Hughey and William H. Eichelberger and wife, for some time before and to the time of their parting in A. D. 1854, wore a business air. Six or seven weeks before W. H. Eichelberger left, the witness, Clark, heard D. Hughey offer W. H. Eichelberger $1000 for the remainder of the crop, stock, &c., that would be on the farm. Without attempting to state an account, the excess, if any, in the amount received by Effie W. Eichelberger appears small when balanced with counter claim. Her claim in her mother's property, her claim of dower relinquishment, the improvements on the Sligh land surrendered to her father, improvements on the Thornton land, beside the sale by her husband, might well be regarded as, between parent and child, a fair equivalent for the $3000. Some of the claims were expressly included in such settlement as the parties made; and if all were not, (though there is no testimony otherwise) circumstances would suggest to the parties that another adjustment could not soon be made.

The referee does not regard the claim of D. Hughey as resting on a pecuniary consideration. Apart from the difficulty of a

grantee repudiating a part of a deed under which claim is made and proving a different consideration from that expressed, the evidence is not satisfactory that D. Hughey intended to execute the trust deed in satisfaction of Effie W. Eichelberger's interest in her mother's land. There may have been promises by D. Hughey and expectations on his daughter's part, but the promises were vague, and the trust deed, upon its face, is evidence

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that no *thinking person would have relinquished a pecuniary right for its uncertain provisions.

The referee is of opinion that all the rights and claims of Effie W. Eichelberger and her husband were paid by the sum of $3000, except that contingent right in the Sligh land, depending for its existence upon the good will of D. Hughey.

The form of certain deeds in Mississippi by persons there to W. H. Eichelberger, in trust for Effie W. Eichelberger, was urged to show that the Mississippi lands were a substitute for her interest in the Sligh land. Considering the sources from which the money was derived which went in payment of the Mississippi lands, the character of a trust might well be attached to it. Besides, it is not to be overlooked that experience may have taught the propriety of securing her interest in the form of trust.

The deed of trust mentions five negro slaves, Bill Gwin, Emeline, her infant child, Sam Bull, Nance and Judy. The description of them in the deed corresponds with that given by Effie W. Eichelberger in her testimony. She says: "David Hughey gave the witness five negro slaves, one man and woman, two girls and a child."

The possession by Effie W. Eichelberger of these slaves was never disturbed by D. Hughey. They went with her to Mississippi; and there was good reason to record the trust deed there, that strangers might have notice of the title to the property.

The referee is of opinion that these slaves were an advancement, and should be accounted for.

He deems any attempt at stating the accounts premature. He has not the information, and the accounting may greatly depend upon the view taken by the court of the matters he will ask leave to report.

The referee submits as his "finding of facts:"

First. That Daniel Hughey died intestate on the 22d day of September, A. D. 1868, in the county of Newberry.

Second. That he left, as his heirs-at-law and distributees, his widow, Mary A. Hughey, and children, Effie W. Eichelberger and Job L. Hughey.

Third. That administration of his personal estate was granted to Mary A. Hughey.

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*Fourth. That the personal estate in the hands of the administratrix is ample for payment of debts.

Fifth. That the intestate died seized and possessed of real estate in the counties of Newberry and Fairfield, described in the pleadings, which are subject to partition.

Sixth. That Daniel Hughey, on the 5th day of February, A. D. 1850, executed a deed of trust to William J. Alston of a parcel of land known as the Sligh land, in Newberry county, and five slaves—one man, one woman and three children.

Seventh. That W. H. Eichelberger lived with his family on the Sligh land from A. D. 1850, until November, 1854.

Eighth. That improvements worth about $1500 were made upon the Sligh land during said time.

Ninth. That Daniel Hughey had possession of the Sligh land from (about) November, 1854, to the time of his death in A. D. 1868.

Tenth. That Effie W. Eichelberger held the slaves mentioned in the deed of trust as her own property, from A. D. 1850 until they were emancipated.

Eleventh. That Effie W. Eichelberger had claims upon her father and rights which were relinquished to him, and also that William H. Eichelberger had claims for personalty sold, which were settled by the payment of $3000 by Daniel Hughey.

Twelfth. That the land and slaves described in the trust deed to William J. Alston were not included in the above settlement.

The referee finds as "conclusions of law:"

First. That the trust deed of Daniel Hughey to William J. Alston is valid.

Second. That during the time Effie W. Eichelberger was in the use and occupation of the Sligh land, she is not to account for profits or pay rent.

Third. That from November, 1854, to the death of Daniel Hughey in A. D. 1868, his estate is not to account for use and occupation.

Fourth. That the estate of Daniel Hughey is to account for use and occupation of the Sligh land to Effie W. Eichelberger from the death of Daniel Hughey.

Fifth. That the Sligh land is to be re-

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garded and held as an *advancement to Effie W. Eichelberger, taking full effect as such at the death of Daniel Hughey.

Sixth. That Effie W. Eichelberger, in accounting for this land as an advancement, must take it with all improvements as it was left by intestate at his death, and accounting for its value at such time.

Seventh. That the former slaves in the trust deed were an advancement to Effie W. Eichelberger, and she is to account for their value as it was when the deed was made in A. D. 1850, according to the common rules of advancements.

Eighth. That the sum of $3000, paid by

Daniel Hughey to Effie W. Eichelberger, is not to be accounted for by her.

Ninth. That a writ issue for the partition of the lands of which Daniel Hughey died seized and possessed, excluding the Sligh land, but that the return of the commissioners await confirmation by the court until an accounting, including both real and personal estate, can be had.

A reference was held at Newberry, September 13th, 1872, and testimony taken, the object of which was to show a use by the administratrix of funds of the estate either for personal purposes or for profit. The referee is of opinion that at this time the matter should be embraced in the accounting, and he reports the testimony taken by him without comment or expression of opinion.

To this report all parties excepted, and case came up for hearing in Circuit Court on such exceptions.

The decree of the Circuit judge, is as follows:

It is adjudged and decreed that the first exception put in on the part of the plaintiff, Mary A. Hughey, and the defendant, Job L. Hughey, be so far sustained as to charge Effie W. Eichelberger as an advancement with $2000 of this money ($3000), handed to her by her father as she was leaving for Mississippi in December, 1854, with interest from the death of her father, Daniel Hughey, and that all of the other exceptions be overruled.

It is further adjudged and decreed that the first, second and third exceptions filed on the part of W. H. Eichelberger and Effie W., his wife, be sustained, and that the deed

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from Daniel *Hughey to W. J. Alston, trustee, dated the 5th day of February, 1850, is a valid subsisting deed, vesting the property therein described according to the use and trust therein expressed in Effie W. Eichelberger for and during her natural life, and at her death to go to the remaindermen, according to the terms and limitations of said deed, and that said land be delivered up to the said Effie W. Eichelberger, and that the estate of Daniel Hughey account to her for the rents and profits of the same from the first of January, 1855.

It is further adjudged and decreed that the property, real and personal, described in said trust deed is not to be accounted for as an advancement by the said Effie W. Eichelberger.

It is further adjudged and decreed that the fourth, fifth and sixth exceptions put in on the part of W. H. Eichelberger and Effie W., his wife, be overruled, and that the said report, as modified by the decree, be confirmed and made the judgment of the court.

Appellants' Grounds of Appeal.

Mary A. Hughey and Job L. Hughey appeal from the decree of the Court of Common Pleas in this action on the following grounds, to wit:

First. Because the Circuit judge erred in deciding that the Sligh land and five slaves were conveyed to the defendant, Effie W. Eichelberger, in payment of debts or other contracts of the intestate, Daniel Hughey, to or with her, inasmuch as the deed of conveyance and the only competent evidence in the case show the conveyance to have been purely gratuitous on the part of the grantor.

Second. Because the Circuit judge erred in holding that the estate of Daniel Hughey shall account for the use of the said Sligh land from November, 1854, inasmuch as, by the very terms of the deed, he had the authority to use the said land or to cause it to be sold at any time during his lifetime, and inasmuch as there is no evidence showing that his control and authority over the land was ever modified by subsequent action on his part or with his consent.

Third. Because the Circuit judge erred in

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holding that the *sum of $1000 out of the sum of $3000 furnished by Daniel Hughey to the said Effie W. Eichelberger was a payment of a debt to her, (the said Effie W.,) inasmuch as there is no proof of his owing her any sum of money for any cause.

Fourth. Because the Circuit judge should have decided that the $3000 and the five slaves were advancements to the said Effie W. by the said Daniel Hughey, to be accounted for by her, with interest, from his death.

Fifth. Because the Circuit judge should have decided that the Sligh land was a mere loan to the said Effie W., resumed by her father with her consent on her removal to Mississippi.

Sixth. Because the Circuit judge should have excluded all the depositions of Effie W. and her husband as incompetent, in that they are the testimony of parties opposed in interest to the intestate and in regard to his declarations and transactions.

Seventh. Because, if the said sum of $3.-000 was not a pure gratuity from Daniel Hughey to the said Effie W., the circumstances show that it must have been paid her in settlement of all her claims in the Sligh land.

Eighth. Because, if the estate of Daniel Hughey is to account for the use of the Sligh land, it should be only from his death in 1868.

Eichelberger and wife also appealed upon the following grounds:

1. Because his Honor erred in deciding that Effie W. Eichelberger should account for, as an advancement, $2000 of the $3000 of the money handed to her by her father, D. Hughey, as she was leaving for Mississippi, with interest from the death of D. Hughey.

2. Because his Honor erred in deciding that Effie W. Eichel..ger should account

for the value of the Sligh place at the death of D. Hughey, including in said valuation the $1500 worth of improvements put upon it by her, as an advancement, whereas in another part of his decree he has held that the Sligh land and five slaves named in the trust deed were not an advancement. This error was evidently unintentional.

3. Because his Honor erred in deciding

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that Effie W. Eichel*berger had possession of all five of the slaves named in the deed to W. J. Alston, from the date of the deed up to the time they were emancipated, when the evidence is that she only had possession of four of said slaves.

4. Because his Honor erred in deciding that Effie W. Eichelberger had released her right to her distributive share in her mother's real estate, except in part payment of the Sligh tract and five negroes named in the deed of trust.

L. J. Jones, Attorney for Eichelberger and wife.

Messrs. Baxter, Pope, Suber and Caldwell, for Mrs. Hughey and J. L. Hughey.

Messrs. L. J. Jones and Leroy F. Youmans, for W. H. Eichelberger and wife.

July 31st, 1878. The opinion of the court was delivered by

McIVER, A. J. Daniel Hughey died intestate on the 22d of September, 1868, leaving as his heirs-at-law and distributees his widow, the plaintiff, and two children, the defendant, Job L. Hughey, the child of plaintiff, and the defendant, Effie, a child of a former marriage, and now the wife of the defendant, William H. Eichelberger. The intestate, at one time, owned three tracts of land in the county of Newberry, one known as the Sligh place, called sometimes the Kinard place, and the Lyles and Heller tracts. After the marriage of Eichelberger to the said Effie, they lived for a time on the Lyles and Heller lands, which then belonged to him. Subsequently, however, they were sold by the sheriff for his debts and bid in by his brother, George A. Eichelberger, but W. H. Eichelberger, under some arrangement with his brother, "held an occupancy or use of this land for life," and so continued in possession until some time in 1847 or 1848, when Daniel Hughey purchased these two tracts, and William H. Eichelberger and wife removed to the Thornton land, in Fairfield county, upon which they made improvements to the value of some $500. This Thornton place was said to have been the property of Mrs. Eichelberger's mother, but the

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*testimony on this point was not very distinct, and it did not appear what was the value of the place nor the extent of Mrs. Eichelberger's interest therein; though it would seem from the testimony of Hope that there were other heirs of her mother besides Effie and her father, whose interest had been bought up by Daniel Hughey, who seemed to have the use and control of the place. After remaining a short time on the Thornton place, William H. Eichelberger and wife again removed to the Sligh place, but at what particular time is not stated. These several moves upon the part of the Eichelbergers seem to have been made at the instance of the intestate, Daniel Hughey.

Soon after their removal to the Sligh place, Daniel Hughey executed a deed, bearing date the 5th of February, 1850, to William J. Alston, for the Sligh place and five slaves, to be held by him in trust for the sole and separate use of the said Effie during her life, ("subject to the exception or reservation hereinafter made") and after her death to be settled upon her issue; and in case of her death without leaving issue, then the said land and slaves were to become the absolute property of said Daniel Hughey. The exception or reservation is that the said Daniel Hughey retains the right—First. "To have, use, cultivate and enjoy, in the most ample manner, free from any rent, claim or hindrance whatever, so much of said tract of land as the said Daniel Hughey may think proper." Second. The right to require the trustee to sell all or any part of the property mentioned in the deed, and reinvest the proceeds in lands or slaves, as said Daniel Hughey may direct. And, Third. The right, by deed or will, to revoke or annul this deed, or make such other disposition of the said property as he may see fit. Daniel Hughey died without exercising the power of revocation or alteration, and the Circuit judge, adopting in this respect the finding of the referee, held this deed to be valid and sufficient to convey the property therein mentioned upon the trusts therein declared, and from this part of his decision there is no appeal.

Some time in the latter part of the year 1854, W. H. Eichelberger and wife left the Sligh place, after having made improvements thereon to the value of about $1500, and removed to the State of Mississippi, where

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they still reside. Immediately after *they left, Daniel Hughey took possession of the Sligh place and continued in the use and occupation of it up to the time of his death—a period of nearly fourteen years; but the slaves mentioned in the deed continued in the possession of Mrs. Eichelberger until they were emancipated.

While on their way to Mississippi, Mrs. Eichelberger received from her father a sum of money amounting to about $3000, but whether as a gift, or in payment of claims which she and her husband may have had against her father is one of the questions in the case.

The questions raised by this appeal are—

First. Whether the Sligh place was an advancement—and if so, when was it made and how is it to be valued? Second. Whether the five slaves mentioned in the deed of trust can be regarded as advancements. Third. Whether the money received by Mrs. Eichelberger from her father was an advancement. Fourth. Whether the estate of Daniel Hughey must account for the use and occupation of the Sligh place, from the time he took possession, say January 1st, 1855, or only from the time of his death. There is also a question of evidence which it will be necessary to dispose of, viz., whether the testimony of Eichelberger and wife, as to transactions or communications with the intestate, was competent. The objection to so much of the testimony of Eichelberger and wife as relates to transactions or communications had with the intestate, must be sustained under the express terms of Section 415 of the code of procedure, so far as the testimony of Mrs. Eichelberger is concerned; but so far as the testimony of William H. Eichelberger is concerned, it cannot be sustained. The transactions and communications referred to were between the intestate and Mrs. Eichelberger, and not between the intestate and W. H. Eichelberger. The language of the code, Section 415, is: "That no party to the action * * * * shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased," &c., and as held by this court in the recent case of Roe v. Harrison [9 S. C. 279]; decision filed March 9th, 1878. The proviso to Section 415 of the code does not apply when the transaction or

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communication *was not between the witness and the deceased, but between the deceased and some other person.

The question whether the Sligh place is to be regarded as an advancement, is mainly a question of fact, in the solution of which the referee and the Circuit judge have reached different conclusions. We agree with the referee in the conclusion which he has adopted. He heard and saw the witnesses when they testified, and therefore had a better opportunity of judging of the force and effect of their testimony than the Circuit judge, who, as is said in the case, "did not hear the evidence in the cause," by which, we must presume, is meant that he did not hear the witnesses testify; for we certainly would not be at liberty to presume that a judge would undertake to decide a case depending largely upon issues of fact, without hearing the testimony read, which had been taken by the referee, and most assuredly we could not assume that any judge would undertake to overrule the decision of a referee upon a question of fact, without first ascertaining what the testimony was, upon which such decision was based. Therefore, while the rule is to accept the decision of the court below upon a question of fact, as conclusive, except where it is, either without any evidence to sustain it, or is, manifestly, against the weight of the evidence; yet where such decision overrules the decision of a referee, and is reached by a consideration of testimony taken in writing, the rule does not apply. Dewitt v. Atkinson, 6 S. C. 142. As this court has, then, the same opportunities of judging of the testimony as the Circuit judge had, and, as is said in Gee v. Hicks, Rich. Eq. Cas. 20, "in such cases of difference of opinion between the Chancellor and the commissioner upon the facts, this court is bound to examine the Chancellor's decree and either adopt or reject it, as the facts may appear to warrant." In doing this, however, we are not "to enter into any discussion at large of all the evidence introduced, or to take up the testimony of every witness on the one side and compare it with that introduced on the other side to rebut it. We look at it as a whole, and justify our conclusion by the influence which its entire scope makes on our minds." Dewitt v. Atkinson, supra. Looking, then, at this question in this light, the first circumstance which attracts our at-

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tention is *that the deed conveying the Sligh place is, on its face, a purely voluntary deed, made by a father for the benefit of his married daughter; next, that the interest conveyed is subject to such reservations and conditions as to render such interest so precarious, during the life of the grantor, as to make it extremely difficult, if not impossible, to suppose that any person possessed of ordinary mental capacity, would be willing to pay any pecuniary value for it; and, finally, we are at a loss to discover any sufficient evidence to show that this deed was based upon any valuable consideration passing from the grantee or the person beneficially interested thereunder, to the grantor. Regarding this, then, as an advancement, the next inquiry is, when was it made—at the date of the deed or at the time of the death of the intestate? By the terms of the deed the interest conveyed to or for the benefit of Mrs. Eichelberger, was of so uncertain and precarious a character, dependent wholly upon the contingency of the grantor's remaining in the same mind, that it can scarcely be said that any legal interest passed under it, until, by the death of the grantor, without altering or revoking the deed, such contingency had happened; and when, in addition to this, it is remembered that the intestate exercised his reserved right of resuming the use and enjoyment of the land in a comparatively short time after the making of the deed, and continued in such use and enjoyment up to the time of his death—a period of nearly fourteen years—we do not think the advancement can properly be regarded as having been made until at the time of his death, when it was no longer possible for him to exercise

the reserved right of revocation. It must, therefore, be estimated at its value at that time in the condition in which it then was, and we can see no ground for allowing Eichelberger and wife anything for the improvements which they put upon the place while they were in the occupation of it, especially as the value of these improvements was, doubtless, as the referee finds, included in the settlement made between Mrs. Eichelberger and her father, when she was on her way to Mississippi, as will hereinafter be more particularly noticed.

Second. The slaves mentioned in the deed of February 5th, 1850, cannot be regarded as

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an advancement; for, besides the *fact that this property cannot be regarded as having been really given to Mrs. Eichelberger until the death of the intestate, inasmuch as the donor reserved to himself not merely a life estate, but, practically, the absolute title, with the right to use and dispose of the property during his life, as completely and absolutely as if no such deed had ever been made, together with the right to revoke the deed, we do not see how a slave can be regarded as an advancement when the intestate died after the abolition of slavery, whereby slaves lost their attributes as property. It is manifestly impossible to ascertain the value of such an advancement, if advancement it be called. By our act of 1791, corresponding in its terms with Sec. 7, ch. LXXXV., Gen. Stat., p. 440, the value of the advancement is to be estimated "at the death of the ancestor," relation being had to its condition at the time of the gift. McCaw v. Blewit, 2 McC. Eq. 104. Now, in this case, the intestate having died after the slaves were emancipated, it is clearly impossible to ascertain the value of these slaves by the rule established by the statute, and we are not at liberty to invent any other. It is not like the case of a slave dying after the gift and before the death of the intestate, while slaves continued to be property, because then we would be at no loss in applying the rule. In such a case, slaves continuing to be property, a standard of value of such property would still be accessible, and the question as to what would such a slave, as the one given, in the condition in which it was at the time of the gift, be worth at the time of the death of the intestate, would present no impossibilities or even difficulties, as the value could readily be measured by such existing standard. But in the case now under consideration there was no such standard at the time of the death of the intestate, inasmuch as there was then no such property. The cases of Manning v. Manning, 12 Rich. Eq. 410, and McLure v. Steele, 14 Rich. Eq. 105, do not conflict with this view, as in each of those cases the ancestor died while slaves were still property, though the settlement of the estate was not made until after the slaves were emancipated. Hence, the question presented to us did not and could not arise in those cases. Without adverting to other reasons, this we think sufficient to show that the slaves mentioned

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in the deed of trust cannot be regarded *as an advancement. It may be that the services or hire of these slaves, while they were allowed to remain in the possession of Mrs. Eichelberger by the intestate, might constitute an advancement, but as that question has not been raised by any exception we cannot consider it, and do not wish to be regarded as indicating any opinion with reference to it.

Third. The next question is as to the money—$3000—received by Mrs. Eichelberger from her father while on the way to Mississippi. This, too, is a question of fact, and upon it, likewise, the referee and the Circuit judge have reached different conclusions; the former, finding that no part of this sum of money was an advancement, but was a payment of sundry claims held by Eichelberger and wife against the intestate, while the latter holds that only $1000 of the sum was a payment, and that the balance should be charged as an advancement against Mrs. Eichelberger. Upon what grounds the Circuit judge drew this distinction do not appear, as no reasons are given by him for any of the conclusions which he has reached. Here, too, we prefer to adopt the conclusion of the referee, as better sustained by the evidence. It is very true that the testimony as to this point, especially after excluding the testimony of Mrs. Eichelberger, so far as it related to transactions or communications had by her with the intestate, is not as clear and satisfactory as is desirable; but still we are of opinion that there was sufficient evidence to warrant the conclusion reached by the referee, especially when it is remembered that this was a transaction between a father and his daughter, who was about to remove to a distant state, leaving behind her such property as it would be inconvenient to take with her, and having certain claims which she and her husband undoubtedly did have against him. It would be unreasonable to expect that parties so related, dealing with each other under such circumstances, would go into nice calculations of value, or make accurate and detailed statements of the several claims which were brought into the settlement. Hence, while the testimony may not, perhaps, be sufficient to enable us to make such statements, which the parties themselves did not, probably, undertake to make, we think there is quite sufficient in the testimony to justify the conclusion reached by the referee, that no part

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of the *$3000 was a gift, but that the whole sum was paid in satisfaction of the various claims which the one party had against the other. There is no doubt but that Mrs.

Eichelberger had a contingent claim of dower in the Lyles and Heller lands, which was released to her father; that Eichelberger left on the Sligh place, when he removed to Mississippi, his crop, stock and other articles, which went into the possession of Daniel Hughey and which he must have estimated to be worth at least $1000, as Clark proves that he offered that much for these various articles; and that Eichelberger, under an arrangement with his brother, had a life interest in the Lyles and Heller lands, which seems to have been surrendered to Hughey. We think, too, that there is good reason to believe that the interest of Mrs. Eichelberger in the estate of her mother was likewise included in this settlement. Then, too, the improvements which the Eichelbergers had put upon the Thornton place and the Sligh place, though not, perhaps, constituting the basis for any legal claim against Hughey, might very well serve as a basis for a payment by Hughey to Eichelberger and wife, upon the same principle as that announced in Murrel v. Murrel, 2 Strob. Eq. 153 [49 Am. Dec. 664], "that though a parent is entitled to the services of his children while under age, he may waive his right and may make the services of his children the consideration of a contract or promise, and that he may give property bona fide in the performance of such obligation of justice, without its being subject to a claim on the part of the other children to consider it in the light of an advancement."

All these various items might very well constitute a sufficient consideration for the sum of money received by Mrs. Eichelberger from her father, and therefore we agree with the referee that no part of this sum of money should be charged as an advancement to Mrs. Eichelberger.

After what had been said on the first question, it is scarcely necessary to say anything as to the fourth question, as it is very manifest that the estate of Daniel Hughey cannot be charged for the use and occupation of the Sligh place, except from the time of his death. We may add, however, that any other conclusion would be directly in face of the

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express terms of the *deed of trust, exempting him from such charge, during his life, while in the exercise of the right reserved to him by the deed.

The third ground of appeal submitted on behalf of Eichelberger and wife, does not seem to have been pressed on the argument and was probably abandoned, as it is certainly not sustained by any testimony whatever, so far as appears in the "case" as submitted, and is directly in face of the finding of fact by the referee and the decision of the Circuit judge. In addition to this, under the view which we have taken of this case, holding that the slaves were not to be regarded as an advancement, this ground loses its practical importance.

The fourth ground of appeal presented by the Eichelbergers is in the following words: "Because his Honor erred in deciding that Effie W. Eichelberger had released her right to her distributive share in her mother's real estate, except in part payment on the Sligh tract and five negroes named in the deed of trust." The language in which this ground of appeal is presented necessarily implies that Mrs. Eichelberger did release her interest in her mother's estate, and the only complaint is that the Circuit judge erred in holding that the consideration for such release was anything except a part payment for the Sligh tract and five negroes named in the deed of trust. We are unable to discover any such holding on the part of the Circuit judge. For as he decided that the Sligh tract and the slaves were not advancements, and as the grounds upon which such a decision was invoked were that they were not gifts, but were conveyed upon valuable consideration, a part of which was the release of Mrs. Eichelberger's interest in her mother's estate, the reasonable inference is that the Circuit judge did decide exactly what is demanded by the fourth ground of appeal, and hence, there is no foundation for any such ground. But as we think, as we have indicated above, that the release of Mrs. Eichelberger's interest in the estate of her mother, constituted a part of the consideration for which the sum of money—$3000—was paid by her father to her, it becomes unimportant to determine precisely what the Circuit judge did decide upon this point.

The judgment of the Circuit Court, in so

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far as it conflicts *with the views herein expressed, must be set aside, and the case remanded to the Circuit Court for further proceedings, in accordance with the principles herein established.

Decree modified.

WILLARD, C. J., and HASKELL, A. J., concurred.

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11 S. C. 56

(Case No. 615.)

FREDERICK E. FRASER v. MARY F. DAVIE, CHURCHILL B. JONES and His Wife and Children.

(April Term, 1878.)

[1. *Interpleader* ⇐1; *Trusts* ⇐178.]

In cases where a dispute arises as to whether a deed of trust has ever become operative, it is proper for the trustee named in such deed to seek the interposition of a court of equity to define his rights and duties, as between the grantor in trust and the beneficiaries under the deed. And a complaint for such purpose is not a bill of interpleader.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 1; Dec. Dig. ⇐1; Trusts, Cent. Dig. § 232; Dec. Dig. ⇐178.]

[2. *Trusts* ⟸179.]

Such trustee is bound to the exercise of good faith towards his grantor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 233; Dec. Dig. ⟸179.]

[3. *Trusts* ⟸178.]

When one for value agrees to convey to another and the latter prepares a deed of trust for signature, professing to be upon the consideration of natural love and affection, equity will look beyond the terms of the deed to the true consideration, and finding that, will so declare it, and act upon it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 232; Dec. Dig. ⟸178.]

[4. *Appeal and Error* ⟸1012.]

A finding of fact by a Circuit judge is not binding upon this court, when a contrary conclusion rests on clear and indisputable grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent Dig. § 3990; Dec. Dig. ⟸1012.]

[5. *Contracts* ⟸175.]

The word "understood" as applied by a witness to his own apprehension of an agreement to which he was himself a party, is direct proof in itself of what the agreement was.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 766, 978, 1010, 1067–1069, 1786, 1803, 1810; Dec. Dig. ⟸175.]

[6. *Deeds* ⟸56.]

The manual delivery of a deed will not be regarded as a full and complete delivery when it is mutually understood at the time, between grantor and grantee, that such deed is not to become operative until some future event. Arthur v. Anderson, 9 S. C. 234.

[Ed. Note.—Cited in Carrigan v. Byrd, 23 S. C. 91.

For other cases, see Deeds, Cent. Dig. § 120; Dec. Dig. ⟸56.]

Before Mackey, J., at Chester, September Term, 1876.

The allegations of the complaint and answers are sufficiently set forth in the opinion of the court. The deed is an indenture, and recites as follows:

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*"Witnesseth: That the said Mary F. Davie, party of the first part, for and in consideration of the natural love and affection that she bears to her nephew, Churchill B. Jones, and Sarah, his wife, and their children," naming them, "and for and in consideration of the sum of five dollars to her in hand paid by the said Frederick E. Fraser, party of the second part aforesaid, the receipt whereof is hereby acknowledged, hath this day bargained, sold, &c., * * * to have and to hold the said bargained premises unto the said Frederick E. Fraser, his heirs, executors and administrators, upon the following trusts and conditions: In trust for the use of the said Churchill B. Jones and Sarah, his wife," &c. The deed concludes in due form and is signed by Mary F. Davie, and Frederick E. Fraser, whose seals are annexed to their respective signatures, in presence of two subscribing witnesses, one of whom makes probate in usual form of the signing, sealing and delivery of the deed.

Frederick E. Fraser testified that he was a nephew of Mrs. Mary F. Davie, and had been her general business agent since 1850; Mary F. Davie held a judgment against C. B. Jones for $4285.74, which, with interest, amounted in January, 1869, to about $6300; said Jones proposed in 1868 to compromise said debt by paying $500 in cash, and $1000 in one, two and three years, with interest at eighteen per centum per annum, to be secured by a mortgage of two tracts of land which he had purchased a year before, and which were included in the trust deed to me; Jones had deeds executed by the sheriff of Chester county to Mrs. Davie for these two tracts, paid her $500 in cash, and Mrs. Davie reconveyed the two tracts to me in trust for said Jones and his wife and children; according to my understanding this deed was not to take effect until the balance of $1000 and interest was paid; Jones has paid Mrs. D. nothing but the $500; in November, 1873, she purchased through her attorney, Maj. S. P. Hamilton, under an execution in favor of C. B. Jones, a tract of land, which, after paying costs, left a credit to Jones of $701.40, which was applied to Mrs. D.'s judgment against Jones; Jones had a credit entered on her judgment against him for $2475, purchase money of two tracts of land covered by deed of trust, leaving about $4878 still

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due Mrs. Davie; as *soon as trust deed was executed it was sent to either Jones or Maj. Hamilton; the existence of the deed had passed entirely out of my mind until reminded of it by Maj. Hamilton, who in 1874 found it among his papers, and handed it to me; the deed was not recorded because, as I understood, it was not to be recorded until all the conditions of the compromise had been complied with; Jones called upon me in 1874 to have the deed recorded; Mrs. D. objected, because Jones had not carried out the terms of his compromise; Jones insisted, and by the advice of my counsel I commenced these proceedings.

Cross-examination.—Do not remember whether sheriff's deed was in possession of or known to Mrs. D. at time of execution of trust deed; did not direct Hamilton in the matter, as he had charge of business as legal adviser of Mrs. D.; trust deed is in Maj. H.'s handwriting, and I paid him $25 for Mrs. D. for professional services in arranging compromise with Mrs. D.; Jones wrote to me early in 1868 proposing compromise, as stated in my direct examination, which I submitted to Mrs. D., and by her directions placed the matter in Maj. H.'s hands; in February, 1868, I wrote to Jones saying Mrs. D. would accept the offer, but would not assign judgment until the whole amount was paid.

Mrs. Mary F. Davie testified, as follows: I am seventy-four years old; am aunt of plaintiff, and I married uncle of C. B. Jones;

am no relation to any of the other parties; I executed a deed in 1869 to F. E. Fraser in trust for C. B. Jones and his family; Jones then owed me about $6000 by judgment; he desired to compromise it on the following terms: $1500—$500 cash and $1000 in one and two years; I agreed to the compromise, and he paid the first $500, but has never paid anything since; this was the consideration of said deed; he now owes me about $5000; I never knew that Jones had bid in land for me and credited the bid on my judgment; I never authorized him to do so; Jones never informed me that he had done so; plaintiff has been my business agent since 1850.

Cross-examination.—I am aunt of Henry D. Fraser and Jane M. Fraser, the witnesses to the trust deed; Mr. Hamilton was my lawyer in Chester, but cannot remember

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what lawyer repre*sented me in the judgment in my favor against Jones, as F. E. Fraser attended to all these matters for me; I think C. B. Jones was present when trust deed was executed, but am not certain; I know nothing about two deeds from Sheriff Walker—they were never in my possession.

S. P. Hamilton, Esq., testified: Was counsel of Mrs. Davie directly after the war; was employed to manage her business here, and particularly her judgment against Jones; was from time to time Jones' attorney; not much concerned with attempted settlement, but Mr. J. made me acquainted with this matter; J. held judgment against Beckham, under which two tracts of land were sold and purchased by J.; in 1868 the two deeds were put on record; they were given to me by J.; it was agreed between J. and myself that I should give him credit for purchase price of land, $2475; terms of agreement, J. to pay $500 cash and $1000 on some credit; I drew the deed; must have been before September 26th, 1868; balance of $1000 to be paid in one and two years—judgment meantime to remain open; drew deed under instructions of J.; Fraser gave me no instructions; I sent deed to Mr. F., January 7th, 1869, by letter, by direction of, I think, Mr. J.; Mr. J. returned me the deed with two others; he directed me to have the other two deeds recorded and not to record trust deed; it lay in my office until this controversy commenced, when J. came to me and said I had it; I had forgotten, but found it; corresponded with Mr. F. in reference to Mrs. D.'s business; informed F. of the terms of the deed; in this I was acting as Mrs. D.'s attorney; did not leave the deed with the clerk; put credit on execution as attorney of Mrs. D.; think J. asked me to give him the deed—told him I thought it belonged to F.; saw F. afterwards in Charleston; said he had forgotton deed—asked me to send it to him to let him look at it; did so; he did not return it.

J. M. Brawley, county auditor, testified that since execution of the deeds by the sheriff to Mrs. Davie, J. has returned the two tracts conveyed by those deeds in Mrs. D.'s name, and has paid the taxes upon them as such.

C. B. Jones' answer, by agreement, was received as evidence; its statements are as follows: That the defendant, C. B. Jones,

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*having bought at sheriff's sale the lands embraced in the trust deed under an execution in his own favor, at Chester C. H., entered into an arrangement with Mary F. Davie, whereby C. B. J. paid over to said M. F. D. $500 in cash, and assigned the bids for the said land to said M. F. D., so that she, by the agreement and arrangement referred to, could make said trust deed to said plaintiff for the uses and purposes therein mentioned, which arrangement was agreed to and carried out by the said M. F. D.; that everything was done that was required between the parties to make the deed perfect, and the deed was understood to be complete and perfect at the time of its execution, and each and every allegation of the complaint to the contrary is untrue; that C. B. J. knows that the said deed was sent to the clerk's once for Chester county to be there recorded, and if it was not done, it was not on account of anything to be done by him under the agreement referred to between him and M. F. D., but must be owing to negligence of plaintiff or M. F. D., whose duty it was to have the deed recorded; and it was intended at the time by all parties to be placed on record, and was intended to be recognized as such by M. F. D. and by plaintiff, who was trustee, and by all the persons interested in the same.

In a letter of Churchill B. Jones to F. E. Fraser, put in evidence by Mrs. Davie, Jones makes the following statement: In the early part of 1868 I proposed to Aunt Davie a compromise, which she consented to—it was as follows: I would pay her $500 cash and $1000 on time—one, two and three years—interest at eighteen per cent.; after this $1500 was paid the balance of the claim she held against me she was to settle on my family; my business did not call me to Charleston until the early part of 1869; before going to Charleston I had the sheriff to execute titles to Aunt Davie for the two tracts of land, which I took with me; on my way down I requested Hamilton to draw up a trust deed for the same; he sent it by express to F. E. Fraser; it arrived too late to be executed before I left Charleston; Aunt Davie knew nothing of trust deed lands at the time of the proposition in 1868; while I was in Charleston I showed the trust deeds from the sheriff to Aunt Davie, when the following second and last arrangement was

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entered into; I was to pay Aunt Davie *$500

cash; upon doing so Aunt D. was to sign the trust deed for the same, and F. E. F. was to forward it, with the two sheriff's deeds, to me to be recorded; and on my paying Aunt D. $1000 more, the same in one, two and three years, with eighteen per cent. interest, Aunt D. would then settle what balance remained on her claim against me on my family in the same way as the trust deed lands; I paid Aunt D. the $500 and returned home; F. E. F. forwarded to me the two deeds from the sheriff, also the trust deed, signed, witnessed and proven; the first time I went to Chester I took the three deeds with me to have them recorded; I left them with Hamilton, requesting him to hand them to the clerk to be recorded, which he promised to do; the first time I was at Chester after that, H. informed me that the sheriff's deeds were recorded but the trust deed was not, and gave the reason why it was not; I then requested him to keep the trust deed until I called for it.

In a letter from C. B. Jones to S. P. Hamilton, also put in evidence by Mrs. Davie, Jones says: You informed me * * * that the two sheriff's deeds were recorded, but the trust deed had been refused record for the lack of revenue stamps; that the law required it should be stamped before it could be recorded, and that I would have to have it done.

The Circuit judge, after an elaborate review of the points at issue, decreed as follows: After due consideration of the law, the facts in the premises and of all the equities of the parties complaining and interpleading herein, it is hereby ordered, adjudged and decreed that the deed of trust described in the complaint herein, was duly executed by the defendant, Mary F. Davie, the settlor thereof, and by Frederick E. Fraser, the grantee named therein, and that the said deed was absolutely and unconditionally delivered by the said settlor to the said grantee, and did vest in the said grantee the legal estate in the lands described in the said deed, and did convey to Churchill B. Jones and Sarah, his wife, and the other cestuis que trust therein designated, the equitable title and beneficial interest in the said lands.

It is further ordered, adjudged and de-

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creed that the said deed *of trust be forthwith recorded in the office of the register of mesne conveyances in and for the county of Chester.

It is further ordered, adjudged and decreed that the plaintiff, F. E. Fraser, do pay his own costs in this action; and that the defendant, Mary E. Davie, do pay the costs and disbursements of the defendants, C. B. Jones and Sarah, his wife, and their co-defendants, the cestuis que trust interpleading herein.

[For subsequent opinion, see 15 S. C. 496.]

Mary F. Davie and Frederick E. Fraser appealed from this decree to the Supreme Court.

Mr. Edward McCrady, Jr., for Mrs. Davie.

The deed purports to be a voluntary conveyance—one in consideration of natural love and affection. From the evidence, it does not appear that Mrs. Davie bears such a relation to the beneficiaries under the deed as would support such a consideration. 2 Black. 297. But if a voluntary deed, equity will not aid Jones and his family, for there is no equity to enforce an imperfect gift. 6 Ves. 662; 18 Ves. 140; 1 Fonb. Eq. 349. See same doctrine recognized in 2 Desaus. 191; 3 Desaus. 1; and in 1 Johns. Ch. 336. Voluntary agreement will not be completed or assisted by a court of equity in cases of mere gift; if anything be wanting to complete the title of the donee, a court of equity will not assist him in obtaining it. 4 De G., F. & J. 263, 519; 2 Mofloy 257.

But this was not a voluntary deed; there was a consideration different from that expressed in its recital, which may be proven. 7 Bro. P. C. 74; 3 T. R. 474; 3 Ad. & El. 649; May's note to § 26, 13th ed. of Greenl. Ev.; 2 Taunt. 141; 5 Barn. & Ald. 606; 18 Ves. 483; 1 Atk. 352; 2 Hill 404; 1 McC. 514; Riley Eq. 131; Best on Ev. (Am. ed., 1875,) 398, note; Sug. on V. & P. 153, note; Whart. on Ev., § 1048; 12 Eng. R. 236, note; 16 Wend. 460; 5 Barb. 455.

Mrs. Davie is not bound by compromise which she, ten years ago, generously agreed to, but of which Jones did not avail himself, and has put her to all this litigation. 2 Strob. 20; 3 Strob. 25.

Mrs. Jones and her children cannot take

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free from the agree*ment of Jones and unaffected by his conduct in the matter. 4 Mer. 222; L. R., 8 Ch. App. 383; 5 Eng. R. 607.

As to the delivery of the deed. It may be shown that the deed was, in fact, not executed, or that its execution was only conditional. Whart. on Ev., §§ 927, 930, 1054; 24 W. R. 159, 33 L. T. 672; 4 Barn. & Ald. 440; 2 Barn. & Cr. 82; 5 Barn. & Cr. 671; 11 M. & W. 128.

We are met by the technical rule that a deed delivered to a party in interest cannot be considered as escrow. But the deed was in Hamilton's hands, Mrs. Davie's agent, and the testimony shows was put there by agreement of all parties.

If sealed instruments are sacred, is it not upon the principle of estoppel—a principle not favored at law? 5 Barn. & Ald. 606. But deed was drawn under Jones' directions, and if she is thereby estopped, he is still more estopped by his sworn returns to the auditor that the land belonged to Mrs. Davie.

Mr. W. G. De Saussure, for F. E. Fraser.

Fraser is not liable for the costs of the action. Perry on Trusts, §§ 433, 892; 5 De

G., M. & G. 258; 1 McC. 251. An appeal relating to costs alone will not be sustained. But where the decree is found to be erroneous on other points, the court is to adjudge the costs upon the principles of the decree as reformed. 2 Strob. Eq. 166.

Mr. G. J. Patterson, for respondents.

The question is, is the deed of January 9th, 1869, a perfect and complete deed of conveyance?

If executed upon condition that it was "not to be put on record until a complete settlement," &c., it would still be a valid deed. 3 McC. 205; 2 Black. 307; 4 Kent 454.

The delivery to the grantee makes it absolute. 8 Rich. L. 325; 4 Strob. 46; 10 Smed. & M. 9; Smith on Cont. 10; 2 Stark. Ev. 477; 4 Com. Dig., tit. "Fait," A, 5; 13 Vin. Ab., "Fait," M, 8; 6 Mod. 218.

The prima facies is surely in favor of the deed, and it can be avoided only by plenary proof, and the attesting witnesses must be called. 1 Phil. Ev. 425; 4 East. 53. In

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his sworn complaint, *plaintiff says the deed was executed and delivered; by this he is bound. 1 Greenl. Ev. §§ 27, 205, 551; 3 Greenl. Ev., § 275. Mrs. Davie admits this under oath; she, too, is bound. Ibid. A promise by Jones to pay $1000, unperformed, cannot affect the rights of the cestuis que trust. 4 Kent 130. There can be no vendor's lien. 2 S. C. 56. If habendum in a deed repugnant to the premises, which are complete, is void, much more should verbal condition annexed to delivery be void, when repugnant to both premises and habendum. Harp 492; 4 McC. 12, 198.

August 13th, 1878. The opinion of the court was delivered by

WILLARD, C. J. This is a complaint in the nature of a bill by a trustee, to have the nature and extent of his interests and duties in regard to the trust property defined and settled, as against the grantor in trust and the cestuis que trust. It has been erroneously supposed by the Circuit decree that the case is one of interpleader. When one admits himself to be liable to perform some act, to the performance of which others make conflicting claims, he may interplead them to ascertain to whom the duty is due. But that is not this case, for the conflict does not depend on the fact that each party claims the same duty from the trustee; on the contrary, the demands of the grantor and the cestuis que trust, are of separate natures, claiming the performance of acts of a different character on the part of the trustee. From the character of the demand it will appear to bear a closer resemblance to a bill for the specific performance of a parol contract for the sale of land in part carried out, than to a bill of interpleader.

The complaint alleges that the defendant, C. B. Jones, being indebted by judgment to the defendant, Mrs. Davie, in an amount exceeding $6000, they agreed to compromise such indebtedness on the following terms: Jones was to pay to Mrs. Davie $500, and to convey to her the land described in the complaint, by way of mortgage, to secure the payment of $1000 more, in installments, with interest at an agreed rate; Mrs. Davie to assign the judgment for the protection of Jones. It is alleged, however, that Jones, without consultation with Mrs. Davie, changed the plan of arrangement in the following

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manner: *Instead of having title to the land, his claim upon it was under the lien of a judgment held by him against a third person, who was the owner thereof, and in addition thereto, under a bid made by him at sheriff's sale on execution, under such last-mentioned judgment, under which he became the purchaser but had not taken title. Jones without previously conferring with Mrs. Davie, but, as appears in evidence, with the consent of her attorney, transferred the bid to Mrs. Davie, to whom title was made by the sheriff, and through her attorney had the amount bid for the land credited on the execution issued against him on Mrs. Davie's judgment. Jones then applied to Mrs. Davie to execute a deed of the land to plaintiff as trustee, for the benefit of Jones and his family.

Mrs. Davie alleges that she was induced to execute such a deed, but with the understanding that it should be detained by the trustee, and not recorded until that portion of the agreement that related to the payment of the $1000 had been complied with. The effect of this agreement will be hereafter considered, but it will be assumed for the present purpose that its object was to render the deed inoperative until the sum of $1000 was paid, or secured to be paid, according to the terms of the compromise.

Defendant Jones contends that the terms of the original agreement were, by mutual understanding, changed to such extent that the land in the hands of the trustee was to be actually discharged from the lien of the judgment of Mrs. Davie upon her receiving the cash payment of $500, she to look to her judgment alone for the balance of her demand. This statement of a new contract appears to be incomplete, as it leaves it quite in doubt what was to become of the balance of the judgment, over and above the $1000 secured by it and the credits upon it. This being the nature of the controversy, the exact question is, whether certain acts are required to be performed by the plaintiff, or by the defendant, Jones, before the deed is operative, so as to accomplish the objects intended by the trust expressed in it. In such a case it cannot be doubted that a trustee may come into a court of equity to have his rights and duties defined, and for a determination wheth-

er some act on the part of a defendant is not essential to give stability to the trust, and

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this does not militate *against the rule that a trustee must not industriously search for secret defects in his title, as his duty is to protect rather than to destroy it.

It is clear that the nature of the controversy demands the interposition of a court of equity in behalf of the trustee to relieve him from the embarrassments of his position, and we find no reason for the severe strictures on his conduct pronounced by the Circuit decree.

There is no controversy as it regards the terms and objects of the original agreement; the controversy relates wholly to the question whether any rescission or modification of that agreement has been made by the acts of the parties. There are two modes under the facts of the case by which such a rescission or modification might have arisen—first, by the mutual agreement of the parties upon consideration; or, second, by waiver on the part of Mrs. Davie of the conditions in her favor, by the acceptance of less than the contract called for, as the consideration of doing that which she was called on to perform as her part of the agreement. Has either of these cases arisen?

It should be remarked that the contract and dealings between the parties rest wholly on a valuable consideration. The creation of a trust does not appear to have been contemplated by the original contract, unless a secret trust was intended by defendant, Jones, in the event that he should require the judgment to be assigned to a third party, intending thereby protection to himself as against his creditors.

As such a trust is not a necessary inference from the terms of the original contract as stated, and has not gone and need not go into effect, it is unnecessary to consider its possible effect as an element of the contract. As far as the original contract was concerned, it was indifferent to Mrs. Davie whether the benefits of the compromise were secured to Jones indefinitely, or to him and his family. The terms of the trust deed proceed wholly from Jones, who prepared it. When one agrees to convey to another, and the latter prepares a deed of trust for signature, professing to be upon the consideration of natural love and affection, equity will look beyond the terms of the deed to the true con-

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sideration, *and finding that it was valuable wholly, will so declare it and act upon it.

The main question in the case as above stated is one of fact, and in order to disturb the findings of the Circuit Court, it is necessary that a conclusion opposite to that of the Circuit Court should rest on clear and indisputable grounds.

We are satisfied that the conclusion of the Circuit Court holding that there was a complete and full delivery was erroneous, as unsupported by the proper legal effect of the proofs and allegations. This question is fundamental to the question already stated as presented by the case, viz., whether any rescission or modification of the original agreement has been effected by the agreement or waiver of the parties, and it will be first considered. The testimony of Mrs. Davie and that of Fraser are in substantial concurrence. The proper deduction from their testimony is, that according to the understanding of both, the deed was to remain in the hands of Fraser, inoperative, until provision was made as it regards the payment of the $1000. This fact becomes extremely important as these parties were the proper parties to the delivery, if one was made, Mrs. Davie as the grantor, and Fraser as the grantee in trust.

Unless, then, this testimony is successfully shaken, it would be extremely difficult to get rid of the consequences of such a mutual understanding between the immediate grantor and grantee, as it regards the nature and intention of the delivery.

It has been objected to Mrs. Davie's statement that she has stated in her answer that it was only the withholding of the deed from record that was contemplated by the condition annexed to the manual delivery of the deed as admitting the deed to be recorded is not essential to its effect as a valid deed between the parties. But it is clear that Mrs. Davie assumed that by withholding the deed from record, it would remain inoperative; and as delivery is an act of the mind, as well as a manual act, presupposing consent that the deed should become operative, evidence showing the absence of that consent must have weight against the inferences arising from mere manual delivery. Mrs. Davie was an aged lady, of seventy-four, dealing with a nephew, and, it is evident from her testimony,

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had an imperfect knowledge of *the state of the transaction at the time she executed the deed in question.

She was examined upon written interrogations and appears to have answered directly, but briefly. Although she does not state, in terms, that it was stipulated that the deed should not become operative until the conditions as to the $1000 were complied with, that question not having been put to her, yet she stated the incomplete state of the transaction at the time the deed is alleged to have been delivered, in a manner that fully accords with and corroborates the more full statement of the matter made by the trustee, Fraser. Fraser states that the deed was not recorded because, as he understood, "it was not to be recorded until all the conditions of the compromise had been complied with."

This testimony has been criticised for the reason that it is the statement of the witness' understanding alone. It is true that when it is sought to prove the existence of a fact by the statement of a witness that he understood

the fact so to be, the proof is of the weakest character, for in that form of statement the sense of "understood" is equivalent to that of "believed," and that belief might be founded on hearsay or conjecture. But here the existence of such an understanding is the very fact to be proved, that word being used in the sense of "agreement," and therefore the mere statement of its existence by a party to it, is direct proof in itself.

The subsequent conduct of the parties shows that they mutually understood that withholding the deed from record was equivalent to withholding it from operating as a deed. It was handed by Fraser to Mr. Hamilton, and retained in his possession unrecorded until the commencement of this action. It does not appear that any act asserting title under the deed has been performed by the trustee.

The Circuit decree arrives at the conclusion that Mr. Hamilton is not to be regarded as the attorney of Mrs. Davie, but on this point the testimony is so clear and conclusive that it does not need comment or illustration. We hold the proof sufficient to show that Mr. Hamilton in taking possession of the deed and holding the same, did so as the attorney of Mrs. Davie.

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*Then taking together the testimony of the grantor and the trustee, and that of Mr. Hamilton, it becomes apparent that the deed was delivered by the grantor to the grantee with the mutual understanding that it should not operate until the terms of the original agreement, as it regarded the payment or security of the $1000, had been complied with.

Opposed to this are the statements contained in the answer of the defendant, Jones, which, by the stipulation of the counsel for the parties, are to be treated as if sworn to by Jones as testimony in the case. The statements of the answer, as it regards the intended effect of the deed, are in general terms, and do not show any facts or circumstances tending to give probability to his statements, as against those of the trustee. Primarily it must be assumed that the immediate grantor and grantee had the best knowledge of what was intended between them, but this inference might give place to a different result, if it was made to appear that the transaction was actually with Jones, and only nominally with Fraser. But the statements of Jones lay no sufficient foundation for such a conclusion. So, too, if any purpose of equity was to be subserved thereby, Jones might be treated as the actual party; but on the contrary, the equities are with Mrs. Davie to have the purposes of her contract carried into effect. We must therefore give effect to the mutual understanding of the parties between whom the transaction was in form of law perfected.

It is clear that the course pursued by the defendant, Jones, was at variance with the original contract, and tended to place Mrs. Davie in a position in which Jones would obtain the substantial benefits intended by the transaction, without affording to her the advantages contemplated in her favor. It is not to be presumed that Mrs. Davie intended to relinquish those benefits, nor was Fraser, though interested as trustee, bound to assist Jones in stripping Mrs. Davie of these advantages. No principle of equity requires that a trustee should yield himself as a party to an overreaching transaction against his grantor. He is as much bound to good faith as one who deals in his own interest. The testimony of Fraser must, therefore, be considered as proceeding from one devoid of

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personal interest and acting wholly *for the benefit of others. As the testimony of Fraser cannot be shaken on the ground of credibility for anything that appears, it is clearly a case for leaving the matters where they stood, according to the mutual understanding of the parties to the act of delivery. An attempt was made by counsel to impeach the accuracy of the memory of Fraser by the admitted fact that at one time he had forgotten the existence of the deed, a circumstance not likely to have happened, had it been regarded by him as complete and operative; but, however that may be, the fact of having forgotten a transaction at some time after its occurrence and prior to giving testimony about it, is not conclusive that the memory of the witness is defective as to its details.

A subject may pass entirely out of the mind, and yet, upon being recalled, the memory of the various matters connected with it may be entirely reliable.

The principles on which the foregoing conclusion, as to the bearing on the effect of manual delivery of the intentions of the parties, were recently considered by this court in Arthur v. Anderson, 9 S. C. 234, and the cases bearing on that subject there noticed. It is not necessary to re-examine the foundations on which they rest. There is no question of an escrow in the case, the true question being the effect in equity of the understanding of the parties under which manual delivery was effected. It is, therefore, unnecessary to consider the propositions advanced relating to the validity of escrows.

There being, then, no absolute delivery of the deed, its recitals cannot be employed against the grantor, as has been attempted; not having direct effect in that respect, it cannot act indirectly upon the parties.

The only proof offered of any change in the terms of the original contract comes from the answer of the defendant, Jones, considered as testimony in the case. The onus probandi is on Jones, who alleges such change. His testimony is rebutted by that of both Mrs. Davie and Fraser, and fails to

repel the presumption of the continuance of the contract in the form originally made.

The want of operation in the deed precludes the charge that Mrs. Davie had waived full performance of the terms of the original contract, for no other act of hers is

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alleged as having produced *that effect. It follows, therefore, that the decree of the Circuit Court was erroneous, and it must be set aside.

The cause must be remanded to the Circuit Court for an inquiry whether the situation of the property and of the parties is such that the deed of trust can take effect in substantial compliance with the terms of the contract between the parties as hereby established, and for a final decree upon the principles hereinbefore stated.

Decree reversed.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. 71

(Case No. 624.)

NAOMI BOUKNIGHT et al. v. ELIZABETH EPTING et al.

(April Term, 1878.)

[1. *Constitutional Law* ⇐93.]

E. E., in 1832, and after her marriage, acquired by purchase a tract of land; afterwards her husband contracted debts which fell due in 1859, upon which a judgment was obtained against him in 1869. *Held*, that Section 8, Article XIV., of the state constitution of 1868, was not intended to act retrospectively upon the rights of the husband in such land, and that his interest therein might be sold under such judgment.

[Ed. Note.—Cited in Bannister v. Bull, 16 S. C. 230; Suber v. Chandler, 36 S. C. 350, 15 S. E. 426; Jacobs v. Mutual Ins. Co. of Greenville, 52 S. C. 119, 29 S. E. 533.

For other cases, see Constitutional Law, Cent. Dig. § 200; Dec. Dig. ⇐93.]

[2. *Constitutional Law* ⇐156.]

Were such intention manifest, a construction to that effect could not be given, as it would violate that provision of the constitution of the United States which forbids a state from passing any law impairing the obligation of a contract, inasmuch as the husband, prior to the adoption of the constitution of 1868, had a vested interest in the lands of which his wife was seized during coverture.

[Ed. Note.—Cited in Kuker v. Carter, 42 S. C. 87, 20 S. E. 22.

For other cases, see Constitutional Law, Cent. Dig. § 430; Dec. Dig. 156.]

[3. *Trusts* ⇐131.]

Where a deed is made in consideration of money paid by J. C., and conveys lands to "J. C. for his daughter E., wife of G. E.," to have and to hold, &c., "unto said E. E., her heirs and assigns forever," the use is executed, and the legal estate vested in E. E. under the operation of the statute of uses.

[Ed. Note.—Cited in Burnett v. Burnett, 17 S. C. 550; Howard v. Henderson, 18 S. C. 188, 189, 190; Ayer v. Ritter, 29 S. C. 138, 7 S. E. 53.

For other cases, see Trusts, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇐131.]

[4. *Husband and Wife* ⇐119.]

The terms of such deed are not sufficient to create a separate estate in E. E., a married woman.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 425; Dec. Dig. ⇐119.]

[5. *Husband and Wife* ⇐114.]

Where a complete legal estate in the wife's lands had become vested in the husband prior to the adoption of the constitution of 1868, such constitution did not operate as a settlement of such lands upon the wife.

[Ed. Note.—Cited in Garrett v. Weinberg, 48 S. C. 43, 26 S. E. 3.

For other cases, see Husband and Wife, Cent. Dig. § 395; Dec. Dig. ⇐114.]

[6. *Constitutional Law* ⇐93.]

Thomas v. Sheppard, 2 McC. Ch. 36 [16 Am. Dec. 632], approved.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 200; Dec. Dig. ⇐93.]

[7. *Constitutional Law* ⇐23.]

[A Constitution, like a statute, operates prospectively only, unless the words employed, or the object in view, clearly show that it was intended to have a retrospective effect.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. ⇐23.]

[This case is also cited in Trustees v. Bryson, 34 S. C. 411, 13 S. E. 619, as to the rule on the subject of the wife's equity to a settlement.]

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*Before Cooke, J., at Lexington, July, 1876.

The facts of the case are fully stated in the opinion of the court.

Mr. H. A. Meetze, for appellants.

Mr. J. M. Baxter, for respondent.

October 29th, 1878. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover possession of real estate. The plaintiffs claim under a sheriff's title for the land in dispute, sold under an execution against George Epting, the husband of the defendant Elizabeth, issued to enforce a judgment recovered April 12th, 1869, in an action commenced March 2d, 1868, on two notes under seal, one due November, 1859, and the other due January, 1859. The defence set up by Elizabeth Epting, who is the only real defendant, was a denial of plaintiffs' title, and an allegation "that she is now seized and possessed of said tract of land in fee, and has been so seized and possessed thereof at all times since the 17th day of December, A. D. 1832, under a deed on that day duly and legally executed and delivered to John Chapman, for the defendant, Elizabeth Epting, by Jacob H. King." The terms of this last-mentioned deed, upon which the case will, in large part, depend, were not set out in the "case," but a copy of it has been attached to the "case," of which, it was agreed at the hearing, it should be considered a part. The plaintiffs requested the court to charge the jury "that George Epting, the

husband of Elizabeth Epting, had an estate for his life in the lands of his said wife, and that said interest was subject to levy and sale under executions against said George Epting." The Circuit judge refused so to charge, and instructed the jury that the foregoing was "the law of the case prior to the constitution of 1868, but that the right of judgment creditors to levy and sell the real estate of the wife was rendered void by the constitution of 1868;" and the jury were directed to find for the defendants, which they did. The plaintiffs duly excepted.

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*In order to sustain the charge of the Circuit judge it would be necessary to give a retrospective operation to the terms of Sec. 8, Art. XIV., of the constitution, securing to married women property held by them at the time of their marriage, as well as that subsequently acquired. The rule, however, is, "that a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect." Cooley on Cons. Lim. 62. In Potter's Dwarris on Stat. 654, it is said: "There is a striking analogy, and generally an entire harmony, between the rules of interpretation of constitutions and those of statutes." And at page 162, in note 9, it is said: "The American authorities are quite uniform on the retrospective effect of statutes. The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared, and courts will apply new statutes only to future cases, unless there is something in the very nature of the case or in the language of the new provision which shows that they were intended to have a retrospective operation."

These principles have been fully sustained by our own court in the case of Ex parte Graham, 13 Rich. 277. The language of Sec. 8, Art. XIV., of the constitution, is as follows: "The real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held by her as her separate property, and may be bequeathed, devised or alienated by her the same as if she was unmarried; provided that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors."

It is very manifest that these words of the constitution do not show "a clear intention that it should have a retrospective effect," and it certainly is not "expressly declared" that it shall so operate, nor is there anything "in the nature of the case or in the language" of the constitutional provision which shows that it was intended to have a

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retrospective operation. We do not *think, therefore, that a retrospective effect can be given to the clause of the constitution now under consideration. But even were we able to give that clause such a construction, the question would still remain whether such a construction would not bring it into conflict with that provision of the constitution of the United States which forbids a state from passing any law impairing the obligation of contracts, because, if it did, then some other construction must necessarily be adopted. There can be no doubt but that prior to the constitution of 1868, a husband did, by virtue of his marriage, acquire an estate in the lands of which his wife was then, or might thereafter become, seized, during the coverture, which was a vested interest and liable to be sold under execution against him. If this be so, it would be difficult to escape the conclusion that any statute or constitutional provision of a state, divesting such vested interest and transferring such estate to another, would be in conflict with the constitution of the United States. This estate in the husband is property, and as much liable to the claims of his creditors as any other property he may have, and any legislation of a state, either by constitution or statute, which undertakes to withdraw such property from the reach of his creditors, would be unconstitutional. Gunn v. Barry, 15 Wall. 610 [21 L. Ed. 212]; Cochran v. Darcy, 5 S. C. 125. Any estate or interest which the husband, George Epting, may have acquired in the lands of his wife, now in question, was acquired in 1832, when the deed under which the defendants claim was executed, and the subsequent provisions of the constitution of 1868, under any construction which may be given to them, cannot release such estate or interest from the claims of his creditors, who, doubtless, extended credit to him upon the faith of this very interest, the debts upon which the judgment was recovered, under which the land was sold, having been contracted after the interest was acquired and before the adoption of the present constitution. We think, therefore, that plaintiffs' exception was well taken. It is argued, however, that under a proper construction of the deed of 1832, the husband, George Epting, acquired no interest whatever in the land thereby conveyed, but that the title vested in Chapman, for the sole and separate use of Elizabeth, the wife, and therefore never was

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*liable for the debts of her husband; and that if this be not so, then the wife had an equity to a settlement of the same for her sole and separate use, and that the provisions of the constitution operated as such settlement. These points do not seem to have been raised in the court below, and no instruction was given or asked for on such

points, so far as we can discover from the "case" submitted here, though these are the only points made in the brief submitted by the attorney for the respondent.

We might very well, therefore, under the case of Mowry v. Stogner, 3 S. C. 251, decline to enter upon the inquiry as to the proper construction of the deed of 1832, until it had been passed upon in the court below. But as we think this inquiry will be conclusive of the case, we deem it better to enter upon it now, as it may save the delay and expense of another appeal. So much of the language of the deed as is material to the questions involved, is as follows: "I, Jacob H. King, * * * in consideration of the sum of $800, to me paid by John Chapman, * * * have granted, bargained, sold and released unto the said John Chapman, for his daughter Elizabeth, wife of George Epting, a certain tract of land, containing, &c., * * * to have and to hold all and singular the premises before mentioned, unto the said Elizabeth Epting, wife of George Epting, daughter of the above-named John Chapman, her heirs and assigns forever;" with the usual clause warranting the premises to said Elizabeth Epting, her heirs and assigns forever. If we regard this as a deed to John Chapman for the use of Elizabeth Epting rather than as a deed directly to Elizabeth, as to which no question has been raised, though possibly it might have been, the question which we first propose to consider is, whether the statute of uses would not, under the terms of the deed, execute the use and vest the legal estate in Elizabeth. The rule, as we understand it, is that where land is conveyed to one for the use of another, or in trust for the use of another, and the person to whom the conveyance is made, the trustee, has no duties to perform, or where there is nothing for him to do requiring that the legal estate shall remain in him in order to enable him to do what is required, there the statute executes the use and the legal title passes to the person for whose use the grant or conveyance was made. McNish v. Guer-

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ard, 4 Strob. *Eq. 66, and Ramsay v. Marsh, 2 McC. 252 [13 Am. Dec. 717]. In this case it is very clear that the supposed trustee had nothing whatever to do, no duty whatever was required of him, for the proper performance of which it was necessary that the legal estate should remain. It cannot be claimed that it was necessary, in order to preserve the separate estate of the wife, for, as we shall see presently, no such estate is provided for by the deed. So that there is nothing in the fact that the conveyance is nominally made to a third person for the use of the wife, which will prevent the marital rights from attaching. The next inquiry is, whether the terms of the deed can be regarded as sufficient to create a separate estate in Mrs. Epting. As Dunkin, Chancellor, says in Wilson v. Bailer, 3 Strob. Eq. 260 [51 Am. Dec. 678], in considering this question we must bear in mind "that a separate estate in a married woman is in derogation of the husband's common law right—that it is the creature of the Court of Chancery—and that unless the intention to exclude the husband is clearly expressed, or arises by necessary implication, the marital right is maintained;" and after declaring that "the absolute terms in which the property is given to the wife, or the amplitude of her enjoyment has never been deemed sufficient to create a separate interest in derogation of the common law right," he proceeds to say: "The implication is, however, necessary, when the estate is declared to be for the sole and separate use of the wife, although the words 'independently of her husband,' or 'without the control of her husband,' are not superadded. So if the wife is authorized to give a receipt, or to do any other act which, as a feme covert, she would not ordinarily do, there is a necessary implication that her separate existence was recognized, and that, in this matter, she was to act and be treated as a feme sole." Now, in the case under consideration, there is no language whatever indicating an intention to exclude the husband, as in Ellis v. Woods, 9 Rich. Eq. 19, and in Martin v. Bell, 9 Rich. Eq. 42 [70 Am. Dec. 200]. The husband is not even mentioned or alluded to, except as a mode of designating the person to be benefited. Nor is there anything in the deed from which an intention to create a separate estate in the wife can be implied. There is no provision that she is to do anything which, as a feme covert, she would not ordinarily do. She is not

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authorized to *give a receipt for the rents and profits of the land, as in Charles v. Coker, 2 S. C. 122. The land is not even given to her "for her own use and benefit," which, in some of the cases, it has been held was not sufficient to imply a separate estate; but it is simply granted "to John Chapman, for his daughter Elizabeth." The case cannot be brought within either of the three classes mentioned in Nix v. Bradley, 6 Rich. Eq. 48, as covering the several modes of disposition by which a separate estate may be created in favor of a married woman. We do not think, therefore, that the terms of this deed are sufficient to create a separate estate in the wife. See 2 Story's Eq. Jur., §§ 1382–3, where the cases are collected.

Again, it is argued that even if the estate was vested in Mrs. Epting for her separate use by the deed of 1832, yet she had an equity to a settlement therein, and that the provisions of the constitution of 1868 operated as such settlement. The rule on the subject of the wife's equity to a settlement is that whenever the wife's property is under the jurisdiction of the Court of Chancery, in such a manner that it requires a decree or order

of the court to put a party rightfully into possession of it, the court will not deliver it over except upon terms of a settlement being made, unless the wife has been sufficiently provided for out of other property, or unless the wife, upon a private examination, shall waive her right to such settlement. Murray v. Elibank, 1 Wh. & Tu. Lead. Cas. in Eq., note 384; Durr v. Bowyer, 2 McC. Eq. 372; Myers v. Myers, Bail. Eq. 24; Yeldell v. Quarles, Dud. Eq. 55.

So, if land in which the wife is entitled to a distributive share is sold for partition, as long as the fund remains under the control of the court the wife's equity to a settlement will be recognized and enforced upon a proper application for that purpose, because the officer of the court holding the fund has no right to pay the wife's share to the husband without an order of the court. Wardlaw v. Gray, 2 Hill Eq. 644; Ex parte Mobley, 2 Rich. Eq. 56; Hill v. Hill, 1 Strob. Eq. 25–6.

But if the wife's property has been actually reduced into possession by the husband, or is not a mere right, or chose in action, but a complete legal estate vested in the hus-

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band, the wife's *equity to a settlement cannot be recognized or enforced. Murray v. Elibank, supra 386; Thomas v. Sheppard, 2 McC. Eq. 36 [16 Am. Dec. 632].

It is true that O'Neall, Judge, does say in Heath v. Heath, 2 Hill Eq. 107, that in Thomas v. Sheppard "the court upon principles and for reasons which are, to my mind, clearly erroneous, refused to set up the wife's equity, yet recognized and acknowledged the rules which I have already stated." But this was a mere dictum, as the question in the two cases was entirely different. For in Heath v. Heath the wife's interest had never been reduced into possession and was still under the control of the court, while in Thomas v. Sheppard the property acquired through the wife had been reduced into possession by the husband, and was no longer within the reach of the Court of Chancery.

Judge O'Neall has not undertaken to indicate the grounds upon which he condemns the decision in Thomas v. Sheppard, and as we are unable to discover any such grounds, but on the contrary regard the decision as in strict conformity to the established principles of law regulating the wife's equity to a settlement, we are quite content to rest this case upon the authority of a decision made by a court consisting of those eminent judges, Nott, Colcock and Johnson.

Our conclusion, therefore, is that George Epting acquired, by virtue of his marriage, a vested legal estate in the land in dispute, which was liable to levy and sale under executions against him, and we see no ground upon which the wife can set up an equity to a settlement therein.

The judgment of the Circuit Court is set aside and a new trial ordered.

Judgment set aside.

WILLARD, C. J., and HASKELL, A. J., concurred.

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11 S. C. *79

*(Case No. 625.)

G. D. CARRIER v. W. WASH. THOMPSON

(April Term, 1878.)

[1. *Execution* ⟸98.]

An execution which has lost its active energy, may be renewed by the written consent of the judgment debtor, endorsed on the execution and signed by him, without the service of a summons, there being no fraudulent collusion between the plaintiff and defendant in such execution. Guignard v. Glover, Harp. 457, sustained.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 199; Dec. Dig. ⟸98.]

[2. *Execution* ⟸116.]

An execution issued prior to the adoption of the code has a lien upon the personal property of the defendant, even after the expiration of its active energy. Warren, Wallace & Co. v. Jones, 9 S. C. 288.

[Ed. Note.—For other cases, see Execution, Cent Dig. §§ 266–271; Dec. Dig. ⟸116.]

[3. *Execution* ⟸111.]

Such lien also attaches to personal property of the execution debtor, acquired after the adoption of the code.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 224; Dec. Dig. ⟸111.]

[4. *Justices of the Peace* ⟸135.]

A sale by a constable under a junior execution issued by a trial justice, will not divest the lien of a senior execution issued in 1869 from the Court of Common Pleas. Blair & Alexander v. Horseby, Dud. 357, and Lenmond v. Short, 3 Strob. 313, doubted, and the cases in this state upon the subject reviewed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 442; Dec. Dig. ⟸135.]

Before Kershaw, J., at Spartanburg, April, 1878.

The facts of the case are sufficiently stated in the opinion of the court.

Upon the trial on appeal in the Circuit Court, the presiding judge signed the following order:

The court finds as matter of fact, that the defendant had no lawful authority to levy upon the mule in dispute.

And as matter of law, that the plaintiff is entitled to the possession of the said mule, now in his possession, under his replevin bond.

It is therefore ordered and adjudged that the appeal herein be dismissed, with costs.

The defendant appealed to this court, upon the grounds that his Honor erred:

1. In holding that an execution issued on December 4th, 1869, upon a judgment render-

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ed on December 1st, 1869, could not be *renewed by the written consent of the defend-

ant in execution, after the expiration of seven years from the original entry of the execution, without application to the court.

2. In holding that the defendant had no lawful authority to levy on the mule in dispute, when the evidence showed that the defendant acted under an execution regularly renewed by the written consent of the defendant in execution.

Messrs. Bobo & Carlisle, for appellant.

The execution of 1869 was a lien upon all the property, real and personal, of J. P. Peace, and did not lose its lien by losing its active energy. 1 Bay 295; 1 McC. 414.

The levy and sale by the constable could not divest the lien of a senior judgment of the Circuit Court, and therefore could confer no title to the purchaser. The trial justice's execution of 1878 did not constitute a lien until actual levy. 1 Hill 277; 1 Hill 286.

After the expiration of its active energy, an execution may be renewed by consent of the defendant in execution without application to the court by scire facias. Harp. 457.

If execution was irregularly renewed, objection cannot be made by third persons. 2. Strob. 220; 1 Bail. 513; 1 Nott & McC. 408.

Mr. J. S. R. Thomson, for respondent.

Even if the sheriff's second execution had been properly issued he would have had no right to levy it upon the mule bought by respondent. The Code, § 316, and its amendments (15 Stat. 872) provide that an execution should create no lien on personal property except by levy. If the mule had been Peace's before the passage of the code (and the onus of proving that was on appellant) Cash's execution would be a lien. But the change in the law was a mere change in the remedy—that lien should date from levy and not from entry—and does not impair the obligation of the contract. Sedg. Stat. and Cons. L., pp. 635, 644; note 350, 659.

If there was lien, it may well be doubted whether constable's levy would not have divested it. Dud. 358.

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*The execution upon which the levy was made by respondent was issued without authority of law. Code, § 306; 15 Stat. 872; Sedg. Cons. & Stat. L. 31, note a.

October 29th, 1878. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover the possession of a mule, brought before a trial justice, where the plaintiff had a verdict, which, on appeal to the Circuit Court, was sustained; and this is now an appeal from the judgment of the Circuit Court. The plaintiff claimed the mule under a sale made March 2d, 1878, by a constable, under a judgment rendered by a trial justice in 1878. At this sale the defendant, as sheriff, gave notice that the mule, which was about being sold, was subject to the lien of an older judgment, and that the purchaser must pay the purchase money to him. He, however, did not object to the sale. The plaintiff paid the purchase money to the trial justice, which was by him applied to the satisfaction of the said execution in favor of H. H. Thomson, and another execution in his office junior to that. On March 12th, 1878, the defendant, as sheriff, levied upon the mule in the possession of the plaintiff, under an execution lodged in his office on March 2d, 1878, which was a renewal of an execution originally lodged on December 4th, 1869, issued to enforce a judgment obtained in the Court of Common Pleas on December 1st, 1869; and under this levy the defendant claimed. This execution was not renewed in the usual form, by issuing a summons, but under an acknowledgment endorsed upon the original execution, and signed by the defendant in the execution in the following words: "I acknowledge that the judgment in this case has not been paid, and consent that this execution be renewed against me, without application to the court. March 2d, 1878."

It is contended by the respondent—First. That the execution under which appellant claims the property in dispute, was issued without authority of law, inasmuch as the only mode in which an execution can be renewed after the expiration of its active energy is that prescribed by the code, as amended by the act of November 25th, 1873 (15 Stat. 499), viz., by the service of a summons upon the judgment debtor; and

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that the written con*sent of the judgment debtor will not dispense with the necessity for the service of a summons, and hence that the levy made under this execution, so illegally issued, conferred no title on the sheriff. It will be observed that the language of the act referred to is merely permissive, not imperative: "But after the expiration of its active energy, as aforesaid, the same may be renewed by the service of a summons on the judgment debtor, his heirs, executors or administrators, to show cause, if any he or they may have, why the same shall not be renewed; and if no sufficient cause be shown, the same may be revived." Now, as the only object in issuing the summons is to give the opportunity to the judgment debtor to show cause why the execution should not be renewed, it is difficult to conceive of any reason why the observance of this mere form, not imperatively required, should be demanded, where it appears in writing, upon the record, not only that the judgment debtor has no cause to show, but actually consents to the renewal. Hence, even in the absence of any authority, we would be disposed to hold that an execution may be renewed by the written consent of the judgment debtor, without the service of a summons, in the absence of

allegation and proof of fraudulent collusion between the plaintiff and defendants in such execution, (and there is none such here.) But the point has been distinctly decided in the case of Guignard v. Glover, Harp. 457, and is therefore no longer open to question.

Second. The respondent contends that even if the execution under which the levy was made is held to have been properly issued, it had no lien on the property in question, and therefore no title could be acquired by such levy. This proposition is based upon the idea that an execution issued since the adoption of the code, upon a judgment obtained prior to that time, has no lien upon personal property until it is levied. We had occasion, in the recent case of Warren Wallace & Co. v. Jones (MS. decision, filed March 9th, 1878, 9 S. C. 288), to consider this question, and to show that the code, as modified by the amendatory act of November 25th, 1873, could not be so construed as to defeat the lien which such an execution had, even after the expiration of its active energy, upon the personal property of the judg-

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ment debtor; *and we deem it unnecessary to encumber this opinion with a repetition of the argument and authorities upon which such conclusion was based.

It is argued, however, in this case, that while this may be true so far as the lien upon property in the possession of the judgment debtor, at the time of the adoption of the code, is concerned, it would not apply to subsequently-acquired property, and that the onus was on the appellant to show that the property here in dispute was in the possession of the judgment debtor at the time of the adoption of the code, in order to bring it within the lien of the execution under which appellant claims. But it must be remembered that executions prior to the code were a lien not only upon the property of the debtor then in his possession, but also upon all that he might thereafter acquire. Brown v. Gilliland, 3 Desaus. 539; Grooms v. Dixon, 5 Strob. 149. Such being the law at the time of the recovery of the judgment upon which the execution in question was issued, and at the time when the contract was made upon which the judgment was founded, the rights of the judgment creditor must be determined by the law as it then stood, and cannot be abridged by subsequent legislation. For, as this court has said in the case of Cochran v. Darcy, 5 S. C. 127, adopting the language of the Supreme Court of the United States in the case of Gunn v. Barry, 15 Wall. 610 [21 L. Ed. 212]: "The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involve no impairment of a substantial right." Now, here the substantial right which the judgment creditor had when his contract was made, was the right to a lien upon all his debtor's property as soon as he recovered his judgment and issued his execution—as well upon that which he then had as that which he might subsequently acquire; and to take away the latter would certainly be the "impairment of a substantial right." Indeed, it is difficult to conceive how, if it is unconstitutional for a state to pass a law withdrawing a certain portion of property of a specified kind from the lien of an execution obtained upon a contract entered into before the passage of such law as has been determined by the homestead cases, it would

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*not be equally unconstitutional to pass a law withdrawing all of another class of property from the lien of such an execution.

Finally, it is argued by the respondent that the lien of the execution under which the appellant claims, was divested by the sale made by the constable under the execution issued to enforce the judgment obtained before the trial justice. This proposition cannot, in our judgment, be maintained, for the judgment and execution issued by the Court of Common Pleas being the oldest in date, it must certainly take precedence of that issued by the trial justice. Kerr v. Montgomery, 1 Hill 277; Robinson v. Cooper, 1 Hill 286.

The proposition contended for by respondent is based upon an inference merely drawn from the point decided in Blair & Alexander v. Horseby, Dud. 357, for certainly the case does not establish any such proposition; and, on the contrary, Richardson, J., in delivering the opinion of the majority of the court, expressly says in speaking of the sale by a constable under a magistrate's execution, junior in date to the execution from the Court of Common Pleas: "It may be questionable whether the sale of the horse was not valid, inasmuch as there had been no previous levy under the senior execution." And again he says: "Supposing the proper rule to be either for or against the validity of the constable's sale," &c., showing very clearly that this case does not decide the point contended, nor does it even contain a dictum to the effect. So that, giving the case its full weight as authority, it furnishes no ground for saying that the sale of property by the constable, bound by the lien of a senior fi. fa., issuing from the Court of Common Pleas, under a junior execution, issued out of an inferior court, divests the lien of the senior fi. fa. and confers a good title on the purchaser. But we do not desire to be understood as committing ourselves to the correctness of the decision in Blair & Alexander v. Horseby. That case was decided by a bare majority of one in a court at which only five judges were present, and as the judge who delivered the opinion of the majority expressed himself in somewhat doubtful terms upon a point which seems

to lie at the foundation of the whole question, and as there seems to be great force in the reasoning employed by Butler, Judge,

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in the dissenting opinion, concurred *in by Evans, J., it may be necessary, when a proper occasion presents itself, to review that decision; especially as it appears to be somewhat inconsistent with other cases on the subject. But as the question does not necessarily arise in the case now under consideration, and was not therefore argued, we do not propose to enter upon the discussion of it further than to present a brief abstract of the cases upon the subject, indicating the points of inconsistency.

There can be no doubt that prior to the adoption of the code of procedure, executions were liens upon personal property from the date of their lodgment in the sheriff's office, even after they had lost their active energy. Snipes v. Sheriff of Charleston, 1 Bay 295; Brown v. Gillilland, 3 Desaus. 539; Greenwood v. Naylor, 1 McC. 414. Indeed, as Nott, J., says in State v. Laval, 4 McC. 342, in speaking of this doctrine: "It is peculiar to this state; but it is too well established now by a series of decisions to be controverted." And as Harper, J., says, in Mitchell v. Anderson, 1 Hill 73 [26 Am. Dec. 158], in speaking of these decisions: "The doctrine established by them has been too long and too firmly settled to be shaken now." If this be so, then it would seem to follow, necessarily, that the sale of property so bound by the lien of an execution, whether made by the execution debtor himself, or by a mortgagee under a junior mortgage, or by a constable under a junior execution from an inferior court, would be made subject to such lien, and the property in the hands of the purchaser would still be bound by the lien of the senior execution.

The cases which treat more especially of the effect of a sale of personal property made by the officer of an inferior court, under an execution issued by such court upon the lien of a senior execution issued out of a superior court, are the following: Greenwood v. Naylor, 1 McC. 414; Kerr v. Montgomery, 1 Hill 277; Robinson v. Cooper, 1 Hill 286; Blair & Alexander v. Horseby, Dud. 357; Alexander v. Collins, 3 Rich. 62; Lemmond v. Short, 3 Strob. 313.

The case of Greenwood v. Naylor, decided in 1821, was a contest between two execution creditors, one of whom had lodged his execution, which was senior in date, in the office of the sheriff of Charleston district, with an endorsement in these words:

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*"Lodged to bind;" which were construed to operate as a stay of the execution; while the other had lodged his execution, junior in date, in the office of the city sheriff, with instructions "to levy and sell." Personal property was sold by the city sheriff under the execution in his office, and upon a rule he was required to pay the proceeds of the sale to the senior execution lodged in the office of the district sheriff. The court, in this case, treated the question as if both executions had been lodged in the same office, and the only point really decided in the case is, that an execution which has been stayed does not thereby lose its priority over a junior execution under which the sale was made. The fact that the executions were lodged in different offices, seems to have received little or no attention at the hands of the court, and therefore the case throws but little light upon the question in the case under consideration. The case of Kerr v. Montgomery, decided in 1833, was this: The sheriff levied upon a wagon under executions in his office, and left it in possession of Brown, the judgment debtor; afterwards the plaintiff, as constable, levied on the wagon under a junior execution issued by a magistrate, sold it, and having bid it off himself subsequently sold it to the defendant. The wagon was then seized in the hands of the defendant by the sheriff and sold under the original levy. The action was brought by the constable to recover the amount for which he had sold the wagon to the defendant, who defended himself upon the ground that the sale by the constable conferred no title as against the lien of the senior executions; and his defence was sustained.

This case would seem to be conclusive of the question in the case now before the court. It is true that in the case of Kerr v. Montgomery, the senior executions had been levied, before the levy and sale by the constable, but that circumstance could have had but little, if any weight, in the decision, as it is not even alluded to in the opinion of the court, and on the contrary the decision is placed upon the ground that the property when sold by the constable was bound by the lien of the senior executions, the language used being: "The fi. fa.'s lodged in the sheriff's office against Brown, before the seizure of the wagon, in execution by the constable, were legal liens upon it, and the sale under

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*them, after the constable's sale and purchase by himself, and his subsequent sale to the defendant, was a regular eviction of the defendant, by a paramount title." And while Richardson, J., in Blair & Alexander v. Horseby, does seem to attach some importance to the fact that the senior executions had been levied before the sale by the constable under the junior execution, that fact is treated by the court as of no importance in the subsequent case of Lemmond v. Short. Indeed, if, as the law then stood, an execution had a lien from the time of its lodgment without levy, it is difficult to conceive how the circumstance that the execution had, or had not, been levied, could affect the question.

Robinson v. Cooper, also decided in 1833, was this: The plaintiff as constable, levied on certain personal property under a magistrate's execution, which was then bound by the lien of a senior execution lodged in the sheriff's office. On the day of sale the sheriff attended with his execution and levied on the property. It was agreed, however, that the sale should proceed, and, if it should be decided by the court that the constable had no right to sell, then the purchase money was not to be paid. The defendant purchased with this understanding, and gave his note to the constable for the amount of his bid. In an action on this note the plaintiff was non-suited, and the non-suit was sustained by the Court of Appeals; the court holding, that while the rule of caveat emptor applies to sales made under process from a court of general or inferior jurisdiction, yet it may be waived or varied by express agreement, as was done in this case; and that the sale by the constable conferred no title. In delivering the opinion of the court, O'Neall, J., uses this language: "In this case the true and only question is, * * * has an execution lodged in the sheriff's office priority over a constable's execution junior in date? There can be no difficulty in answering this question in the affirmative. An execution from a court of general jurisdiction binds the goods of the defendant from the day on which it is lodged in the sheriff's office." It is true that Judge O'Neall throws out the suggestion that if the proceeds of the constable's sale be applied to the senior execution its lien would be discharged, but this was not at all necessary to the decision of the question before

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the court, and was therefore, *as said by Butler, J., in his dissenting opinion in the case of Blair & Alexander v. Horseby, not "obligatory either on himself or on the court." Indeed, it is obvious from the language used by Mr. Justice O'Neall, while throwing out this suggestion, that he did not design to endorse the doctrine contended for in the case now under consideration; for he says, after deciding the real points arising in the case: "But it is perhaps necessary in this case to go further, and to make it the occasion of considering and deciding the effect which the lodgment of an execution in the sheriff's office might have on sales under levies subsequently made of magistrates' executions; I admit, in the outset, [as we do] that a sale by a sheriff under a junior execution would be good. For having actually or constructively, both executions, the whole authority of the law is in him to make the sale, and it is his duty to apply the proceeds correctly. The lien on the goods is discharged by his sale; for his levy vests the property in him for the purpose of satisfying the liens by execution subsisting on the property. But, I apprehend, a totally different question is presented when it is contended that the levy of an execution of an inferior jurisdiction is to divest the prior lien of an execution of a superior jurisdiction. To discharge the lien of the latter, the proceeds of the sale must be paid over to it; for it is an encumbrance on the property entitled to be levied on it, to the extent of its value. If the proceeds of the sale are paid over to it, it is, in effect, a levy and sale of the goods under it. But, if the sale by the constable under a junior levy, [execution?] could discharge the lien without paying over to the senior execution the proceeds, it would be an easy mode of defeating it, and would, in effect, authorize the defendant to alien his own property."

The case of Blair & Alexander v. Horseby, decided in 1838, was this: The defendant, as constable, sold a horse as the property of one Black, under several magistrates' executions in favor of third persons. The plaintiff, having an execution of older date, issued out of the Court of Common Pleas, of which notice was given to the constable before the sale, he was forbidden to sell. He, however, sold the horse, and the plaintiffs brought this action to recover, as is stated

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in the report of the case, "the *amount of their judgment and execution"—doubtless meaning the amount of the proceeds of the sale; because certainly the defendant could not, in any view of the case, be made liable for more than he received—the proceeds of the sale. The Circuit judge decreed for plaintiffs, and on appeal his decision was sustained. It is very manifest, as shown by Butler, J., that the principle decided by this case cannot be applied in cases where there are several executions in the sheriff's office, of the same or of different dates, without leading to great and unnecessary confusion, or at least to results that could not readily be accepted. If the several executions are of the same date, then the question would arise, "Which plaintiff shall have the power to elect and recover the money in the hands of the constables?" Or, if of different dates, "Shall the senior creditor have this power alone? If so, he is made the exclusive judge of the liens of others, without their option or control." For surely it could not be held that the constable was liable to the senior execution creditor for the proceeds of the sale, and still the property in the hands of the purchaser be liable to the lien of other executions senior in date to the magistrate's execution under which the constable made his sale. "If the senior execution creditor has exclusively the right to decide on the matter, he may very well save himself, while he compromises the rights of others. To illustrate the case: Suppose that a horse worth $500 should be sold by a constable for $50, and that a creditor with the oldest execution in the sheriff's office should make his election and apply $25 to the pay-

ment of a balance to that amount, due on his execution, must the junior creditor be compelled to take the remaining $25, and forego his right of selling the horse for $500, under his execution, by which he could have got $475, instead of $25?" These, and other considerations not necessary to be adverted to now, may well create a doubt whether it would not be better to hold that where property bound by the lien of a senior execution, in the sheriff's office, is sold by a constable under a junior execution, that it is sold subject to the senior lien, and remains liable in the hands of the purchaser to the satisfaction of such lien; and therefore that the senior execution creditor has no lien on the proceeds of such sale, and is not entitled to

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recover them. It is *undoubtedly true, as established by the case of Paysinger v. Shumpard, 1 Bail. 237, that where one purchases property at private sale, subject to the lien of an execution, of which he has express notice, and subsequently sells the same, he cannot be made liable to the execution creditor, either for the amount he paid for such property or for the amount for which he may have sold it. For, as said by Colcock, J., in that case: "The lien is on the property alone; and a third person coming into possession of it incurs no personal liability to the creditors." It is impossible to reconcile the case of Paysinger v. Shumpard with that of Blair & Alexander v. Horseby: and although the former was decided in 1829, and the latter nine years later, the one does not, even by implication, overrule the other; for the former is cited and recognized as authority in the latter, both in the opinion of the majority and minority of the court. For although in the one case the property was sold at private sale, and in the other by a constable under a magistrate's execution, it is difficult to see how this can affect the question under consideration, though it would make a vast difference if the sale under the junior execution was made by the sheriff, for the reason stated by O'Neall, J., in the case of Robinson v. Cooper, supra, and for the further reason that when a sheriff has several executions in his office, and advertises and sells under one which proves to be invalid, yet nevertheless the sale shall be valid if there is any other good execution in his office at the time; because, in selling he acts under all of the executions in his office, and if any one of them be sufficient to authorize the sale, the sale will be valid. Hence, when he sells under a junior execution, the sale is made by authority of the senior as well as the junior execution, and the lien of all the executions upon the property is thereby divested, and the title of the purchasers is unaffected by such liens. Vance & Davis v. Red & Young, 2 Speers 90; Arnold v. McKellar, (MS. decision filed March 18th, 1878, 9 S. C. 335.)

The next case on the subject, Alexander v. Collins, decided in 1846, was as follows: A constable levied on certain property of A. & C., under a magistrate's execution, which, was bound by a senior execution issued out of the

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Common Pleas and lodged in *the sheriff's office. The plaintiff, Alexander, who was sheriff, notified the constable of this senior execution, previous to the sale, and required payment of the proceeds of the sale to be made to the senior execution. The constable refusing to do so, this action was brought by Alexander, as sheriff, to recover such proceeds; when it was held that he could not recover. It is true that this decision was based upon the ground that the plaintiff, as sheriff, before he had levied, had no such right as enabled him to bring the action, and the case therefore cannot be regarded as in direct conflict with Blair & Alexander v. Horseby. But Wardlaw, J., in delivering the opinion, does seem to intimate doubts of the authority of that case. His language (the italics being ours) is: "The case of Blair & Alexander v. Horseby, Dud. 357, may be authority for maintaining that *a plaintiff* in a Circuit Court execution, waiving his right to pursue property of the defendant which was bound by the lien of his execution, and has been sold by a constable under a magistrate's execution, may, after the notice, recover from the constable the proceeds of the sale in his hands. But the general lien of an execution cannot give to *the sheriff* a right so to recover. After the levy the sheriff acquires an interest in the specific property levied upon, which will sustain his action of trover or trespass against a constable or other person. This interest would, in a contest between the sheriff and a constable who had levied before the sheriff's levy, but after the lien of the execution in the sheriff's hands attached, have relation back to the commencement of the lien, so as to take the property from the constable, or a *purchaser from him*." The fact that Judge Wardlaw uses such terms in speaking of the case of Blair & Alexander v. Horseby, and the further fact that he dissented in the subsequent case of Lemmond v. Short, would seem to indicate that he agrees with Butler and Evans, JJ., in their dissent from the point decided in Blair & Alexander v. Horseby.

The last case upon the subject is Lemmond v. Short, decided in 1848, in which it was held that where a constable had sold property subject to the lien of an execution from the Court of Common Pleas, after notice from the sheriff that he would claim the proceeds of the

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sale as applicable to the execution in his *office, and the plaintiff in such senior execution had become the purchaser at the sale, the constable could not recover the amount of his bid from such purchaser because it was applicable to the execution in the sheriff's office, al-

though it had never been levied, and therefore, under the authority of Cobb v. Pressly, 2 McM. 416, such purchaser, under these circumstances, could not be required to pay the money to which he was entitled under his execution even to the sheriff, and consequently not to the constable. This case does recognize the authority of Blair & Alexander v. Horseby; but at the same time recognizes the cases of Kerr v. Montgomery and Robinson v. Cooper as deciding the point in issue in the case now before the court, viz., that a sale by a constable, under a junior execution issued by a magistrate, will not divest the lien of a senior execution from the Court of Common Pleas, and consequently confers no title on the purchaser as against the lien of such senior execution.

Consequently, whether the cases of Blair & Alexander v. Horseby and Lemmond v. Short be or be not considered as authority, the conclusion which we have reached in the case now before the court cannot be affected thereby. The most that they establish is, that the plaintiff in the senior execution may elect to pursue the funds in the hands of the constable arising from the sale made by him; not that he is bound to do so.

The judgment of the Circuit Court is set aside, and a new trial ordered.

Judgment set aside.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*(Case No. 636.)

ABRAHAM G. JOHNSON and Wife, ALICE, JOHN T. NORTHROP and Wife, MARY, v. ROBERT Y. HENAGAN, As Administrator De Bonis Non Cum Test. An. of B. K. Henagan, and as Administrator of J. H. Henagan, and A. B. HENAGAN and S. F. G. HENAGAN.

(November Term, 1877.)

[1. *Executors and Administrators* ⇐165.]

An executor held not liable for having sold in 1863, for confederate money, cotton raised by him on the plantation of testator; the will having directed the executor to pay the debts out of the crops to be raised.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 642; Dec. Dig. ⇐165.]

[2. *Appeal and Error* ⇐1019.]

Conclusions of fact drawn by a referee from the conflicting evidence of witnesses examined before him and not overborne by any clear weight of undisputed testimony, nor unfounded in the evidence, sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008–4010; Dec. Dig. ⇐ 1019.]

[3. *Executors and Administrators* ⇐100.]

The principles declared upon which an executor's accounts should be stated, in a case where some of the beneficiaries had become entitled to a part of the personalty immediately upon testator's death, and to another part at a subsequent date, and others were devisees of land, upon which the executors were to make crops as a primary fund for the payment of debts, the personalty being next liable, and the land having been sold to pay debts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 416; Dec. Dig. ⇐100.]

[4. *Executors and Administrators* ⇐96.]

A purchase by an executor of slaves, a brood mare and other property for the estate, disallowed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 410; Dec. Dig. ⇐96.]

[5. *Executors and Administrators* ⇐109.]

An executor charged by the will with the duty of making crops on testator's plantations, is not entitled to a credit on his accounts for a suit of clothes bought for himself.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 435–438, 440–447, 763; Dec. Dig. ⇐109.]

[6. *Executors and Administrators* ⇐111.]

The payment of a counsel fee not supported by facts sufficient to enable the court to judge of its necessity and propriety, disallowed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 448–462; Dec. Dig. ⇐111.]

[7. *Executors and Administrators* ⇐503.]

Accounts rendered by parties dealing with an executor are not, in themselves, proofs of disbursements; nor are entries in mercantile books, without further testimony, proof of payments to laborers, or that such payments covered advances for the production of crops.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2156; Dec. Dig. ⇐503.]

[8. *Executors and Administrators* ⇐109.]

Amounts paid for the purchase of articles should not be credited on an executor's accounts, unless proven to have been proper for the protection of the personal estate, or necessarily incurred in carrying out the directions of the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 435; Dec. Dig. ⇐109.]

[9. *Executors and Administrators* ⇐301.]

An executor who pays out of his testator's assets a debt due by a legatee, can look only to the distributive share of such legatee for reimbursement.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1224; Dec. Dig. ⇐301.]

[10. *Wills* ⇐728.]

Where an administrator cum testamento annexo, ceases to make crops for the payment of debts, upon the lands of testator, under the directions given to the executors by the will, the legatees of the personalty have no claim upon the subsequent rental; but the personal property becomes then subject to division amongst them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1776; Dec. Dig. ⇐728.]

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[11. *Executors and Administrators* ⇐104.]

*The rule for computation of interest on executors' accounts, as laid down in Livingston v. Wells, 8 S. C. 347, approved.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 423–432; Dec. Dig. ⇐104.]

[12. *Executors and Administrators* ⟸473, 474.]

Certain legatees brought an action against the executor for an account: the other legatees were all made parties defendant, and one of them died pendente lite. *Held*, that the personal representative of such deceased legatee was not a necessary party to the further proceedings. If a proper party, the executor having the power to bring him in, could not object to his absence.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2042; Dec. Dig. ⟸473, 474.]

[13. *Executors and Administrators* ⟸504.]

An administrator cannot interpose the want of a settlement of his intestate's estate, caused by his own neglect, as an objection to his accounting for another estate, incidentally connected therewith, of which, also, he is administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2157; Dec. Dig. ⟸504.]

[14. *Appeal and Error* ⟸155.]

An appeal may be taken from a judgment entered up pro forma by appellants, for the purpose of appealing therefrom.

[Ed. Note.—Cited in Wallace v. Columbia, &c. R. R. Co., 36 S. C. 599, 15 S. E. 452.

For other cases, see Appeal and Error, Cent. Dig. § 970; Dec. Dig. ⟸155.]

[15. *Executors and Administrators* ⟸118.]

[An administrator is not chargeable for personal property lost or destroyed by natural causes or unavoidable casualty without his fault.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 472; Dec. Dig. ⟸118.]

[16. *Executors and Administrators* ⟸121.]

[A direction by a testator to his executor to raise crops on his estate until the debts were paid is to some extent in the discretion of the executor; and an administrator with the will annexed is not bound, regardless of time and circumstance, to continue cultivating indefinitely.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 493; Dec. Dig. ⟸121.]

Before Shaw, J., at Marlborough, March Term, 1876.

Governor Barnabas K. Henagan, of Marlborough district, died in 1854, leaving of force a last will and testament, of which John W. Henagan, J. H. Henagan and J. J. Harllee were appointed executors; the two last named qualified, and James H. Henagan, who was a son of testator, was the chief acting executor. The opinion of the court states so much of the will as is necessary to a proper understanding of the points involved in this case.

The testator left him surviving his widow, four sons, James H., Robert Y., Andrew B. and Samuel F. G., and two daughters, Mary and Alice. Mary afterwards intermarried with Abraham G. Johnson, and Alice intermarried with John T. Northrop. The widow of testator died before action brought.

The executors cultivated the lands of testator before the war and made crops, under the directions of the will. They sold the Grove place (devised to R. Y. Henagan) under a power in the will, to pay debts with. When the war commenced, Harllee removed to Arkansas, where he remained until his death in 1866. J. H. Henagan went into the army. R. Y. Henagan took out letters of administration durante absentia, early in 1862, and, the executor having been killed in battle in July, 1862, administered cum testamento annexo de bonis non on the estate of B. K. Henagan, in May, 1863, and also became administrator of the estate of J. H. Henagan. The heirs-at-law of J. H. Henagan were his surviving brothers and sisters.

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*R. Y. Henagan then cultivated crops upon the lands of his father's estate until the end of 1867, after which the devisees took possession of the lands and cultivated them. The administrator sold, in 1868, the Creek place devised to him.

J. H. Henagan, executor, sold six negroes of the estate, with which to pay a large and pressing debt. Subsequently he purchased from C. D. Evans, commissioner in equity, other negroes for the estate, which were worked as estate negroes; and he gave a bond for the amount of their purchase money, upon which payments were afterwards made. R. Y. H., after he administered, purchased a brood mare for the estate.

The two daughters of testator, with their husbands, brought this action in May, 1870, against R. Y. Henagan, as administrator cum testamento annexo of the estate of B. K. Henagan, and as administrator of the estate of J. H. Henagan, for an account of his administration of the two estates, and A. B. Henagan and S. F. G. Henagan were made parties defendant. Before judgment was obtained, Samuel F. G. Henagan died.

The accounting was taken before D. D. McCall, Esq., to whom, as special referee, it was referred. His report is as follows:

D. D. McCall, to whom it was referred as special referee in the above-stated action, to inquire and report upon the actings and doings of R. Y. Henagan, as administrator de bonis non of B. K. Henagan, deceased, with will annexed, would respectfully report:

That during the latter portion of 1870, and also during 1871 and the present year, he has held various references in said action, as will be shown by the testimony taken, which references were for the most part at the instance of the plaintiffs, and related to the crops and expenditures of the plantation known as the "Cannon place" during the years 1863, 1864, and since then up to the present year. The number of references and great amount of testimony taken have been owing in a great measure to the failure of administrator to file with his answer an account current, and from failure to make annual returns for any of the nine years cover-

ed by his administration, except 1866, and this return related only to transactions of 1863 and 1864, although made and filed on

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June 25th, 1866. The referee finds that *the estate has been managed in a reckless and negligent manner from the beginning, by the administrator; that at the time the administrator took charge of estate, it only owed one debt—the bond to W. H. Evans, trustee—and that on this debt only $4000 has been paid by administrator, including the $2000 paid on May 1st, 1873—the day letters of administration were granted to the administrator; while on the other hand large sums were paid out by the administrator upon the debts of J. H. Henagan, for which the estate of B. K. Henagan was in no way responsible; and the result is, that the whole real estate of B. K. Henagan has been sold, and the whole personal property disposed of by the administrator and others, with a heavy judgment still unsettled. The plaintiffs, by their counsel, urged that the seventy bales of cotton sold by the administrator to Johnson & Breeden, on the 11th day of July, 1863, for $13,846.91 (confederate money), should be charged to the administrator as on hand at the close of the war, claiming the conversion of cotton into depreciating confederate currency to be unwarranted. The balance of the cotton not sold by the administrator was saved at the close of the war, and the sale made by the administrator to Johnson & Breeden, viewed by the light of subsequent events, was a very unfortunate one for the estate, not a dollar of the large amount received from this cotton being applied to the debt due by the estate, being refused by the holder of the bond. The referee is disposed to think that the administrator in this sale acted in good faith, and, as he supposed, for the best interest of the estate, and therefore charges him with confederate currency received.

The administrator, in the account current filed by him on the last reference, and also in the return made in 1866, charges himself with fourteen hundred and fifteen bushels corn sold to different persons in the year 1863. There are no dates attached to any of these sales, nor any proven on reference. The referee therefore charges these items in part on March 15th and on November 1st, being governed to some extent by the prices obtained. The same want of dates occurs in regard to sales of corn made in 1864, and ref-

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eree charges in same manner, and *scales accordingly, although by so doing the price of corn in good money is as low as nine cents per bushel.

The plaintiffs introduced testimony to show that the amount of corn sold during the years 1863 and 1864 greatly exceeded the amount charged; but the evidence was conjectural and uncertain, and the referee has adopted the amount charged in annual return made in 1866.

The referee has, with a great deal of trouble, prepared an account current covering the transactions of said administrator, which is intended as a part of this report, by reference to which will be seen the various items of credit allowed to said administrator. The account of C. Graham, for which the administrator claims credit in 1866, and to which plaintiffs object, the referee allows so much thereof as from the character of the items appears to have been for the plaintiffs or the plantation. The account of E. M. Emanuel, which the administrator claims to have been for the plantation, the referee rejects, except $15, which is allowed for bagging and rope. The items of this account, among which is quite a large one for bagging purchased in the fall of 1865, the estate could have had no use for; and when it is remembered that the administrator says that the items of the account were for the estate, and wishes credit therefor, and at the same time says that the estate for the year 1865 had only from three to five acres in cotton, the referee cannot understand the use the estate would have in November, 1865, for two hundred and seventy yards of bagging and large quantities of rope. For such reasons as this, the amount is not allowed, except as above.

As to the amount of cotton made on the Cannon place in 1866 and 1867, there appears to be considerable difference of opinion. Mr. H. H. Tart, who superintended this plantation in 1866, but did not remain until the crop was prepared for market, says in his testimony that A. B. Henagan reported the cotton made in 1866 at one hundred and seven bales, and in 1867 at one hundred and eleven bales, and that the administrator agreed to these statements, but that he, Tart, did not rely on these reports. This witness, in the opinion of the referee, is one whose veracity cannot be questioned, and who is more intimately acquainted with this place than any one else, having been overseer on

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it from *1854 to 1859, then in 1861 and 1866. He says that eighty-six bales of cotton were the smallest number ever made on the place within his knowledge, and in going over the crop in the summer of 1867 for the purpose of ascertaining how much it would make, at the request of J. H. Baggett, estimated the cotton at eighty-five bales, and wrote to Baggett accordingly. The administrator, on examination as witness, says that sixty-five bales were made in 1866, which were sent to Baggett, and A. B. Henagan thinks the crop of 1866 sixty or sixty-odd bales, and crop of 1867 about the same.

The administrator says that the crop of 1867 was sixty bales, sold by Baggett and Kirkpatrick. Now, it appears from the testimony of the administrator that the crop of 1866 was five bales more than that of

1867, which, according to the estimate of Mr. Tart of the crop of 1867, would make that of 1866 amount to ninety bales. The administrator, in his testimony, says that all of the items in the estate account of Baggett & Co. were for the estate. In looking over this account the referee finds that on September 20th, 1866, the estate is charged with bill bagging, rope, &c., to amount of $277.64, and on February 2d, 1867, to one bale bagging of five hundred and seventeen yards, amounting to $144.76. The proof before the referee, as to the number of yards of bagging necessary to pack a bale of cotton, taken in connection with the above testimony of the administrator, would lead to the conclusion that the one hundred and seven bales admitted by administrator to Mr. Tart in 1866 (which is denied by him in his evidence, and also by A. B. Henagan) were really below the correct amount. The referee, in view of all the facts of the case, estimates the crop of 1866 at eighty bales, and charges the administrator accordingly. According to the testimony of administrator, six hundred and forty yards of bagging were purchased for the crop of 1867, which would pack at least one hundred bales cotton, and for this year the referee charges the administrator with seventy bales of cotton. In making up the account of 1867, the referee charges the administrator with interest allowed him by J. H. Baggett & Co. on the account, but which is omitted in the account current submitted by the administrator.

By the will of B. K. Henagan, under which

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the administrator *acted, the plantation was to be worked and debts paid from proceeds of crops; but the administrator claims to have ceased working the plantation for the benefit of the estate after the year 1867, being unable to run same, and charges himself with $300 as rent for 1868, 1869, 1870, and 1871, during which years the lands, stock, &c., were divided out between himself and brothers and cultivated in separate crops. The plantation was not offered to the highest bidder, nor, in the opinion of the referee, attempted to be rented to any one, although the administrator in his testimony speaks of offering to rent to N. S. Rogers, who was examined as a witness in this case, and from whose testimony it might be inferred had already more lands than he could successfully manage, which was no doubt known to the administrator. The plaintiffs claimed that the entire crops of those years should be charged to the administrator, and he failing to show that he was entitled to any credits could not be allowed any.

The testimony of several witnesses examined in this case shows that the usual rent of land in this county is one-fourth cotton and one-third of corn; and Mr. Tart, in estimating what proportion of the crops made on this place should be profits after paying expenses, says that since the war thinks that one-third of the entire crop would pay the expenses, and that two-thirds of each crop ought to be clear. The referee has charged the administrator with one-third of the crops of lint cotton, and one-third of corn made on place during these years, for the use of the plantation, horses, mules, implements, &c., giving to him all the cotton seed, fodder, peas, oats, &c., made, and at the same time takes the estimate of cotton from the testimony of administrator. The $500 worth of goods claimed by administrator to have been turned over to plantation about first 1867, the referee allows, but rejects the amount claimed to have been sold to hands by store in 1866, on the testimony of Northrop and Tart. The referee allows credit for all such items on the account of Baggett & Co., as he considered were for the benefit of the estate. Commissions are not allowed the administrator except for 1866.

The referee charges the administrator with three head of cattle given away by A. B. Henagan in 1871, and with the stock of mules and horses carried from the plantation into

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Darlington by *the administrator and A. B. Henagan, except the two mules and wagon purchased by A. B. Henagan, and estimates these horses and mules at $500, including the implements, &c., belonging to estate.

The referee finds, that on January 1st, 1872, Robert Y. Henagan, as administrator de bonis non of B. K. Henagan, deceased, was indebted to said estate, as balance in his hands, in the sum of $22,289.23.

To this report exceptions were taken by the plaintiffs, and also by the defendant, R. Y. Henagan, as follows:

The plaintiffs except to the report of D. D. McCall, Esq., referee, filed September 4th, 1872, on the following grounds:

1. Because the referee has sanctioned the sale of seventy bales of cotton in 1863 for confederate money, whereas it is respectfully submitted that such sale was altogether unwarranted, and that the administrator in making such sale exceeded the limits within which his discretion could lawfully be exercised.

2. Because the referee has ignored the fact which is admitted in R. Y. Henagan's answer and established by the proof, that he was in fact appointed administrator early in 1862, instead of in May, 1863, and has failed to charge said administrator with the crop of 1862.

3. Because the referee has not charged the administrator with the full amount of the crops of corn made in 1863 and 1864—five thousand bushels each year—and has only charged him with the amount which he represents himself to have sold in those years.

4. Because the referee has failed to charge the administrator with the twenty-five bales cotton proved to have been on hand in the

spring of 1865, after the passage of Gen. Sherman's army.

5. Because the referee has failed to charge the administrator with the full amount of the cotton crops for the years 1866 and 1867, which, according to the testimony, should have been at least eighty-six bales in each year, and which, according to the admission of the administrator, should have been one hundred and seven bales in 1866, and one hundred and eleven bales in 1867.

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*6. Because the referee in estimating the amount of the crops for the years subsequent to 1867, has been governed entirely by the testimony of the administrator himself, ignoring the testimony of other and disinterested witnesses.

7. Because the referee failed to charge the administrator with the full value of the stock, farming implements, &c., which he carried off himself and permitted others to carry off from the "Cannon place."

8. Because the referee has failed to charge the administrator with the cotton seed of the crop of 1871.

The following exceptions are made to the report of D. D. McCall, Esq., the special referee in the above-stated case, by the defendant, R. Y. Henagan, administrator:

1. The item of $268 was put in the inventory and appraisement by mistake, and ought not to be charged in the account of the administrator.

2. $11,846.91 of the money received from Johnson & Breeden for cotton, ought to be charged on the 21st, instead of the 11th day of July, 1863.

3. The $850 for the hire of carpenter Sam, and the $135 for the hire of the blacksmith, ought to be charged on January 1st, 1864, instead of the days on which they are charged.

4. The payments made on the bond of J. H. Henagan to C. D. Evans, commissioner, dated April 2d, 1860, which, in 1863, amounted in the aggregate to $5277.13, under the evidence, ought to be allowed as credits.

5. The payments made on notes of J. H. Henagan to W. S. Ellerbee, R. C. Emanuel, Simeon Emanuel, R. C. Hamer, C. Graham, Ambrose & Delaney, J. D. McCulloch, S. Emanuel, ag't, and on the accounts of the same to Harris & Harrell, and on a judgment against the same for $421.32, ought to be allowed as credits to R. Y. Henagan, as administrator of B. K. Henagan.

6. The referee erred in not allowing R. Y. Henagan wages from the time he took charge of the Cannon place, 1861, till the time he took out letters of administration on the estate of his father, in 1863, a period of about two years.

7. The referee erred in charging the ad-

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ministrator with a *thousand bushels of corn, and sixteen thousand pounds of fodder on November 1st, 1864, the evidence being that there was really no sale of the same made, though there were some pledges made to the government for the same.

8. The referee erred in not allowing the administrator in the accounts of 1864 credits for $125, paid by him to M. Iseman for a suit of clothes for himself; for $85 to S. Emanuel, for his sisters, Alice and Mary; for $300 to J. W. Henagan, for board for Alice and Mary; for $1500 to R. C. McIntyre, for brood mare for the estate; for $150 paid dentist in Raleigh, for work on Mary Henagan's teeth.

9. The referee erred in not allowing the fee of $1000 paid Gen. W. W. Harllee, in February, 1865.

10. The referee erred in charging R. Y. Henagan, administrator, with three bales of cotton sold by Baggett & Co., on April 21st, 1866; and with six of the twenty-one bales of cotton sold by C. Graham on May 24th, 1866, the three and the six out of twenty-one being the cotton of R. Y. Henagan individually, and not the cotton of the estate.

11. The referee erred in not crediting the accounts of the administrator for 1866 with $457.53, the purchases made by J. H. Baggett & Co., in 1866, as appears by their account current made up to March 1st, 1868.

12. The referee erred in not giving the administrator credit for the whole amount paid by him on the account of C. Graham, Edwin Bates & Co., and Emanuel, in 1866, except for the items of cash paid A. B. Henagan.

13. If the administrator is not allowed credit for the amounts paid to Mowry & Co., L. D. Mowry & Co., C. Graham and others, because they were debts of J. H. Henagan and not of B. K. Henagan, it is respectfully submitted that the administrator ought to have credit for all the payments he made for the estate of B. K. Henagan with the money of the estate of S. H. Henegan.

14. The referee erred in not allowing the payments made on the accounts of Neil Alford, Alexander Thomas, P. Epstein, and the one to Francis Murphy, for $73.

15. The referee erred in not allowing the

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administrator credit *for $1024.19, the amount charged in plantation book in 1866 against laborers on plantation; or, if not allowing him that precise amount, he erred in not allowing him credit for one-third of the crop made that year, that being the share of the laborers, and the evidence being that they were paid and that the estate got the whole of the crop.

16. The referee erred in not giving the administrator credit for one hundred and eighty bushels of corn purchased from Fladger in 1867, for $1.40 per bushel; and for fifteen bushels purchased from Hays, in the same year, at $1.50 per bushel, which were used by the estate.

17. The referee erred in not giving the ad-

ministrator credit for the amounts which he paid H. Tart, overseer's wages for 1866.

18. The referee erred in charging the administrator with $975.06, on account of interest on J. H. Baggett & Co.'s account current.

19. The referee erred in not crediting the account of the administrator for 1867, with so much of the account of J. H. Baggett & Co. for that year as was allowed and paid by sales of cotton during the year, or by money in hand, he having credited the same in 1868.

20. The referee is not supported by the evidence in charging the administrator with a crop of more than sixty-five bales of cotton in 1866, and a crop of more than sixty bales in 1867, the numbers with which the administrator charges himself.

21. It is respectfully submitted that the referee is not sustained by the evidence in concluding that there were more than sixty-two bales made in 1868 on the Cannon place.

22. The referee erred in charging the administrator, in the accounts of 1868, with $6283.14, for the purchase money of the Mill creek plantation: 1st. Because, as administrator de bonis non with the will annexed of the estate, he had no legal right to make the sale; and 2d. If he had the authority to sell, he ought only to be charged with the real value of it, which was proved to be $2000 or less; and 3d. If there was enough money in his hands to pay the debts of the estate, or enough has been made since by rents, &c., he had the right to sell the property as his own, as he did do under the advice of counsel.

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*23. It is respectfully submitted that the evidence does not authorize the referee to conclude that there were three hundred and seventy-five bushels of corn and more than seventy bales of cotton made on the Cannon place in 1866.

24. The evidence does not sustain the referee in charging one-third of the corn and cotton made on the Cannon plantation for rent for the years of 1868, 1869, 1870, 1871, and that he only should be charged with the value of the rent as proved.

25. The referee erred in continuing to charge the administrator interest on annual balances after the year 1868, instead of simple interest.

26. The referee erred in charging the rent of the plantation for 1868 in the accounts for 1868, and the same for 1869, 1870 and 1871; and the rent of 1868 ought to be charged in 1869, and so on in all the different years, which is the general rule, and is supported by the evidence in this case.

27. It is respectfully submitted that there can be no decree against the administrator until the personal representative of Samuel F. G. Henagan is before the court.

28. It is respectfully submitted that there can be no decree against R. Y. Henagan, as the administrator of the estate of B. K. Henagan, until there is an accounting on the estate of J. H. Henagan, who was an acting executor of the will of B. K. Henagan, and who was a devisee and legatee under the will of B. K. Henagan, and the rights of his estate and those claiming the same, can be properly arranged in no other way than by closing up his estate first.

29. It is respectfully submitted that the referee ought to have taken down and made a report of all the payments proved to have been made by R. Y. Henagan for the estate of J. H. Henagan and for A. B. Henagan, so they might be deducted from the amounts which he may find to be due to them respectively.

30. It is respectfully submitted, that the referee ought to have made a separate account for the rents and profits of such portion of the Cannon and other property of the estate of B. K. Henagan as were respectively in the possession of R. Y. Henagan, A. B. Henagan, and S. F. G. Henagan, in the years

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1868, *1869, 1870 and 1871, so that R. Y. Henagan might have the proper credit for the amounts found against the other brothers.

31. It is respectfully submitted that R. Y. Henagan is, under the provisions of the will of his father, B. K. Henagan, and in consequence of the sale of the Grove plantation for $4000, and the Mill Creek plantation for $6285.14, entitled to the whole balance in his hands, over and above the amount for which the Cannon plantation sold, and the outstanding indebtedness of his late father.

32. It is respectfully submitted that the evidence does not sustain the referee in charging the administrator with $500 for personal property taken off by him from the plantation.

The referee submitted the following report on exceptions:

D. D. McCall, as special referee in the above-stated action, having, on the 4th of September last, filed his report upon the accounts of R. Y. Henagan, as administrator de bonis non of B. K. Henagan, deceased, and having been served with exceptions to said report, both by plaintiffs and the defendant, R. Y. Henagan, administrator, would respectfully submit the following report upon said exceptions:

1. As to the exceptions of said plaintiffs, he would overrule them, for the reasons given in his former report.

2. As to the exceptions of the defendant, the administrator, the referee would respectfully report, that as to the first exception there was no testimony or allegation prior to the filing of the exceptions by the defendant, of any mistake in the inventory and appraisement.

As to the second exception, the scaling of the confederate money received for the cotton was made upon the basis indicated as the

correct one in said exceptions, although the referee follows the account current of the administrator as to the mere date used.

As to the third exception, the administrator, in his account current, charges himself with said items in 1863, without giving a day or month; and the referee, by scaling same as of the last day of that year, gives to the defendant the most favorable day possible.

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*As to the three foregoing exceptions, and also as to all the other exceptions of the defendant, the referee would respectfully report that after careful consideration he overrules each of them, for the reasons given in his former report, taken in connection with the testimony submitted.

The Circuit decree on exceptions is as follows:

This case came on to be heard upon exceptions to the report of the referee.

I shall not go behind the order of reference, although invited so to do by some of the exceptions of the defendant. To the report of the referee the plaintiff filed eight exceptions, all of which are overruled. I would remark, on the second exception, that the complaint stated the date of the administration of the defendant to be in the year 1863; the answer of defendant admits simply that he administered, and the inventory is dated June 12th, 1863. I might also add, there was no evidence as to the crop of 1862. To the report of the referee the defendant filed thirty-two exceptions, which I shall consider out of their order. Some of the exceptions were abandoned at the hearing.

The eighth exception charges error in the report of the referee in not allowing defendant credit for the sum of $1500, the price of a horse purchased by him from McIntyre.

The defendant states in his evidence that this animal was purchased as a brood mare for the estate. There is no evidence which satisfies me that this statement is untrue, or which throws any reasonable doubt on it. He should be allowed credit for the sum of $1500, scaled according to the act.

The ninth exception claims that the defendant should have credit for the sum of $1000, paid as a fee to Gen. Harllee. It is usual to allow administrators and executors credit in their accounts for reasonable counsel fees. There is nothing in this case which takes this from under the usual rule. The defendant should be credited with the amount of $1000, reduced according to the scaling act.

The eleventh exception charges error in not allowing defendant credit for certain amounts paid for the estate to Baggett & Co.

The administrator is charged with the

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whole cotton crop of *1866. My judgment is, that he should be charged with two-thirds of the crops for the years 1866 and 1867, and he should be credited with the amount paid Baggett & Co. for bagging and ties purchased for the year 1866; the amount is $277.64. The defendant should pay for the bacon out of his one-third of the crop.

The twenty-second exception will be considered in connection with the thirty-first.

The twenty-fifth exception charges error in the calculation of interest. The rule, as I understand it, is this: The administrator is to be charged with interest on whatever balance appears against him at the end of each year. I observe a charge for interest in the accounts for 1864; the first charge for interest should be in the account for 1865, for the year 1864; the balance against the administrator appearing on the first day of January, 1864, carried interest for that year.

Thirty-first exception claims, in substance, that the administrator, in accounting in this case, is entitled to retain an amount equal to the amount of sales of the Grove and Mill creek plantations. In my judgment, the mention of the Mill creek plantation only leads to unnecessary complication. There should be no charge against the administrator for the amount of the proceeds of Mill creek, for the reason that he held it under the will of the testator, subject only to sale for payment of debts; and if sold for that purpose, he had a right to re-imbursement out of the personal estate, over and above his distributive share. He paid a portion of the proceeds to Baggett & Co., for the benefit of the estate, and has been credited with that amount. The fact that the sum paid Baggett & Co., for estate was proceeds of sale of Mill creek, is entirely immaterial to this litigation.

The Grove plantation was also devised by testator to defendant, subject to same conditions. It was sold by the executor for the payment of the debts of the estate; and my judgment is, that the defendant, as against the estate in this litigation, is entitled to retain the amount for which the Grove plantation was sold, with interest thereon from the date of the sale.

The other exceptions of the defendant are overruled.

It is ordered and decreed that this case be

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recommitted to the *referee, for the purpose of making a report according to the principles of this decree.

I have filed herewith an explanatory statement to be taken as a part of this decree.

I think it proper to state that the delay in filing my decree in this case has been occasioned by the very complicated character of the case, and my continued ill health since the hearing. John T. Green.

May 5th, 1873.

The referee afterwards reported as follows:

The above-stated case having been recommitted to the undersigned as referee, for the purpose of making a report in accordance

with the principles of the decree of his Honor Judge Green, made in said action—

The said referee would respectfully report, that in adjusting said accounting, as directed by said decree, and allowing the credits thereby directed, he finds the balance in the hands of the said Robert Y. Henagan, as administrator of B. K. Henagan, deceased, on this day, to be $1716.16.

The referee would further report, that the Grove plantation was sold and conveyed by the executors of B. K. Henagan on September 4th, 1857, from which time interest has been computed on the amount realized from said sale.

The referee having computed the explanatory statement, filed by his Honor Judge Green, with his decree, refers to same as an exhibit to this report.

The defendants refused to enter up judgment on this report, when the following order was obtained from Judge Shaw, March 8th, 1876:

The special referee in this action having filed his report of January 10th, 1874, upon the accounts of Robert Y. Henagan, as administrator, in which a certain amount is found against the said administrator and in favor of the plaintiffs, which said amount they allege to be much less than they claim to be justly due and owing by said administrator; and the said plaintiffs having given notice to the defendants that they would ap-

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ply to *this court for leave to enter up judgment in this action, in accordance with the findings of said referee and the decretal order on which the same is based, with a view to appeal therefrom, the defendants having refused and neglected so to do; and argument of counsel having been heard for and against said motion: It is, on motion of plaintiffs' counsel, ordered that said final report of the referee be confirmed and made the judgment of this court, without prejudice to the plaintiffs' right to appeal therefrom to the Supreme Court.

Judgment was accordingly entered up by plaintiffs March 18th, 1876.

Both parties filed exceptions to this judgment as follows:

The plaintiffs except to the judgment in this cause rendered, and the rulings of Judge John T. Green in his decretal order of May 5th, 1873, on which the final judgment is based, in the following particulars assigned as error:

1. In that the judge in his decree of May 5th, 1873, erred in overruling the exceptions which the plaintiffs took to the referee's report of September 4th, 1872; and the final judgment in accordance with said decree is erroneous for the reasons set forth in said exceptions, which said exceptions are renewed as to said decree and final judgment.

2. In that said decree of May 5th 1873, is erroneous in sustaining the 8th, 9th, 11th, 22d, 25th, and 31st exceptions of the defendant, R. Y. Henagan, to the referee's report of September 4th, 1872, which said exceptions, it is submitted, should have been entirely overruled, and the referee sustained in these points, and the final judgment conforming to said decree in this respect is erroneous.

3. In that the explanatory statement accompanying and forming part of said decree and constituting the basis of the final judgment, is erroneous, being contrary to the principles governing the mode of stating the accounts of administrators, in calculating interest on annual balances, especially where annual returns are not made and no regular accounts kept.

4. In that said decree and final judgment

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should have been *in accordance with the rulings and findings of the referee in his report of September 4th, 1872, modified only in those particulars claimed by the plaintiffs in their exceptions thereto, which said report, corrected upon the basis of said exceptions, should have been made the judgment in the cause, and it was error to have held otherwise.

The defendant, Robert Y. Henagan, excepts to the judgment rendered by Judge A. J. Shaw, on the 18th day of March, 1876, in this, that he gives the plaintiffs judgment upon their own order, and that without any prejudice to their right to appeal from the same; and he also excepts to the rulings of Judge John T. Green, in his decretal order of May 5th, 1873, on which the final judgment is based in the following particulars assigned as errors:

1. In that the judge, in his decree of May 5th, 1873, erred in not sustaining the 27th and 28th exceptions of the defendant, R. Y. Henagan, to the report of the referee of September 4th, 1872, which exceptions are renewed to said decree and final judgment.

2. In that the judge, in his decree of May 5th, 1873, erred in overruling all the exceptions which the defendants took to the referee's report of Sept. 4th, 1872, except the 8th, 9th, 11th, 22d, 25th and 31st, and the final judgment in accordance with said decree, for the reasons assigned in the overruled exceptions; which last-named exceptions are renewed as to said decree and final judgment.

3. In that the judge, in his decree of May 5th, 1873, erred in overruling the whole of the defendant's 8th exception, except the item of $1500 paid R. C. McIntyre for a brood mare; which exception, except so far as was sustained by his Honor, is renewed as to said decree and final judgment.

4. In that the judge, in his decree of May 5th, 1873, erred in overruling the exceptions of the defendant to the report of the referee of Sept. 4th, 1872, except so far only as the exceptions were sustained by the decree; and with that exception they are now renewed.

The plaintiffs and Robert Y. Henagan appealed to the Supreme Court upon the grounds set forth in their several exceptions.

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*Mr. J. H. Hudson for plaintiffs.

Johnson & Johnson for defendant.

November 20th, 1878. The opinion of the court was delivered by

WILLARD, C. J. The action is by two of the legatees of B. K. Henagan, for an account against R. Y. Henagan, as administrator cum testamento annexo of the original testator, B. K. Henagan, and also as administrator of J. H. Henagan, who was, until his death, sole acting executor under the will of said B. K. Henagan. The interests of the plaintiffs, joined as such with their husbands, and who are styled by the will "Mary and Alice," consisted, under the will, of two undivided one-sixth parts of the personal estate, a portion of which was given to the wife of the testator for life, with remainder to the children; Mary and Alice took two sixth parts of the remainder in the personal estate given to the wife for life, and two-sixths of the balance of the personal estate.

The portion of Mary and Alice was given to J. H. Henagan, the sole acting executor, in trust, with remainders over in case either daughter should die, leaving no issue surviving her. The testator devised the "Cannon place" to J. H. Henagan and A. B. Henagan, and the "Glover land" and "Mill creek" places to the defendant, R. Y. Henagan.

The testator directs that his estate, both real and personal, "shall remain undivided until all my debts are paid and satisfied." He also directs that "crops made on the lands shall pay my debts. But that in the event that the proceeds arising from the crops and otherwise are not sufficient, then I desire my executors hereafter named to dispose of a sufficiency of personal property to pay the same; or, if my executors think best, they are empowered to sell a part or the whole of the lands given to my son, Robert Y. Henagan. If the executors should, in their judgment, dispose of a part or the whole of the lands above described, given to my son, Robert Y. Henagan, then and in that case I desire my son Robert shall be entitled, out of my personal property, over and above his distributive share, to the amount the land may sell for, above specified."

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*The will contains provisions looking to a certain contingency upon which the proportionate shares of Mary and Alice may be increased out of the amount given to Samuel, one of the testator's sons; but it does not appear that such contingency has happened.

J. H. Henagan, J. W. Henagan and J. J. Harllee were appointed executors.

The complaint prays a general accounting as administrator cum testamento annexo, and as administrator of the deceased executor, and that plaintiffs may be paid their proper proportion of the estate.

The complaint alleges the death of the trustee of Mary and Alice, J. H. Henagan, but does not allege the appointment of a trustee in the place of such deceased trustee. The purposes of the trust cannot be satisfied during the lifetime of Mary and Alice, as the remainder over, on the contingency of their dying without issue, needs the support of the trust; the trust was also for their protection against the marital rights of their husbands. No attention appears to have been paid to these facts by either party, and no order appears to have been taken for the appointment of a trustee.

The wife of testator died before action brought, consequently the plaintiffs, Mary and Alice, were entitled, at that time, to one undivided sixth each of the personal property of which the testator died possessed, subject to the payment of the debts of the estate in the manner prescribed by the will.

The decree ascertains a certain sum to be due from the defendant, R. Y. Henagan, as administrator cum testamento annexo of B. K. Henagan, and directs payment of this sum among the several parties entitled as legatees or devisees under the will of B. K. Henagan, according to their respective shares. The plaintiffs, and the defendant, R. Y. Henagan, have appealed from the decree. The other defendants have not appealed, consequently their only interest in the appeal relates to supporting the decree as against the appeal of R. Y. Henagan.

The appeals bring to notice many exceptions taken to the report of the referee and the decree of the Circuit Court. In order to understand the interests of the parties excepting and appealing, it will be necessary to

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state, with some degree of *accuracy, their respective interests under the provisions of the will, and then it will be possible to trace the bearing of the questions raised, by way of exception, in the interests of the respective parties. We shall, in this way, discover what questions are material to be considered, and what are not.

We will first consider the interest of Mary and Alice under the will, as affected by the question raised on the accounting. Their sole interest is, as cestuis que trust, to have placed in trust that part of the estate of their testator devised to them through his will. Their only interest, under the will, is in the personal estate left by the testator; as to part of that personal estate, their interest commenced at the death of the testator, and as to the remaining part, at the death of their mother, the life tenant. The liability of the personal estate, as the primary fund for the payment of debts, is in part disturbed by the will. The realty and personalty are to be kept together until the debts are paid

and satisfied. The personalty and realty combined constituted plantation property. The crops to be made upon the lands in the hands of the executors were designated as the primary fund for the payment of the debts of the estate. These crops were to be made by the united employment of that part of the realty and personalty that was available for that purpose. If the crops were insufficient for that purpose, then resort was to be had to the personalty for that purpose.

Authority is given to the executors to sell the "Glover land" and "Mill creek" property, devised to the defendant, R. Y. Henagan; in which case R. Y. H. is to be compensated therefor out of the personal estate, independent of his distributive share therein. "Mary and Alice" are clearly interested to have the produce of the plantation, over and above its current expenses, applied to the payment of debts, so as to relieve the personalty devised, as far as possible, from contribution to that purpose. If it appears that the crops were insufficient for that purpose, then to the extent of the actual payment of the debts, over and above the amount derived from the crops and applicable thereto, the defendant, R. Y. H., is entitled, as administrator, to be allowed such amount, as against the other of the personalty charged against him. If any debts

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remain unpaid, he is also *entitled to retain, for the purpose of applying to the payment thereof, so much of the amount that may be found chargeable against him, on account of the personalty that came into his hands, as may be necessary for that purpose. It follows that the plaintiffs are entitled to the consideration of all questions raised by their exceptions, as by those of the defendant, R. Y. Henagan, that affect the amount and value of the personalty that came into the hands of J. H. Henagan, as executor, and of the defendant, R. Y. Henagan, as administrator cum testamento annexo, and as administrator of J. H. Henagan, the executor, and the disposition of the same; also of such questions as affect the amount and value of the produce of the lands and the application thereof.

To avoid complexity, the questions at issue will be examined as raised by the exceptions to the referee's report. It is said in the decree of Judge Green, that some of the exceptions taken by the defendant, R. Y. Henagan, to the referee's report, were abandoned before him. It is not, however, stated which of them were abandoned, and as there is no other evidence of abandonment in the case, they must, therefore, be considered.

Plaintiff's Exceptions to Referee's Report.

1. Objects to the allowance of the referee of a claim made by the administrator for the sale of seventy bales of cotton, produced on the lands subsequent to the death of the testator, for confederate currency. The allowance was proper. The cotton was produced under the authority of the will for the purpose of paying debts. It was a necessary inference that the product was to be sold from time to time to pay current expenses of planting and produce a balance for payment of debts. There was clear implied power to sell. The fact that confederate currency was taken, was an ordinary incident of the transactions of that class at that time. It does not appear that the cotton was sold for less currency than, at its current purchasing rate, represented the market value of the cotton. The bona fides of the transaction is sustained by the referee, and there is no ground to disturb his conclusion. State v. Moseley, 10 S. C. 1. The exception was not well taken.

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*2. This exception must be overruled. There is no proof that letters of administration cum testamento annexo, and of the estate of J. H. Henagan, were issued prior to 1863. The complaint does not lay the foundation for an account as administrator durante absentia.

3, 4, 5, 6 and 8. These exceptions involve a question of fact purely, namely, the amount produced during certain years upon the lands of the testator, appropriate to the payment of debts under the will. The conclusions of the referee are drawn from conflicting evidence, in which questions of the credibility and accuracy of testimony largely enter. Such questions belong peculiarly to the court that tries the issues of fact in the first instance, and involve important inferences of fact. We cannot see that the conclusions of the referee on this subject are overborne by any clear weight of undisputed testimony, or are unfounded in the evidence. These exceptions are not well taken.

7. This exception is, "because the referee has failed to charge the administrator with the full value of the stock, farming implements, &c., which he carried off himself and permitted others to carry off from the 'Cannon place.'" There has not been such a statement of the account as to enable us to determine what allowance, if any, should be made to the plaintiffs by reason of the loss or disposition of personalty on the Cannon place at the decease of the testator. The principles of the accounting in this respect, should be as follows: The trust account for "Mary and Alice" must be credited with two sixth parts of the value of the personal property, other than that in which testator's wife had a life interest as of the date of testator's death, and of the residue of the personalty on that place, as of the death of the tenant. As this exception only relates to the "Cannon place," the account must be so stated only as it regards the personalty on that place. To this must be added the value of all other personalty chargeable in favor of the plaintiffs, as finally fixed by this decision, taking the report of the referee first made as the basis of computation. From this must be deducted all personal property lost or destroyed by

natural causes or unavoidable casualty, without the fault of the administrator; also, the amount, if any, and all sums paid for the indebtedness of the testator, over and above the amount realized for that purpose out of

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the crops raised upon *the lands of the testator. The defendant, R. Y. Henagan, must be allowed, out of the balance, any amount paid on account of the debts of the testator existing at his death, out of the proceeds of the sale of the "Cannon," "Mill creek" and "Glover" places. The Cannon place was devised absolutely to J. H. Henagan and A. B. Henagan, and was not liable to the payment of the debts by the will, except as it should be used for making crops for the estate, and the administrator of J. H. Henagan is entitled to a credit for any moneys derived from the sale of that place, applied to the payment of the debts of the testator. So the Mill creek and Glover places were devised to the defendant, R. Y. Henagan, and he must be credited with any part of the proceeds of the sale of those places that was applied to the payment of the debts of the testator. As the account appears to be taken on different principles, it will have to be restated in this respect; but as to its items, it will only be re-opened to the extent rendered necessary by this decision.

Defendant, R. Y. Henagan's, Exceptions to Referee's Report.

1. The item of $268, charged as cash in inventory, is not sufficiently explained to remove the inference from its appearing in the inventory. The inventory is not before us and the conclusion of the referee must stand.

2. The duty of scaling, referred to in this exception, appears, by the referee's report on the exception, to have been the basis of the scaling by him, although entries are made in the account as of different days. The argument of the defendant does not dispute the correctness of this statement made by the referee in this respect and it must stand.

3. The objection to the charge of the hire for a blacksmith and a carpenter in 1863 instead of 1864, is placed by the argument on the sole ground that it is by the custom of the country chargeable on the following January. It must be presumed that the charge was made according to the fact, and that was the correct mode of charging.

4. The amount paid by the administrator for the purchase of slaves was not a proper

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item of charge. He had no authority *to purchase for the account of the legatees of the personalty by the will, nor had he authority to substitute other property for that devised. If the necessities of planting for the estate could under any circumstances have authorized it, still that fact is not made out. Whether property sold or otherwise lost can be properly accounted for by other similar property acquired to the estate, is a question that cannot arise under this exception which involves merely the question whether debts created by the administrator for the purchase of permanent property can be ranked as debts of the testator, as against the personalty.

5. This exception is in part disposed of by what is said as to purchasers for the estate, under the last preceding exception. As it regards the other portions of this exception, the evidence referred to in support is too vague and indefinite to afford ground for disturbing the referee's conclusions.

6. As the question of the settlement of the defendant, R. Y. Henagan's account, as administrator durante absentia, is not open, the charge for his wages while in charge of the Cannon place, before letters of administration were taken out on the estate of R. K. Henagan cum testamento annexo, and on the estate of J. H. Henagan, cannot be considered.

7. This exception depends upon inferential conclusions to be drawn from conflicting testimony, and cannot be allowed, for want of overbearing testimony.

8. The referee properly rejected the demand of the plaintiff for a suit of clothes for himself. If this is intended to cover a claim for personal services, it cannot be so considered, as it is not properly connected with that subject. The evidence claimed as supporting the claim for money paid to S. Emanuel has not been found, possibly owing to the fact that no particular reference to the folio where found was made, as required by the rules of this court. The claim of $300 for the board of Alice and Mary was, probably, a gratuity merely, and, as such, not chargeable. The purchase of a brood mare is already disposed of by what has been held as to that class of purchases; such purchases are not chargeable against the legatees. The testimony as to payment for dentist's work is not referred to by folio, and has not been found. This exception is not well taken.

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*9. The charge of $1000 paid as counsel fee, is not supported by the facts, sufficient to enable the court to judge of its necessity and propriety.

10. This exception depends on the credibility and accuracy of the testimony of the defendant, R. Y. Henagan. The character of the testimony is such that a view opposite to that taken by the referee, is not a necessary inference. This exception is not well taken.

11. The accounts rendered by parties dealing with the administrator, are not, in themselves, proof of disbursements. This exception is not well taken.

12. The referee was justified in not crediting amounts paid for articles purchased, unless satisfied, by evidence, that they were proper disbursements for the protection of

the personal estate, and the cultivation of crops for the benefit of the estate. This exception is not well taken.

13. It must be assumed, upon the testimony and findings of the referee, that the money paid for the debt of J. H. Henagan came from the assets of B. K. Henagan. J. H. Henagan was entitled to a distributive share of the personal estate of B. K. Henagan, and to that share R. Y. Henagan must look for reimbursement. As the object of the present accounting was, among other things, to ascertain the amount of the share of J. H. Henagan, as well as the other legatees, that credit cannot come into the present account. This exception is not well taken.

14. The account of Niel Alford was not proved—it was conjectured merely. No proof was offered that the account of A. Thomas was chargeable to the estate. The account of King and Cassidy was not sufficiently explained. The statement that the account of P. Epstein was for the benefit of the estate, was insufficient as proof, as it does not appear that the benefit was of the nature that could justify expenditure by the administrator. This exception is not well taken.

15. The item of $1024.19 was not sufficiently proved by the mercantile books of Henagan & Northrop; these books required proof. The transactions between the hands and the store of H. & N., are not entitled to be admitted into the account, without additional proof that such transactions cover

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advances *made for the production of crops for the estate. This exception is not well taken.

16. The statement that corn was purchased for "estate purposes," is insufficient; nor was the statement that corn was "used on the plantation" sufficient, as there may have been other uses for it than such as concerned the case of the stock belonging to the estate and making the crops. This exception is not well taken.

17. The testimony as to payments to Tait, as overseer for 1866, is too indefinite and uncertain to afford ground to disturb the conclusion of the referee. This exception was not well taken.

18 and 19. The account of J. H. Baggett & Co. will have to be restated. The items allowed should be stated in the several years in which the transactions that constituted that account occurred. It does not appear with sufficient clearness what items of the account were allowed. The allowance of interest must be revised accordingly. The administrator must be allowed interest on all items of that account allowed as a credit against interest charged. These exceptions must be sustained to the extent just stated.

20, 21 and 23. The subjects of these exceptions have already been disposed of, as they relate to the quantity of produce, fixed by the referee on disputable testimony—for this reason, the conclusion of the referee cannot be disturbed. These exceptions are not well taken.

22. The legatees are not entitled to be credited with the value of the Mill creek place, as that place was specifically devised, and if sold to pay debts, the amount used for that purpose was to be replaced out of the personalty. This exception was not well taken.

24. The referee erred in charging for the use of the plantation for the years 1868, 1869 and 1871. The plantation, independently of the personalty, was not subject to the claims of the legatees, and its rental could not be charged for the benefit of the legatees of the personalty. The use of the personalty by the administrator, or by others with his assent, in planting in these years, should be compensated to the legatees, on the principle that when the administrator ceas-

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ed to plant for the estate he *held the personalty for division alone, subject to the usual liability in such cases. The devotion of the lands to cultivation for the relief of the personalty was not absolute, but to some extent dependent on the discretion of the executor during his life; we cannot say that the administrator cum testamento annexo was bound indefinitely, as it regards time and circumstances, to continue planting, nor is there a proper foundation in the pleadings and proofs, to charge the administrator cum testamento annexo, as for a breach of duty in ceasing to plant for the estate. The account must be reformed in this respect.

25. Interest is improperly charged in the account after 1868. The rule of computation, in such cases, was laid down by this court in the case of Livingston v. Wells, [8 S. C. 347] S. C., April Term, 1876, and need not be recited. The interest account, subsequent to 1868, must, under this exception, be conformed to that rule.

26. This is substantially disposed of by the conclusion stated under the twenty-fourth exception, calling for a revision of the account as it regards the annual rent charged. The rent for the use of the personalty should be charged in the year in which the property was used.

27. The want of representation in this action, on the part of S. F. G. Henagan, is not material to the stating of the account as affecting the interests of the plaintiffs. If all the proper parties were not before the court, it was within the power of the administrator to cause them to be brought in, and, failing to do so, he can gain no advantage, as against the plaintiffs, from their absence. This exception was not well taken.

28. If the settlement of the estate of J. H. Henagan was material, in order to reach the

indebtedness of the administrator of B. K. Henagan, then the administrator should have brought forward his accounts, as such administrator—that accounting being open under the pleadings; and, failing to do so, it must be assumed that such a settlement is unnecessary. The estate of J. H. Henagan is only incidentally concerned in the accounting, as affecting the legatees of B. K. Henagan, and to the extent only of the assets of B. K. Henagan that came into the hands of J. H. Henagan. This exception is not well taken.

29. As it regards the subject of this ex-

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ception, the referee *appears to have stated the account as fully as the evidence would admit of. The referee was not bound to assume the truth and accuracy of verbal statements made by R. Y. Henagan, not accompanied by proper vouchers, nor can this court make such assumption as against the referee's report. This exception is not well taken.

30. In view of what has already been said as to rent subsequent to 1868, this exception need not be further considered.

31. The principle on which the account should be stated, as it regards the sale of the Grove and Mill creek places, has already been stated, and disposes of all matter that need be considered under this exception.

32. This exception involves the effect of disputable evidence, and affords no ground for disturbing the referee's conclusions. There must, however, be a statement of the amounts chargeable to the administrator on account of personal property of the estate, improperly disposed of and unaccounted for, subject to the limitations herein stated.

It will not be necessary to notice any of the exceptions interposed to the final judgment, except that of the defendant, which seeks to exclude the plaintiffs from reviewing the ground on which the judgment was taken, for the reason that the judgment was entered, in form, by the plaintiffs. The act of entering judgment was formal, merely, and cannot be considered as a waiver of the objection that existed to the decree embodied in that judgment, and which were in invitum. The other exceptions are already disposed of.

The judgment and decree of the Circuit Court, so far as it is not in accordance with the general and particular conclusions stated, must be set aside, and the first and final reports of the referee must be modified according hereto, and there must be an account upon the principles above stated, in which all matters finally determined by the decree and report of the referee, and not disturbed hereby, shall stand established as between the plaintiffs and the defendant, R. Y. Henagan; and as against the other defendants, parties to the suit, the account must be opened only to the extent of the matters deter-

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mined under the appeal *by the defendant, R. Y. Henagan, as affecting defendants made parties by proper proceedings.

There must be provision also made for the ascertainment and payment of the debts, if any still due, provided for by the will, and after the payment of such debts, or provision made therefore, the amount, if any, due the plaintiffs must be ascertained, and a trustee appointed, and a decree taken for them in accordance with the foregoing conclusions, with liberty to the other defendants properly represented before the court, or who may become so represented, to move for such order or decree as may be proper in the premises.

Decree modified.

HASKELL, A. J., and KERSHAW, Acting A. J., concurred.

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11 S. C. 122

(Case No. 645.)

BLAKELY & COPELAND v. WILLIAM H. FRAZIER and WILLIAM A. SANDERS, as Executors of Marshall Frazier, Deceased.

(November Term, 1877.)

[1. *Appeal and Error* ⇐106.]

An action was instituted in 1871 in the county where plaintiffs lived; after the amendment to the code, adopted November, 1873, and after answers put in, an application was made by defendants to have place of trial changed to the county wherein they resided, and was refused, and defendants at the trial again objected to the venue and the objection was overruled. *Held*, that such rulings were denials of substantial rights material to the defence, secured by statute, and were erroneous.

[Ed. Note.—Cited in Nixon & Danforth v. Piedmont Mut. Ins. Co., 74 S. C. 440, 54 S. E. 657.

For other cases, see Appeal and Error, Cent. Dig. § 726; Dec. Dig. ⇐106.]

[2. *Appeal and Error* ⇐91.]

From such denials an appeal will lie to this court.

[Ed. Note.—Cited in Bardin v. Drafts, 10 S. C. 497; Du Pont v. Du Bos, 33 S. C. 395, 11 S. E. 1073; Ex parte White, 33 S. C. 450, 12 S. E. 5; Ferguson v. Harrison, 34 S. C. 172, 13 S. E. 332; Matthews, Ex'r, v. Nance, Sheriff, 49 S. C. 324, 27 S. E. 100; Salinas & Sons v. Aultman & Co., 49 S. C. 327, 27 S. E. 385; Atlantic Coast Line R. R. Co. v. South Bound R. Co., 57 S. C. 321, 35 S. E. 553.

For other cases, see Appeal and Error, Cent. Dig. §§ 612–641; Dec. Dig. ⇐91.]

[3. *Appeal and Error* ⇐90.]

Meaning of the phrases, involving the merits and affecting the judgment as used in Section 11 of the code and its amendments, discussed.

[Ed. Note.—Cited in Westfield v. Westfield, 13 S. C. 485; Dill v. Moon, 14 S. C. 339; Bennett v. Sandifer, 15 S. C. 420; Hawkins v. Wood, 60 S. C. 525, 39 S. E. 9; Bolin v. Southern Ry. Co., 65 S. C. 226, 43 S. E. 665; Lynch v. Spartan Mills, 66 S. C. 16, 44 S. E. 93.

For other cases, see Appeal and Error, Cent. Dig. § 599; Dec. Dig. ⇐90.]

[4. *Pleading* ⇐420.]
Irregularities in complying with an order of the Circuit Court allowing amendments to the pleadings, cannot be taken advantage of at the trial of the cause, nor be the subject of an appeal to this court.

[Ed. Note.—Cited in Davis & Broadway v. Barwick & Son, 88 S. C. 355, 356, 70 S. E. 1007.

For other cases, see Pleading, Cent. Dig. § 1410; Dec. Dig. ⇐420.]

[5. *Limitation of Actions* ⇐53.]
Where a factor pays the amount of a reclamation made upon him for a balance due on the sales of cotton shipped through him, on account of overdrafts by the owner of the cot-

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ton, the statute of limitations com*mences to run in favor of such owner, from the day of payment by the factor, and not from the sale of the cotton.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 291; Dec. Dig. ⇐53.]

[6. *Factors* ⇐46.]
A factor who voluntarily pays the amount of a reclamation demanded of him by cotton-sellers in Liverpool, for balance due on account-sales for overdrafts, and sues to recover it from the owner of the cotton, assumes the burden of proving the accounts correct; the account-sales and the payment are not sufficient evidence of his right to recover.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 75; Dec. Dig. ⇐46.]

[7. *Trial* ⇐206.]
It is not error to refuse to charge as to the sufficiency of evidence apart from its legal character and tendency.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 500; Dec. Dig. ⇐206.]

[8. *Arbitration and Award* ⇐82.]
An award which merely decides by which one of two persons an account is to be primarily paid, does not bind a party to the arbitration to the correctness of the items composing the account.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 445; Dec. Dig. ⇐82.]

[9. *Witnesses* ⇐138.]
In an action brought by a factor against the executors of the owner of certain cotton, to recover the amount of a reclamation paid on account of such cotton, a witness, through whom the factor shipped such cotton and paid the amount of such reclamation, may testify to conversations had between himself and such owner, now deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 574, 575; Dec. Dig. ⇐138.]

[10. *Witnesses* ⇐141.]
But in such case the factor cannot testify to conversations had between himself and such deceased person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 577; Dec. Dig. ⇐141.]

[11. *Costs* ⇐277.]
In an action against the executors of A., the unpaid costs of a suit on the same cause of action against A., brought and discontinued during his lifetime, cannot be interposed as a defence.

[Ed. Note.—Cited in Hadwin v. Southern Ry., 67 S. C. 466, 45 S. E. 1019.

For other cases, see Costs, Cent. Dig. § 1049; Dec. Dig. ⇐277.]

[12. *Venue* ⇐61.]
[An application for a change of venue should be made before a cause is reached on the docket.]

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 95; Dec. Dig. ⇐61.]

Before Cooke, J., Richland, May, 1876.

This was an action brought by the plaintiffs against the executors of Marshall Frazier, deceased, to recover a certain amount of money paid by plaintiffs under the following circumstances:

In March, 1866, the house of Marshall, Beach & Co., of Charleston, received through Blakely & Copeland, of Columbia, two hundred and eleven bales of cotton, which belonged to Marshall Frazier, of Edgefield, Frazier, in person, delivering to Marshall, Beach & Co. the letter of advice written by Blakely & Copeland, which accompanied the shipment of the cotton. The cotton was sent by Marshall, Beach & Co., to Beach, Root & Co., of Liverpool, and Frazier was given a letter of credit to Salomon, Root & Co., of New York, by which he drew from the New York house $20,000 as an advance upon this shipment. The Charleston, New York and Liverpool houses were composed of the same individuals as partners, and were identical in interest. A check on a New York bank, payable to Frazier and endorsed by him, was

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produced in court by E. W. Marshall, *head of the Charleston house, having been accounted for by the Charleston firm in its settlements with the New York house, and received by Marshall, Beach & Co. from Salomon, Root & Co. in due course of business: and Frazier subsequently acknowledged to E. W. Marshall that he had received the money. According to the testimony of E. W. Marshall, it is the custom of merchants through whom produce is shipped, that advances go forward with the shipment as a charge thereon, and are paid from the sales of the produce. As soon as Salomon, Root & Co. advanced the $20,000 to Frazier, they wrote to Beach, Root & Co. informing them of the advance and sent the account forward, reducing it to pounds, shillings and pence, at the prices that day prevailing in New York for sterling exchange on Liverpool. According to account-sales rendered by Beach, Root & Co. it appeared that this draft was paid May 1st, 1866, it being £4186 5s. 6d.

In May and June, 1866, this cotton was sold in Liverpool and fell short of paying charges and advances by £778 11s. 4d. This amount was paid by Marshall, Beach & Co., and its repayment demanded by them of Blakely & Copeland; afterwards at B. & C.'s request, demand was made upon Marshall Frazier for this amount. Frazier thought Blakely & Copeland were primarily liable. The question, who was primarily liable to Marshall, Beach & Co.—Blakely & Copeland

or Frazier—was submitted to Gov. F. W. Pickens, selected by Frazier, and Wm. M. Martin, selected by Marshall, Beach & Co., who awarded as follows:

"We, the undersigned, agree and decide that the said Blakely & Copeland were factors of the said cotton, and in the first instance directly responsible for all said reclamation." Signed by the arbitrators and dated November 19th, 1866.

On December 10th, following, Blakely & Copeland paid to Marshall, Beach & Co. £778 11s. 4d. "at the current rate of exchange this day, say $6.70 per pound sterling, making the sum of $5216.40 United States currency," balance due on account of the shipment of cotton made by M. Frazier.

To recover this amount, Blakely & Copeland brought their action against Marshall Frazier, in Edgefield district, February 16th, 1867, and the same on motion of plaintiffs'

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attorneys was *ordered by Judge Melton to be discontinued and plaintiffs pay the costs, July 18th, 1870. In August of the same year, Marshall Frazier died. Another suit on same cause of action by same plaintiffs against W. H. Frazier, executor of M. Frazier, was instituted in Richland county, in August, 1871. W. H. Frazier, in his answer, objected that Wm. A. Sanders, his co-executor, had not been made a party. On March 2d, 1872, Judge Melton "Ordered, that the plaintiffs have leave to amend their summons and complaint in this action by adding the name of William A. Sanders, one of the executors of Marshall Frazier, deceased, as a defendant in this action." Another order to same effect was passed by Judge Carpenter, October 25th, 1873, which reads as follows:

1. That the above case be withdrawn from the jury, and that the same be continued.

2. That the plaintiffs have leave to amend their complaint within thirty days by making as a party defendant, William A. Sanders, as co-executor of Wm. H. Frazier, of the last will and testament of Marshall Frazier, with apt words to charge him.

Summons under this order was dated November 19th, 1873; entered in the sheriff's office at Edgefield, January 7th, 1874; served, together with amended complaint, on Sanders, January 14th; entered in the sheriff's office at Greenville, March 24th, and served together with amended complaint on W. H. Frazier, March 27th. Amended complaint was filed in the clerk's office in Columbia, November 22d, 1873.

The defendants denied any liability for the money claimed; denied that the payment was made at request of M. Frazier; denied overdraft on cotton; plead statute of limitations; that the amended complaint and summons had not been served, or attempted to be served, within thirty days, as required by the order; and that the costs in the action brought against their testator in Edgefield had not been paid.

At May Term, 1875, of the court for Richland, it was objected to the jurisdiction of the court that the action was properly triable only in Edgefield county, and the court was requested so to order. Judge Carpenter refused, and the defendants excepted. At the trial of the cause in May, 1876, the same ob-

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jection and *request was made, and Judge Cooke overruled the objection and refused the request, and the defendants excepted.

At the trial objection was made by defendants to testimony by E. W. Marshall, of Marshall, Beach & Co., and by J. M. Blakely, one of the plaintiffs, as to conversations relating to the matters at issue had by such witnesses with Marshall Frazier, during his lifetime; they were admitted and defendants excepted.

The complaint alleged that plaintiffs were partners when payment of the reclamation was made in December, 1866; a witness testified that the firm was dissolved in December, 1866.

According to one of the witnesses, "Reclamation is, where there is a deficiency, as in this case, the claim made for a payment of such deficiency."

No proof was offered of the correctness of the accounts rendered by Beach, Root & Co., of the sales of the cotton: but such account sales, received by Marshall, Beach & Co. from Beach, Root & Co., were put in evidence.

At the trial the defendants made the following requests for rulings and charges:

The defendants requested the court to rule that this action could not be maintained, because the costs of the former suit of the same plaintiffs against Marshall Frazier had not been paid when this action was commenced against William H. Frazier, executor, and were not paid until long after the said William H. Frazier, executor, had answered plaintiffs' complaint, setting up this, among other grounds of defence. The court refused to rule as requested; whereupon defendants excepted.

The defendants requested the court to rule that the plaintiffs could not proceed with this action against William A. Sanders, executor, on two grounds:

1. That the order of the court, October 25th, 1873, not having authorized plaintiffs to amend the summons by adding William Sanders as a party defendant, their doing so was unauthorized, and set up as a ground of defence by Sanders in his answer.

2. That the order of the court, October 25th, 1875, granting leave to plaintiffs to amend their complaint within thirty days, by making as a party defendant William A.

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Sanders, as co-execu*tor of William H. Frazier, of the last will and testament of Marshall Frazier, with apt words to charge him, had not been complied with, as appeared on

the record. The court refused so to rule, and the defendants excepted.

The defendants requested his Honor to charge the jury that the liability incurred by M. Frazier to plaintiffs, if any such liability was incurred, arose upon the sale of the cotton in Europe, or, at latest, when the proceeds of sale fell due; and the statutes of limitation ran therefrom in his favor. His Honor refused this request, and the defendants excepted.

The defendants requested his Honor to charge the jury that the statutes of limitation ran in favor of the defendants until process was lodged with the proper officer for service upon them both. His Honor refused this request, and the defendants excepted.

The defendants requested his Honor to charge the jury that the defendants could not answer as executors of M. Frazier until process was served upon them both, and that there was no action properly instituted until process was lodged with the proper officer for service upon both of them. His Honor refused this request, and defendants excepted.

The defendants requested his Honor to charge the jury that the statutes of limitation ran in favor of the defendant, Sanders, until the lodgment of process with the proper officer for service upon him. His Honor refused this request, and the defendants excepted.

The defendants requested his Honor to charge the jury that whatever benefit accrued to the defendant, Sanders, from the statutes of limitation, enured also to the defendant, W. H. Frazier.

The defendants requested his Honor to charge that when new parties, who ought to have been parties originally, are brought before the court by amendment, such new parties may avail themselves of any valid defence which they may have under the statutes of limitation at the time they are made parties to the suit. His Honor refused this request, and ruled that the proposition was inapplicable; and defendants excepted.

His Honor, after refusing all the requests

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of the defendants to *charge as aforesaid on the statutes of limitation, charged the jury that the statutory period had not elapsed when process was lodged for service on W. H. Frazier, and that the bar of the statute did not exist in favor of either of the defendants. Whereupon defendants excepted.

The defendants requested his Honor to charge the jury that the account-sales introduced in evidence, alone or taken together with the other testimony, are not sufficient proof that the cotton of M. Frazier was actually sold, nor of the prices at which it was sold, nor of the expenditures therein charged against M. Frazier; these transactions having occurred in Liverpool, England. His Honor refused so to charge, and the defendants excepted.

The defendants requested his Honor to charge that the check of Salomon, Root & Co., introduced in evidence, alone or taken with the other testimony, is not sufficient proof that the money herein referred to ($20,000) was advanced to M. Frazier. His Honor refused so to charge, and the defendants excepted.

The defendants requested his Honor to charge that even if the account sales are sufficient evidence of the transactions therein referred to, M. Frazier was entitled to the proceeds of sales in English money reduced to United States currency, at the current rates of exchange and gold at the time the cotton was sold, or at the time the proceeds fell due, as stated in said accounts of sales. His Honor charged the jury that while this was true, if considered independent of the award and of Frazier's acquiescence in the account of sales rendered, yet, that if M. Frazier signed the award, and afterwards stood by and permitted plaintiffs to pay the reclamation claimed on the cotton, he was estopped from further objecting to the accounts and returns of the sale of his cotton, and was liable for the money paid as reclamation by Blakely & Copeland. Whereupon the defendants excepted.

The defendants requested his Honor to rule and charge the jury that the drafts of Salomon, Root & Co., on Beach, Root & Co., April 18th and 19th, 1866, were their own drafts, and not the drafts of M. Frazier, and that M. Frazier was not liable for the same, and that it was a breach of duty to apply Frazier's money to the payment of said

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drafts. His Honor charged the *jury that while this was true, if considered independent of the award, and of the fact that Salomon, Root & Co. had advanced to Marshall Frazier $20,000, to be repaid out of the proceeds of the sale of his cotton, yet, if M. Frazier, after having received the $20,000, signed the award and afterwards stood by and permitted plaintiffs to pay the reclamation claimed on the cotton, he was estopped from further objecting to the accounts and returns of the sale of his cotton, and was liable for the money paid as reclamation by plaintiffs. Whereupon the defendants excepted.

The defendants requested his Honor to rule and charge that plaintiffs' action should have been brought upon the entire account of their transactions and those of the other factors, Marshall, Beach & Co., Salomon, Root & Co., and Beach, Root & Co., stated in United States currency, in an account between Blakely & Copeland and M. Frazier, and that the balance should not have been in account between Beach, Root & Co. and M. Frazier. His Honor refused so to rule or charge, and the defendants excepted.

Defendants requested his Honor to charge that it was the duty of Blakely & Copeland to render full and complete returns of all the

transactions in regard to this cotton: and that if the jury believe they did not do this, they are not entitled to recover. His Honor refused so to charge, and the defendants excepted.

The defendants requested his Honor to rule and charge that the partnership of Blakely & Copeland having been dissolved before the alleged payment of the money by Blakely & Copeland to Marshall, Beach & Co., the plaintiffs could not recover under the allegations of the complaint. His Honor refused so to charge, and the defendants excepted.

Verdict for the plaintiff for $8,455.77, and defendants appealed.

[For subsequent opinions, see 15 S. C. 615, 20 S. C. 144.]

The "points submitted by appellants," and referred to in the opinion of this court, are found in the argument of Mr. A. J. Norris, and are as follows:

First Point. The court, in Richland, had no jurisdiction to try this action, because neither of the defendants resided in that county. Code, § 148, and amendment; 15 Stat. 913.

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*This amendment is a remedial statute, and should be construed liberally. Potter's Dwarris on Stat. 73; 16 Abb. Pr. 31; 18 Abb. Pr. 31; 25 How. Pr. 416—a case directly in point. See, also, 2 Paige 284. The whole code refers to matters of practice only, and the amendment should be applied to cases pending at the time of its passage. The general doctrine (Potter's Dwarris on Stat. 162) that statutes are not to have a retroactive operation, does not apply to remedial statutes. Ibid., and p. 164, note; Bishop on Stat. Crimes, §§ 84, 85. There is no interference with a contract by such changes; if so, defendants would have rights under the law as it was in 1866.

Second Point. Plaintiffs failed to amend their pleadings in accordance with order of October 25th, 1873, by being too late; and said order gave no authority to amend the summons. 2 Wait Pr. 508, 569; 4 Wait Pr. 688; 14 How. Pr. 337; 3 Sandf. 736; 32 How. Pr. 310. Filing amended complaint was not sufficient. 4 Wait Pr. 690; Code, §§ 122, 150, 154, 431.

Third Point. The action of plaintiffs is barred by the statute of limitations. Code, § 122. If both executors had been originally sued, the lodging of the summons with the sheriff, or the service of one, would have bound both. But not so when one only is sued. The limitations in the code do not apply to this demand. § 96. Under the old law, a suit against one only of two or more qualified executors was void. 2 Bay 194.

Fourth Point. The shipment and sale of the cotton, what it sold for, what charges were paid on it, &c., must be proven by persons having personal knowledge; accounts and statements of sales, &c., are not sufficient. See proper practice in Kuhtman v. Brown & Goldsmith, 4 Rich. 485.

Fifth Point. Check of Salomon, Root & Co. should not have been admitted in evidence, because not proved by drawers or payers.

Sixth Point. M. Frazier was entitled to the proceeds of the sales of his cotton in English money, reduced to United States currency at the current rates of exchange and gold, at the time the cotton was sold, or at the time the proceeds fell due, as stated in said accounts of sales. 3 Kent Com. 115, 116, 117, note; 11 East 269; Chitty on Bills *686; 1 McM.

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320; 2 B. & Ad. 78; *3 Sumn. 523; 1 McLean 423; 4 Johns. 124; 20 Johns. 102; 16 Ves. 461; 2 Wash. C. C. 167.

Seventh Point. The alleged drafts are not Frazier's drafts, and he is not responsible for them. There is no proper proof that they were drawn or paid. But suppose they were; his draft on them in New York could not be changed in its character by drafts of those three firms inter sese.

Eighth Point. The plaintiffs should have brought their action on the entire account made out in United States currency, and covering all their transactions with the cotton. They could not select one item of the account and sue upon that. 11 Rich. 466.

Ninth Point. Plaintiffs did render an account after action brought, showing that Frazier only owed them $4881.40. So judgment was excessive.

Tenth Point. E. W. Marshall is assignor of the claim for reclamation, and his testimony was incompetent. Code, § 415.

Eleventh Point. Same objection applies to the testimony of J. W. Blakely, a party to the cause.

Twelfth Point. Plaintiffs were not entitled to recover under the allegations of the complaint, as their partnership had been dissolved before they made their payment to Marshall, Beach & Co.

November 21st, 1878. The opinion of the court was delivered by

WILLARD, C. J. This action is brought by the plaintiffs as factors of Marshall Frazier, deceased, against his executors for money alleged to have been paid by plaintiffs for the account and benefit of said Frazier. The transactions out of which the present demand arises was a consignment of cotton for sale by plaintiffs, as factors of and on account of the defendants' testator, to Marshall, Beach & Co., of Charleston, who consigned to Beach, Root & Co., of Liverpool, by whom the cotton was sold and account of sales rendered. In the account-sales after crediting the proceeds of the sales of the cotton, and debiting commissions, charges, advances, and interest, a balance appeared to the credit of Beach, Root & Co. This balance appears to have been paid by Marshall, Beach & Co., and by them

collected from the plaintiffs who now seek to recover the same, less an admitted offset,

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*from the executors of Frazier. A verdict was rendered for plaintiffs, and the present appeal is based on exceptions to the rulings and charge of the Circuit judge. So far as these exceptions are brought to notice by the points submitted by the appellants, they will be considered, and in the order stated by the appellants.

The first point is that the court in Richland county had no jurisdiction to try this action, because neither of the defendants resided in that county.

It appears that prior to the term at which the cause was tried, and at May Term, 1875, an application was made to the Circuit Court to transfer the cause for trial to Edgefield county, where the defendants both resided, which was refused, and that the defendants at that time excepted to such ruling. It does not appear whether such application was made on notice to the parties, or upon the call of the docket. Properly, it should be made before the cause is reached on the docket, so that the parties may have due notice of the place of trial in order to enable them to make their preparations for the trial. As no irregularity is alleged as the ground of the refusal of the Circuit Court to change the place of trial, we must assume that the application was made in due form, at all events that the plaintiffs assented to the time and manner in which it was made. As objection to proceeding with the trial in Richland county was made on the same ground at the trial, and an exception taken to its denial, whatever may be the force of the last-named exception, in itself considered, it certainly apprised the plaintiffs that the defendants intended to insist on the claim which they had made at a prior time, and therefore they cannot be regarded as having abandoned any right that they might have, as it regarded an error in the previous ruling. The question then arises, was the refusal of the Circuit Court to order the case to be tried in Edgefield county erroneous, and can advantage be taken of such error on this appeal. It is clearly not a question of jurisdiction, in the proper sense of that term, but of the denial of a substantial right material to the defence. The defendants being residents of the county of Edgefield, that was the proper county for the trial of the cause. 15 Stat. 913. The court had the right, however, to change the place of trial "in the cases pro-

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vided by statute." *Unless this power is duly exercised the right of a defendant under the statute is absolute.

The cases in which the court may change the place of trial are stated in Section 149 of the code, as follows: "1. When the county designated for that purpose in the complaint is not the proper county. 2. When there is reason to believe that an impartial trial cannot be had therein. 3. When the convenience of witnesses and the ends of justice would be promoted by the change."

In order to warrant a change on the grounds stated in the second and third subdivisions, it must be shown by the allegations and proofs of the parties that such grounds for the action demanded exist.

The order of the court interfering with the right secured by the statute, can only be supported when resting on such allegations and proofs.

The reasons that may have existed in the breast of the judge are no sufficient ground of his action in such cases, and seldom in any case. It does not appear that any allegations or proofs were submitted to the Circuit Court that could have justified the exercise of the power of the court to change the place of trial from the county in which, by law, it was entitled to be tried in the absence of special grounds for its removal.

On the other hand it was the clear duty of the court under the first subdivision to order the place of trial designated in the complaint to be changed, when it appeared that that was not the proper place of trial. The directions of the statute, that the court may change the place of trial when not laid in the proper county, is not merely a grant of authority for that purpose, but imposes a duty, in view of the fact that the right to such change was secured by the statute.

It must be assumed that the court had the record of the case before it, and determined that as matter of law the residence of the defendants in Edgefield was immaterial to the question raised by the motion. As imperfect as is the statement of the nature of the decision we feel warranted in assuming thus much. The refusal to change the place

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of trial was clearly wrong, and it *remains to be considered whether that wrong can be alleged as an error at law under the present appeal.

The jurisdiction of this court extends to all appeals from intermediate orders and final judgments in actions where such order or judgment involves the merits. 15 Stat. 868. An order involving merely the exercise of discretion on the part of the court making it is not appealable, as error of law cannot be alleged as against such an order. 1 Wait Prac. 465. When, however, the order affects a substantial right, necessarily affecting the judgment, it must be regarded as involving the merits. The term "merits" is not very clearly defined. It certainly embraces more than the questions of law and fact, constituting the cause of action or defence. As it regards the principles of construction, the necessary means of attaining an end stand upon the same ground of privilege as the end itself. If, then, a party is entitled to an appeal as a means of securing

a proper judgment, he is presumably entitled to such appeal, in order to secure that without which the judgment could not be rightfully had. The word "merits" naturally bears the sense of including all that the party may claim of right in reference to his case. Nor is any authority brought to notice that limits the sense to any particular class of rights among those that have a tendency to control the results of cases. The expression "affecting the judgment," employed by the statute (15 Stat. 868) must be regarded as equivalent, in the sense of that statute, to the other expression, "involving the merits," as defining the cases to which that jurisdiction shall extend. They must be regarded as different definitions of the same case. In Section 11 of the code, as it originally stood, the expression was, "involving the merits and necessarily affecting the judgment." As that section now stands, the review of judgments, and intermediate orders upon direct appeal from such judgments or orders, extends to all cases "involving the merits," the other words being omitted, while as it regards intermediate orders, brought up for review by an appeal from the final judgment, the expression employed to limit the jurisdiction is "necessarily affecting the judgment," omitting the words "involving the merits." It is evident that the words "involving the merits," is used in its large significance in

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the original text *of the code, as appears from the character of the terms limiting it to cases where the judgment was necessarily affected. On the other hand, in the amendment of 1873, this limitation is dispensed with, presumably as unnecessary, and the terms there employed are treated as equivalents. Whatever can be regarded as affecting the necessary means of obtaining a judgment, must be regarded as affecting the judgment itself.

It may be concluded from the foregoing that whenever a substantial right of the party to an action material to obtaining a judgment in such action is denied, a right of appeal lies to this court. Prior to the recent amendment of the code relating to the place of trial, the defendant could not, as matter of right, claim that a trial should be had in the county of his residence. In those cases where the venue was not fixed by the nature of the cause of action itself, it was the right of the plaintiff to select the place of trial, subject only to the limitation that such place of trial must, when any of the parties reside within the state, be in some county where one or more of such parties, either plaintiff or defendant, resides. If the defendant desired to effect a change, it could only be obtained by the order of the court on the grounds specified by law. It is evident that under the law as it now stands, the defendant may claim of right that the trial should be had in the county where he resides, in cases of the class to which the present belongs. If, then, it is material to his defence that the jury, convened to try his case, should be drawn, summoned and empaneled in the manner prescribed by law, so that the denial of right, in this respect, entitles him to an appeal, it is manifest that to change it from a vicinage other than that designated by law, is an error in a matter involving a substantial right material to his defence, and thereby necessarily affecting the judgment. The conclusion reached renders a new trial necessary.

The second point involves the question whether irregularities in complying with an order of the court allowing amendment to the pleadings, can be taken advantage of upon the trial of the cause. It is the duty of the parties, if they wish to take advantage of an irregularity in the mode of interposing a pleading, to move the court in due time before the cause is called, for such order as the nature of the case may demand. It is too late

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to *take such an objection after the parties have framed an issue and gone to trial upon it. If the parties had a right to object to the validity of a pleading on the ground of irregularity merely, it would be equivalent to saying that a pleading irregularly interposed may be disregarded as a nullity. The contrary of this is true, namely, that such a pleading is good until set aside on the ground of irregularity. The defendant, in making the objection before us, does not stand on the ground of vindicating a substantial right denied to him, but of taking advantage of mere irregularities in form by the opposite party; clearly no such appeal can be allowed by this court.

The third point relates to the statute of limitations. The court properly refused to charge that the cause of action in suit arose upon the sale of the cotton in Europe. The liability of defendants' testator to the plaintiffs could not arise until the actual payment by the plaintiffs of the amount of the reclamation made by the parties who sold the cotton. If, prior to that payment, the plaintiffs had sued M. Frazier, it is clear that they would have failed in their action. The question of the effect of the statute of limitations, as it regards the defendant, Frazier, depends upon the fact that at the commencement of the action the defendant, Frazier, was the only executor having authority under the will to act. The will does not admit of any joint executor during the existence of due qualification on the part of Frazier. Consequently the action was well brought, as it regards Frazier, and the statute cannot be pleaded by him as running after service upon him. As it regards Sanders, we do not know by what title he is treated as the executor, inasmuch as by the will he cannot claim to be such; and as we are not informed upon what ground he is claimed or

admitted to be such, we cannot, at the present stage of the case, determine his relation to the statute of limitations.

The fourth point involves the question of the necessity of proof of the right of the Liverpool house to demand a reclamation. It was of course necessary to make proof of the state of the accounts, in order to show that the money advanced by the plaintiffs was paid for the advantage of the defendants. The plaintiffs had the right to put the

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parties making claim against *them to proof of the accounts in an action, and by waiving such proof by voluntary payment they could not throw that burden on the defendants, but must be regarded as having assumed that duty. The submission and award cannot properly be regarded as an admission by the testator of the defendants of the propriety of the reclamation. The question submitted was as to on whom the duty of settling the accounts was incumbent in the first instance —whether upon the owner of the cotton or his factor; and the decision imposed that duty on the plaintiffs, as such factors. This was the whole effect of the arbitration. There was therefore error in this respect in the charge and refusal to charge.

The request to charge, to which the fifth point relates, was properly refused, as it involved a charge as to the sufficiency of evidence apart from its legal character and tendency, and therefore as to matters of fact within the exclusive competency of the jury.

The charge to which the sixth point relates was clearly erroneous. It involves the proposition that the award of the arbitrators fixed the amount of the reclamation as due from the testator, and therefore the account could not be examined as it regarded the charges for premium on gold and for exchange. As the award could not have such effect, the charge is erroneous. The court having charged the proposition embraced in the request, independently of the erroneous charge that followed, no further question of error is presented.

The observations made as to the sixth point apply to and are decisive of the seventh point. The proposition embraced in the request to charge was submitted to the jury, but its effect destroyed by an erroneous conclusion as to the effect of the award.

It is not necessary to determine the true form of stating the accounts between the plaintiffs and defendants, or their testator, as that is a matter of detail not necessarily affecting the results of an accounting. The court, having reposed the settlement of the accounts upon the effect of the award, rendered questions as to the form of stating the accounts immaterial, as far as it concerned the matters presumably embraced in the verdict. We do not deem it necessary to

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lay down the rule that should govern *the statement of the accounts as it regards matters of form on any future trial of this cause.

The proposition embraced in the ninth point was properly refused. The effect of rendering imperfect or conflicting accounts by the plaintiffs was a matter to be determined by the jury, and not by the court.

The tenth point is not well taken. E. W. Marshall was not a party to the suit, nor, as far as appears, directly or even indirectly interested in its results. The fact that the witness was a member of the house in Charleston to whom the cotton was consigned by the plaintiff, and through whom the reclamation was made against the plaintiffs, does not put him in the position of having once owned or been interested in the demand made by the plaintiffs. The cause of action upon which they sue arose only in their hands by the payment of the reclamation. They did not assume or acquire any right that had subsisted in the hands of the Charleston house as against M. Frazier; for the effect of the arbitration, as assented to by all the parties, and which is necessarily regarded as the law of the case, fixed the liability, primarily, on the defendants, of stating and settling the account; and the defendants cannot assume a state of relations at variance with that ascertained by the award. Besides, the effect of payment by the plaintiffs was to destroy the right of reclamation, not to preserve it in their own hands, inasmuch as they acted as the agents of the testator. The testimony in question was clearly competent.

The objection to the testimony of the plaintiff, Blakely, made by the eleventh point, was well taken. He was a party to the action, and his testimony related to conversations with a deceased person, and was given in a case where the executor of such deceased person had an opposite interest in such action. The admission was therefore clearly improper.

The twelfth point seeks to take advantage of an immaterial variance between the allegations and proofs, which cannot be done.

It does not appear distinctly what the facts were upon which objection was made to the commissions put in evidence. Nothing appears on the subject but general ad-

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missions affecting them. *As upon another trial admissions made on the present record will not be conclusive as to the right to introduce the commissions, it does not appear that the questions in this respect, raised by the present record, can arise on such future trial, and we deem it unnecessary to consider them in the absence of the facts. The present action being against the executors of M. Frazier, we cannot see how the unpaid costs of an action against M. Frazier, brought and discontinued during his lifetime, can be interposed as a defence. Although

the cause of action may be the same, there is not an identity of parties. The defendants, as defendants, have no right to demand such costs, but merely as the personal representatives of the deceased former defendant. Under the view taken of the case, we do not regard it as at all material to consider the other matters discussed, as they arise out of the view taken of the case by the Circuit Court, which, as we have seen, was erroneous, and as not likely to be of importance as the further consideration of the case.

There should be a new trial.

New trial granted.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. 139

(Case No. 650.)

HENRY KOON, as Administrator de Bonis Non of Clinton Wilson, v. WILLIAM MUNRO, as Administrator of W. J. Keenan, and the Distributees of Wilson's Estate.

(April Term, 1878.)

[1. *Executors and Administrators* ⟸86.]
An administrator during the war was justified in receiving confederate money at its nominal value, on ante-bellum contracts, when such money was needed to defray current or extraordinary expenses of the administration, or to pay outstanding debts, whose payment was capable of being enforced, or where there was danger of losing an unsecured credit if not collected, or for purposes of payment to a legatee or distributee with his or her sanction. But an administrator should not be held to strict

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accountability as an insurer of such reasonably anticipated results, if actuated by a fair and honest judgment, resting on reasonable grounds. Our cases since 1868 upon this subject reviewed.

[Ed. Note.—Cited in Chick v. Farr, 31 S. C. 481, 10 S. E. 176, 390.

For other cases, see Executors and Administrators, Cent. Dig. § 378; Dec. Dig. ⟸86.]

[2. *Executors and Administrators* ⟸103.]
If an administrator in 1864 funded confederate money, rightfully in his hands and not available for purposes of the administration, into confederate bonds, he would be entitled to a credit on his accounts for the bonds.

[Ed. Note.—Cited in Finch v. Finch, 28 S. C. 168, 5 S. E. 348, 13 Am. St. Rep. 665.

For other cases, see Executors and Administrators, Cent. Dig. § 421; Dec. Dig. ⟸103.]

[3. *Executors and Administrators* ⟸88.]
An administrator may discharge in a depreciated currency only so much of his own indebtedness to his intestate, as may be advantageously used for the benefit of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 393; Dec. Dig. ⟸88.]

[4. *Executors and Administrators* ⟸104.]
At whatever time of the year letters of administration are granted, the administrator is chargeable with interest on the balance in his hands at the end of that calendar year.

[Ed. Note.—Cited in Nicholson v. Whitlock, 57 S. C. 41, 42, 35 S. E. 412; Anderson v. Silcox, 82 S. C. 117, 63 S. E. 128.

For other cases, see Executors and Administrators, Cent. Dig. § 428; Dec. Dig. ⟸104.]

[5. *Executors and Administrators* ⟸508.]
Commissions to an administrator are compensation for services rendered, and their forfeiture, for failure to make annual returns, may be enforced as incidental to an accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2193; Dec. Dig. ⟸508.]

[6. *Executors and Administrators* ⟸458.]
The duty of filing annual returns is imposed upon an administrator by an act of the legislature, and must be enforced according to the terms of the statute.

[Ed. Note.—Cited in Epperson v. Jackson, 83 S. C. 164, 65 S. E. 217.

For other cases, see Executors and Administrators, Cent. Dig. § 1971; Dec. Dig. ⟸458.]

[7. *Executors and Administrators* ⟸88.]
Where a debtor to an intestate administers on his estate, and charges himself as administrator at different dates afterwards, with collections of his own indebtedness, persons interested in the estate may hold the administrator to such statement of his actual payments, or may rely upon the principle that his debt was paid the day he administered.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 3934; Dec. Dig. ⟸88.]

[8. *Executors and Administrators* ⟸118.]
An administrator having confederate money in his hands in April, 1864, will not be credited with one-third part thereof, because the value of such money was reduced to that extent by an act of the Confederate States congress.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 475; Dec. Dig. ⟸118.]

[9. *Judgment* ⟸272.]
A judgment filed more than sixty days after the last day of the term at which the cause was heard, is valid. Constitution, Article IV., § 17.

[Ed. Note.—Cited in Kaphan v. Ryan, 16 S. C. 357; Gary v. Burnett, Id. 633; Witte Bros. v. Clarke, 17 S. C. 314, 328.

For other cases, see Judgment, Cent. Dig. § 519; Dec. Dig. ⟸272.]

Before Northrop, J., at Union, March Term, 1877.

This was a case in chancery brought by the plaintiff as administrator de bonis non of Clinton Wilson, deceased, against William Munro, as administrator of William J. Keenan, deceased, who during his lifetime had been administrator of the said estate of Clinton Wilson, and against the distributees of the said Wilson, praying an account by said William Munro of his intestate's administration of said Wilson's estate, and for a sale of the lands of said Wilson in aid of assets. The distributees, in their answer, join in the prayer of complainant that William Munro, as the legal representative of the said William J. Keenan, do exhibit a full and particular account of his intestate's adminis-

tration up to the time of his death of the es-

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tate of Clinton Wilson, that came into *the hands of the said William J. Keenan to be administered. The defendant, as administrator as aforesaid, filed his answer, and therewith submitted an account of his intestate's administration of the said Wilson's estate, claiming "that the estate of Clinton Wilson is indebted to the estate of Wm. J. Keenan, in the sum of $291.96 on September 16th, 1867; and also in the sum of $650.87 in Confederate States money."

By order of the court, dated March 24th, 1873, it was referred to John L. Young, Esq., as special referee, "to take the testimony in the above-stated case, and to state the account of W. J. Keenan as administrator of the estate of C. Wilson, deceased."

The referee submitted his report on September 10th, A. D. 1873.

To this report exceptions were taken by the administrator of Keenan, and also by the distributees of Clinton Wilson's estate.

The following facts were brought out by the testimony and the accounting: Clinton Wilson died November 23d, 1860, and letters of administration on his estate were granted to William J. Keenan, December 14th, 1860. The estate consisted principally of choses in action to a very considerable amount, nearly all of which were collected in Confederate States currency; among these were a note of said W. J. Keenan for $2000, less a credit, besides interest, and a note of Keenan & Norris (a firm, of which Keenan was a member,) for $9712.83, besides interest. On December 31st, 1860, Keenan, administrator, had received for the estate $2056.65, in excess of his receipts. On his own indebtedness and the indebtedness of Keenan & Norris, he charged himself, in his first return, filed April 2d, 1862, with $5125, paid by Keenan & Norris, January 21st, 1861; in his second return, filed March 11th, 1863, with $2500, paid by Keenan & Norris, July 1st, 1862; in his third return, filed January 10th, 1866, with $7047.37, balance, paid by Keenan & Norris, February 22d, 1863, and with $2298.32, balance, paid by W. J. Keenan, February 22d, 1863. Keenan collected large amounts from other parties during those years and paid out large sums to creditors. In 1864 and 1865 he made no returns; his transactions for those years were embraced

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in his return of January, 1866. *Of the moneys in his hands, $5800 were invested in Confederate States bonds.

Some of the collections made by Keenan were shown to have been from parties insolvent at the close of the war, and some from parties insolvent at the time they made their payments, and also insolvent at the close of the war.

Keenan died November 17th, 1867, in New Orleans; William Munro administered on his estate in South Carolina. Letters of administration de bonis non on the estate of Clinton Wilson were granted to Henry Koon, the plaintiff, March 6th, 1869.

The case came on for a hearing before Northrop, J., at March Term, 1877, and on October 1st, 1877, his decree was filed, which was as follows:

This cause is one of complicated accounts in the settlement of an estate. It was heard on exceptions to report of referee. The testimony shows that Clinton Wilson died A. D. 1860. Keenan administered December 14th, 1860, and died November 17th, 1867. Henry Koon, on March 6th, 1869, took out letters of administration de bonis non upon the Wilson estate, and William Munro, defendant herein, became administrator of the personal estate of Keenan, deceased. Henry Koon filed his bill in this court March 11th, 1869, praying for a full and particular account of the administration of his intestate's estate, and making the heirs-at-law of Clinton Wilson, deceased, parties defendant. Their answer was filed November 29th, 1870.

John L. Young, referee, made his report September 10th, 1873. In the meanwhile, the defendants E. P. Coulter, W. Harrison Gregory and his wife, and Austin Wilson died, and Charles Bolt, clerk, administered upon their estates and has filed his answer herein.

The referee reports $8745.55 as due by William J. Keenan, administrator, in "Confederate currency" on September 19th, 1867, and $304.61 due to him on same date in "United States currency."

Plaintiff and defendant excepted. The second exception taken by defendant's counsel; that the referee should have allowed W. J. Keenan, administrator of Clinton Wilson,

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deceased, credit *for the sum of $428.50, interest from January 21st, 1861, to April 1st, 1862, according to vouchers Nos. 27, 28, and 29, is sustained.

The real issue raised by the pleadings in this cause, appears in the plaintiff's exception, objecting to the finding of the referee: that the balance due the estate of Clinton Wilson, was due in "Confederate currency," and not in legal or United States currency, as well as in the defendant's exception, objecting to the finding of the referee, refusing the administrator of Clinton Wilson credit for $3500, invested in seven per cent. confederate bonds. It seems to be admitted for the purposes of this decree that the investment was made on December 31st, 1864. Was this investment just and legal, and is the balance found against the defendant to be struck in confederate currency, or in lawful currency?

The testimony was voluminous, and the argument on either side eminently laborious and accomplished.

I am clearly of opinion that the invest-

ment was not proper, nor can it be allowed, and that the balance against the administrator should be found in legal currency. It seems plain from the testimony that the assets were ante bellum, and that their origin was of a gold valuation. The administrator was largely indebted to his intestate's estate, and I am not satisfied that he was authorized to receive in confederate currency any further payments than were necessary to the purposes of the administration, and surely not more than were actually paid out by him in discharge of the liabilities of his intestate's estate. He was able to pay the same, $17,000 of his own debt, contracted at a gold valuation, by paying out confederate currency, and cannot take refuge behind the general reputation for patriotism to which he was entitled. It is good law, that debts due an estate by the administrator are as cash in his hands, but it appears here that the administrator charged himself from time to time with the collection of these assets, subsequent to the administration, and that he was one of a co-partnership indebted to the estate.

There was much effort to show by letters and other testimony that the defendants, Elkanah Coulter and John Coulter, bound their wives as distributees, to the ratification

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of this investment. *If this was proved, it could hardly bind the other distributees to their loss.

Nor am I satisfied that these defendants could bind their wives—the distribution not having been completed before the death of the wives. There would have been no settlement, nor reduction into possession. But as matter of law, I find the proof insufficient. Story on Agency, § 237, and note. They, the Coulters, do not appear to have had knowledge of the essential facts.

This investment appears to me, therefore, to have authority neither in fact nor law.

If it could appear that the administrator had received, as a matter of necessity, the confederate currency invested in confederate bonds, I would not hesitate to hold the investment legal and valid. Fitzsimons v. Fitzsimons, 1 S. C. 413; Horn v. Lockhart, 17 Wall. 576 [21 L. Ed. 657]; Cureton v. Watson, 3 S. C. 454.

The facts, however, as I understand them, do not warrant this view of the case, and I am constrained to conclude that this investment was without authority of law. So far as interest is concerned, I have reached the conclusion that interest should be charged on the balance struck on January 1st of each year; that no interest should be allowed on the balance due by the administrator, Keenan, from time of his death, until letters of administration were granted de bonis non—that is, from November 17th, 1867, to March 6th, 1869.

Counsel have agreed to allow the commissions to the administrator on the balance found due by him, and they are allowed.

I file with this decree a statement of the administrator's account as it appears to be made out.

It is therefore ordered, judged, and decreed that the plaintiff, Henry Koon, administrator de bonis non of the estate of Clinton Wilson, recover of Wm. Munro as administrator of the estate of Wm. J. Keenan, deceased, the sum of $11,122.61, to be paid by the said Wm. Munro, out of any assets in his hands belonging to the estate of his intestate not yet administered, and any that may hereafter come into his hands to be administered, and that the said Henry Koon do,

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after paying all the costs of this suit, *and expenses of administration, pay over the balance in his hands to the distributees of the estate of Clinton Wilson, deceased, their attorneys or assignees, according to their respective interests.

And it is further ordered that the said distributees, and Henry Koon, as administrator de bonis non, have leave to apply at the foot of this decree for such orders as may be necessary to carry out such decree.

In the statement of the administrator's accounts, filed with the Circuit decree, the administrator is charged with interest on balance in his hands December 31st, 1860, and is allowed no commissions on his receipts and disbursements for 1863 and 1864. William Munro, administrator, appealed to this court upon the following grounds:

1. Because, from the proof, the collections made by the administrator in confederate money, were rendered necessary by the exigencies of the estate, were proper under the circumstances attending them, and should therefore be sustained.

2. Because the administrator should have been allowed credit for the amounts collected on the notes of Keenan & Norris and of W. J. Keenan, that were actually expended in paying off debts of the intestate, contracted in legal currency.

3. Because the administrator should not have been charged in legal currency with amounts collected by him in confederate currency from insolvent persons, who could not have otherwise paid their debts due to the intestate, or any part thereof.

4. Because, even if charged with amounts collected by him in confederate money on debts outstanding at the intestate's death, and unsecured, due by insolvent or doubtful persons, he should only be charged with the actual value of the money so collected by him, and not with the whole amount in legal currency.

5. Because the administrator is charged with interest on $2056.65 for one year, from December 31st, 1860, to December 31st, 1861, when administration was granted on December 10th, 1860.

6. Because the administrator is not allowed commissions upon the amounts due from W.
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J. Keenan and Keenan & Norris, col*lected during his administration; nor upon amounts paid to the same parties.

7. Because the administrator is not allowed commissions upon his receipts and expenditures during the years 1863 and 1864, but is charged with the amount thereof as legal currency.

8. Because, if the collections from Keenan & Norris and Keenan are not sustained, interest should be calculated upon their notes, and not upon annual balances against the administrator.

9. Because the conclusion of fact reached by his Honor the Circuit judge, that the investment of the administrator in confederate bonds was made on December 31st, 1864, was not admitted by the defendant, and is not sustained by the proof.

10. Because the investment made by the administrator in confederate bonds ought to have been sustained.

11. Because, if not sustained as to all the distributees, it should have been as to the wives of John Coulter and Elkanah Coulter, and especially as to the interest of John and Elkanah Coulter, purchased by them from Wilson, one of the distributees of Clinton Wilson, deceased.

12. Because, if the investment in confederate bonds is not sustained, then the amount of confederate money in the hands of the administrator, on April, 1864, should have been reduced one-third, as provided by act of congress of Confederate States.

13. Because the decree of his Honor the Circuit judge was not filed within sixty days from the last day of the term of court at which the cause was heard, as required by Article IV., Section 17, of the constitution of this state.

[For subsequent opinion, see 18 S. C. 374.]

Messrs. J. B. Steedman and R. W. Shand, attorneys for appellant.

Messrs. Rion & McKissick, attorneys for respondent.

November 22d, 1878. The opinion of the court was delivered by

WILLARD, C. J. W. J. Keenan administered on the estate of C. Wilson. At Keenan's
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death, administration de bonis non *was granted to the plaintiff, Koon, and the defendant, Munro, became the administrator of Keenan.

The administrator of Keenan is now called to account for the administration by his intestate of the estate of C. Wilson.

The principal question in the case is whether the estate of Keenan should be allowed certain credits claimed as due from the fact that he had converted assets of the estate into confederate bonds in 1864. It must be assumed that this transaction was, in point of fact, the funding of confederate currency in bonds of a like character, though bearing interest. It appears in evidence, and is also notorious as part of the general history of those times, that at the time of such funding (1864) confederate currency was the only currency in circulation in this state. It is not alleged nor suggested that any other currency was in the hands of the administrator at the time of such funding; on the contrary, the scope of the argument in the case embraces the inference that the collections for the estate were made in confederate currency, so far, at least, as the character of those collections could enter into the present question.

Should it appear that at the time of such funding the administrator had rightly become possessed of, and held as part of the assets of the estate, an amount of confederate currency in excess of what was capable of being disbursed for the legitimate purposes of the administration, and that in 1864 he had funded that amount in confederate bonds, he would be entitled to account for the confederate currency by credit for the bonds taken in exchange for it. Such a transaction would amount to no more than the conversion of a non-interest-bearing security of a certain class into an interest-bearing security of the same class, and, as such, could manifestly occasion no loss of assets. The important question in this case is whether the administrator can be regarded as having converted confederate currency, rightfully in his hands, as assets of his intestate, into confederate bonds. It is possible that the administrator might, consistently with a due discharge of his official duty, have become possessed of assets of the estate in the form of confederate currency, notwithstanding the fact that such currency was not, in a legal sense, money, so that the debtors of the estate could
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compel its reception in discharge of *their debts, and notwithstanding the further fact that its current value was less than its nominal value as compared with gold, and that it should be taken at its nominal value in the discharge of debts due the estate.

The object of administration is the distribution of the decedent's estate among those entitled to it according to law. Debts must be collected and paid as the first step towards distribution. That it may happen that a community is stripped of the due and legal medium of discharging obligations, namely, coined money or its legal equivalent, is a possibility not so remote but that it may be considered by the courts. Such a state of things existed in this state during the period covered by the administration of Keenan. Although the circumstances that accompanied such condition of things were peculiar, yet, even if we could conclude that their exact recurrence in any community could not be regarded as a reasonable possibility, the fact remains that the real cause of the monetary

condition was the absence of gold and silver from the state to such an extent as to deprive the community of a proper medium of exchange. This fact was not necessarily dependent on the circumstance that there was pending a dispute as to the right of supreme governmental authority over the territory of the state, maintained by arms, and involving incidentally the question of what was to be regarded as lawful money for the purposes of discharging obligations. Coined gold and silver, of a suitable character to obviate all question as to the proper medium of payment, might have existed in sufficient quantities to meet all demands upon a currency, notwithstanding the pendency of such a question. Other causes than that of the nature of the political questions involved induced the disappearance of gold and silver. Commercial causes afford the real means of explaining this fact. The pendency of the war at once created a demand for purchases abroad, and prevented exportations of a class of commodities that would have supplied the place of gold and silver in such transactions.

Gold and silver disappeared from the state as the medium of exchange. This was not a peculiar consequence of a war of an exceptional character, but a natural and ordinary consequence of war dependent only on the

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fact that one of the belligerents pos*sessed the means of excluding the others from ordinary exchanges in foreign markets, to which the other was compelled to have recourse as a purchaser. The disputed question of sovereignty had no necessary connection with its occurrence. We must therefore conclude that the possibility of the deprivation of a community of the proper medium of the payment of obligations is within legal contemplation and consideration, and we are at liberty to look for the rules that should prevail under such a state of circumstances.

Although when such a state of things exists, it must be regarded as temporary as affecting the general functions of the state, yet it is not in such a sense temporary that administration and similar legal functions can be suspended during its continuance. To maintain a state of war without exhaustion, or to overcome any other natural cause tending to paralyze public economy and private industry, must be the care of every government, and a reasonable view of the objects of laws must lead to the conclusion that there are principles intended to meet such exceptional cases, intimately connected as they must be with the general well-being of the community. To interrupt the due course of law as to the transmission of property or solution of debts, is to diminish the general prosperity to the degree that such interruption is important as it regards the extent of the transactions affected, or its duration. In view of these circumstances, it is impossible to conclude that when, from the pendency of war or other cause, the community is deprived of the customary and legal means of paying debts and making exchanges, and resort is had by common consent to a substantial currency without definite legal authorization, the course of administration must cease, and administrators retain the assets in their hands unconverted and unapplied to the purposes of administration, whatever might be its consequences as affecting the administration. Such a rigid rule would work peculiar hardship in the case of administrations.

Death seldom finds estates in such complete preparation that outstanding credits are equivalent to investments and debts without power of compelling the disposition of assets. On the contrary, it must be anticipated that

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the assets of an intestate estate *will embrace credits of an unsecured and doubtful character, and debts capable of creating a pressing necessity for calling in the credits of the estate. It must be assumed as a general fact that there is a necessity for prompt action on the part of administrators that cannot admit of suspension or interruption under such a state of public affairs as that under consideration. If debts are not paid, the sale of assets can be compelled, and from the necessity of the case supposed the assets must be sold for the prevailing currency, such as it is, and that currency must be the means of paying the debt. To require that property be sold at public sale, for gold and silver, when those commodities cannot be obtained, would be oppression under the forms of law and contrary to justice. If the administrator, unwilling to take collections of credits in such cases in such currency, permits the realized property of the estate to be seized and applied to the payment of its debts, then, while the sacrifice is only transferred from the doubtful assets to the good, not only the natural order of looking in the first instance to the outstanding credits as the means of paying debts is disregarded, but the collection of uncertain and doubtful demands postponed at the very time when it should be specially pressed, for the existence of such a state of affairs necessarily depreciates all obligations resting merely on personal responsibility.

It cannot be doubted that when an entire community, without dissent, and under the spur of necessity, concur in adopting a medium of exchange that can only derive its value from common consent, and the language of commerce and trade, and, indeed, of all industry, becomes accommodated to such medium of exchange, power to employ such medium in transactions would be implied from such general consent, in many supposable cases, which would bind parties in the absence of their declarations to the contrary. It would be difficult to define this principle with accuracy, and establish its conditions and limits; but its existence cannot be doubted. The existence of such a presumpton as

existed between the attorney who issued an execution during the period under consideration, and the sheriff who sold property for confederate money under such execution, is illustrated in State v. Moseley, 10 S. C. 1.

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The present ques*tion does not directly depend on the operation of such an implied power, but the principles are closely allied.

It would follow, if the foregoing deductions are sound, that the test of the right of the administrator to receive, in satisfaction of the debts of the estate, a currency in common use but not having the quality of a legal tender, is the necessity of the administration; one element of this necessity being the existence of debts capable of affecting, prejudicially, the assets of the estate unless satisfied, and the other would be just ground to apprehend loss of assets by allowing unsecured debts to remain outstanding. As it regards the payment of legacies and distributive shares, it is evident that either the express consent of persons entitled thereto, or such facts and circumstances as would give rise to a presumption of such consent, would warrant the reception of such currency when only required for purposes of that description. It is clear that in either of these cases, as well as when money is needed to defray current or extraordinary expenses of the administration, the administrator would be authorized to receive such currency at the rate at which it passed from hand to hand in the community as money, unless there should be reason to conclude that it could not be advantageously employed at such valuation for the purposes of the administration. In the cases supposed it might wholly defeat the end proposed, for the administrator to insist that currency should be used in such transactions at its value, according to a gold standard. It is unlikely that parties who might use their currency more advantageously, would employ it for the purpose of paying debts. Besides, the case supposed rests on the reasonable idea that such currency may be used at its nominal value for the legitimate purposes of administration, and in that case the value of the currency would be that for which it would be advantageously used in the purposes of the administration, and not what it is worth, according to a legal standard, practically inapplicable to the case.

It is proper to add that, in applying these principles, the administrator ought not to be held to strict accountability as an insurer of such reasonably anticipated results, but so long as he brings a fair and honest judgment, resting on reasonable grounds, to guide his conduct in this respect, he should receive

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protection. *This depends on the principle that one clothed with the exercise of discretion is only responsible for its abuse.

There is nothing in the cases heretofore decided by this court on this general subject that conflicts with the foregoing propositions, but much to sanction them. Clarke v. Deveaux, 1 S. C. 172. The point decided in this case was that a trustee could not make a profit to himself out of the trust estate by retaining assets of the estate and accounting for them in depreciated currency at its nominal value. Here there was no question on the ground that advantage to the estate was contemplated, but the interest of the trustee was alone the ground of his action. Gibbes v. Guignard, 1 S. C. 359, involved a question of fact merely. The legal question of the right of a trustee to invest in confederate securities did not arise for decision, the fact of such investment not being established. Mayer v. Mordecai, 1 S. C. 383 [7 Am. Rep. 26]. In this case, bonds adequately secured and constituting a settled fund, were unnecessarily called in and invested in confederate securities. The case turned upon the necessity, under the deed of trust, of consultation with the cestuis que trust in the case of a change of investment. It was held that there was an impropriety in calling in the settled investment and taking in payment currency at a less actual value than the bonds called for, although at its nominal value, but the force of this consideration was in the fact that there was no necessity, actual or presumable, that warranted such action on the part of the trustee, and the absence of such a necessity was pointed out as material in the opinion in the case.

Sanders v. Rogers, 1 S. C. 452. In this case the trustee called in a secured bond in confederate currency at its nominal value, as he alleged, with the expectation of purchasing other bonds, as directed by the terms of the trust. It was held that the trustee had no reasonable ground for calling in such bond, as no arrangements had been made at the time of calling it in for such a purchase; in fact, no substantial purpose of re-investing appeared, but the confederate currency was suffered to lie unproductive for a long time, and finally was converted into confederate bonds. The loss for which the trustee was held liable was not for converting the currency into bonds, but for taking it in payment of a secured bond without any necessity therefor.

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*Womack v. Austin, 1 S. C. 421. The investments in this case were required to be of certain specified kinds, excluding an investment in confederate bonds. Confederate bonds are stated in the views of the court to have been unsafe means of investment. This does not apply to the conversion of a still less valuable security, as not bearing interest, into such bonds, and by no means conflicts with the proposition under consideration, which only contemplates the use of confederate currency for a temporary purpose, as a medium of exchange, but in harmony with a view that looks only to neces-

sity, as connected with the interests of the estate, as the ground for receiving such currency.

Moorehead v. Orr, 1 S. C. 304. The point decided in this case was that the administrator of a guardian has no right to exercise the powers of his intestate as guardian, in the matter of making investments on account of the ward's estate.

Fitz Simons v. Fitz Simons, 1 S. C. 400. In this case the administrator was held liable for calling in a secured bond in depreciated currency at its nominal value, for the reason that no necessity of administration warranted such act. This impliedly concludes that if such necessity had, in fact, existed, or its existence could be reasonably presumed, authority so to do might have been inferred. If capable of being inferred in the case of a secured debt, it clearly would be so in the case of an unsecured debt.

Creighton v. Pringle, 3 S. C. 77. This was a case of changing investments that were optional and upon consultation, and, of course, no necessity can be presumed to have existed for calling in secured debts, constituting settled property for depreciated currency at its nominal value.

Cureton v. Watson, 3 S. C. 451. In this case a security was called in in depreciated currency at its nominal value, and the liability of the guardian was put upon the absence of necessity for so doing.

Waller v. Cresswell, 4 S. C. 353. The point decided in this case was raised as a naked one, namely, whether a guardian could legally make a loan to the confederate government, and as it directly involved a question of the construction and effect of the constitution and laws of the United States, it was

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decided under *the authority of Head v. Tally [Fed. Cas. No. 6,293] U. S. S. C. This case differs from all the other cases of the class in this court, as a federal question was directly interposed that was ruled by the Supreme Court of the United States.

Chalk v. Patterson, 5 S. C. 290, was a case of investment by a public officer acting under the direct orders of the court, and is not, therefore, an analogous one. That case, with Pickens v. Dwight, 4 S. C. 360, was placed on the ground that an officer of the court obeying the requirements of the act of the confederate congress, as it regards funding currency, must be regarded as yielding to superior force which he has no power to resist, and could not be held responsible therefor. The question presented was not one of investment, as the officer had no general authority to invest, and no special authority appears.

It will thus be seen that the cases in this court are in perfect harmony with the conclusions already stated, and even go so far as to give implied support to them. It remains to examine the bearing of these principles on the facts disclosed by the present case, as it regards the further question whether the administrator is to be regarded as having converted confederate currency rightfully in his hands as part of the assets of his intestate's estate into confederate bonds.

It appears that the administrator was indebted to the estate both individually and as a member of a co-partnership. Assuming that there was in his hands, as administrator, an amount of confederate currency at the time of funding, that currency must, according to the account submitted in evidence, represent an amount wholly or in part placed by the administrator among the assets on account of such indebtedness. Such a transaction is equivalent to a payment by the administrator on account of his indebtedness in confederate currency. Applying the principles heretofore stated to such facts, but with regard to the additional fact that the administrator in taking from himself depreciated currency at its nominal value was acting in his own interest, though not necessarily to the exclusion of the interest of the estate, and it is clear that he should be credited with so much only of the amount paid by him in currency on account of the indebtedness with which he was connected

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personally, as was *advantageously used for the benefit of the estate. An expenditure for the purchase of confederate bonds could only be sanctioned by necessity, and must be regarded, independently of such necessity, as disadvantageous to the estate, and of course the administrator would not be justified in paying his indebtedness to the estate in depreciated confederate currency at its nominal value for the purpose of converting such currency into confederate bonds. It would not necessarily result from this that the entire investment in confederate bonds should be disallowed independently of an examination of the accounts, to ascertain whether any portion of the currency that went into such bonds was derived from assets of the estate, other than that paid by the administrator himself, in discharge of his individual and joint debts. The decree of the Circuit Court advances a different principle from that here propounded as the basis of the account with which it is accompanied. It must be accordingly assumed that in stating such account, regard was not had to circumstances that might restrict the liability of the administrator upon the principles already stated. Although we might readily, on the basis of the returns set forth, arrive at a solution of the present question, yet to some extent that conclusion would rest on presumptions and inferences arising from those accounts.

As the statement of the accounts was not conformed to the principles that should have been applied to them, the attention of the

parties not having been directed, as may be assumed, to such considerations, there should be a new inquiry directed and confined, as it regards the present question, to ascertaining how much, if any, of the amount funded in bonds consisted of confederate currency rightfully in the hands of the administrator as assets of the intestate not available for outlay to meet any other proper exigency of the estate, to the end that the administrator should receive credit for such amount upon the principles above stated. To the extent thus indicated the conclusions of the Circuit judge should be set aside.

What has already been said disposes of the questions raised by the appeal in the first, second, third, fourth, tenth and twelfth grounds of appeal.

The fifth ground of appeal is not well

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taken. Interest is *charged in the customary manner, commencing at the beginning of the year next succeeding the granting of administration. The argument of the appellant seems to treat the charge of interest as a penalty for not disbursing funds in due time; on the contrary, as the rule has been applied too long to admit of question, it is intended to enforce upon the administrator the duty of keeping the funds of the estate productive which are employed for the purposes of administration.

The first proposition embraced under the sixth point is that forfeiture of commissions for want of making due annual returns cannot be enforced as incidental to an accounting, but must be made the subject of a judgment directly establishing the forfeiture and imposing the penalty. The doctrine contended for is undoubtedly sound in its application to forfeitures affecting vested rights, but commissions are compensations for services rendered. The forfeiture imposed by the statute afforded only the right to commissions as compensation for mere work to be performed, which was an executory right and not anything in the nature of a vested right.

The other proposition under this sixth ground of appeal claims commissions on the amount found to be due by the final judgment in this action. Upon the final adjustment of the account in conformity herewith, the administrator will be entitled to such commissions upon the amounts ascertained to have been received and disbursed by him as shall not have been previously credited in the accounts, provided such commissions shall not have relation to years in which the administrator failed to make his returns.

As the footing of an account remains to be finally ascertained, the principles in question cannot be applied to ascertain at the present time the proper allowance for commissions.

Nor can we yet determine, as affecting the question of commissions, on the amount of any judgment that may be recovered by plaintiff, whether conforming to such judgment should be regarded in equity as a voluntary payment under judicial construction, or as purely in invitum. What has been said disposes of the points raised by the seventh ground of appeal.

It is urged that the omission to file returns

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during the dis*arrangement of business occasioned by the war, was excusable. The requirement is a statute requirement, and conditions not expressed cannot be interpolated. Whether it is competent for a court of equity to allow to an administrator compensation, where he ought not to be chargeable with the failure to file his returns, is a question that cannot be considered, for want of sufficient ground laid for raising such question; the claim here is for commissions and must be pursued under statute.

It will become necessary to settle the interest account in harmony with the ultimate conclusion, whether the administrator is to be regarded as having actually paid in the amounts due from himself and from Keenan & Norris. If it is found that no such payment was made, then interest should be computed on the notes and no charge for interest made in the accounts as for cash received. If it is found that any part of that indebtedness is to be regarded as paid, the interest will, as to such part, run into the interest account, and as to the unpaid balance, be computed on the notes as indebtedness. The parties in interest had an undoubted right to hold the administrator to the statement of an actual payment, and also to rely on the principle of equity that deems the amount due from the administrator as paid. In taking the position that there was no actual or legal payment, they demand a re-adjustment of the account according to the actual facts and that entails a corresponding re-adjustment of the interest account.

The ninth ground relates to matters that can have no important bearing on the questions at issue. The eleventh ground cannot be supported; the facts on which it depends were seriously controverted by testimony conflicting with that of the administrator, and the conclusion of fact that he had failed to establish the fact that his action complained of was taken with the advice and consent of certain of the distributees, cannot be disturbed, for the reason that it depends almost wholly on a question of the credibility of the conflicting testimony.

The twelfth ground contains the proposition that because the debtor in a certain transaction (the confederate government) had said to its creditors that unless they performed certain acts, not called for by their contracts, those debts should be reduc-

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ed to a *certain amount, such declaration should be judicially enforced. We do not

think that this proposition demands argument to show that it has no foundation.

The objection that the judgment was not filed in sixty days after the adjournment of the court, is without force. The constitution imposes no penalty for the failure of judges to render their decisions in the required time, and the courts certainly would not visit the consequences of any wrong that might be committed by a judge on the innocent party entitled to a judgment, and who is the only party prejudiced by the delay, by taking from him a judgment admittedly just.

The judgment of the Circuit Court must be set aside, so far as inconsistent herewith, and in all other respects affirmed, and the case remanded for further proceedings in conformity herewith.

Decree modified.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. 158

(Case No. 656.)

SPEARS & COLTON v. SPARTANBURG, UNION AND COLUMBIA RAILROAD COMPANY. GEE & HUMPHRIES v. THE SAME. THOMAS McNALLY v. THE SAME. J. C. FARRAR v. THE SAME. PHILIP M. COHEN v. THE SAME. WM. A. NICHOLSON v. THE SAME. WM. E. McNEACE v. THE SAME.

(April Term, 1878.)

[1. *Carriers* ⇐114.]

The liability of a railroad company as a common carrier does not extend over the whole time of the existence of their lien for freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 609½; Dec. Dig. ⇐114.]

[2. *Carriers* ⇐85.]

A railroad company does not retain its character as a common carrier until notice of the arrival of the goods is given to the consignee,

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and he *has a reasonable time thereafter to remove them. Haskell, A. J., dissenting.

[Ed. Note.—Cited in F. L. Layton & Sons v. Charleston & W. C. R. Co., 90 S. C. 325, 72 S. E. 988.

For other cases, see Carriers, Cent. Dig. § 317; Dec. Dig. ⇐85.]

[3. *Carriers* ⇐114.]

At what time the liability of a railroad company as a common carrier does terminate, not settled: Willard, C. J., holding that it ceases at the moment the goods have arrived at their place of destination, and are placed in a properly-constructed and guarded warehouse, subject to the demand of the consignee: (cases upon this subject reviewed and discussed)—McIver, A. J., holding that the liability continues until the consignee has had a reasonable time, after the arrival of the goods, to remove them: Haskell, A. J., holding that the consignee is entitled to notice of arrival and that the liability continues until he has had a reasonable time thereafter to remove his goods.

[Ed. Note.—Cited in Hipp & Co. v. Southern Ry. Co., 50 S. C. 137, 27 S. E. 623; Bristow v. Atlantic Coast Line R. R., 72 S. C. 46, 51 S. E. 529; Brunson & Boatwright v. Atlantic Coast Line R. Co., 76 S. C. 13, 56 S. E. 538, 9 L. R. A. (N. S.) 577; Murphy v. Southern Ry., 77 S. C. 78, 57 S. E. 664; Harris v. Southern Ry. Co., 100 S. C. 469, 85 S. E. 158.

For other cases, see Carriers, Cent. Dig. §§ 608–620; Dec. Dig. ⇐114.]

Before Mackey, J., at Union, October Term, 1877.

The seven causes above stated were heard together on Circuit and in this court, and they all involve the same questions.

The Spartanburg, Union and Columbia Railroad Company is a common carrier; as such it had received at its two termini the goods for the recovery of the value of which the above-entitled actions were brought. The goods in some of the above-stated cases were unladen from the cars on the forenoon of Friday, June 1st, 1877, in some on Saturday afternoon, June 2d, and in the others before either of the above-specified dates, and placed in the depot at the time of unlading—the freight charges thereon being unpaid.

During an extensive conflagration in the town of Union, in the said state, (not originating at the depot,) on the 3d day of June, 1877, the depot and its contents, including the goods above mentioned, were consumed.

It was in proof that no notice of arrival had been given to the consignees, and that the company required payment of freight charges before delivery. The plaintiff, Farrar, lived in Union county, fourteen miles from town; all the other plaintiffs resided and did business in the town of Union.

The court charged the jury that unless there is a special exemption, in terms, of liability, brought home to consignee, a common carrier retains its character as a common carrier until notice of the arrival of the goods

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is given to consignee, and he *had reasonable time afterwards to take the goods; to which defendant excepted.

The court further charged the jury that the liability of common carriers, as such, must extend over the whole time of the existence of their lien for freight; to which defendant excepted.

The jury found verdicts for plaintiffs.

Defendants appealed upon the same grounds taken in their exceptions to the judge's charge.

Mr. James H. Rion, for appellants.

1. We admit that if the goods were in the custody of the defendant as common carriers, then the company is liable for their destruction by an accidental fire.

2. If, however, the custody was that of warehousemen, then the company, having proven that the fire occurred without fault on its part, the defendant is not liable. 11 Rich. 339.

3. The whole question in this case turns,

then, upon determining in what character the defendant had custody of the goods when burnt—as common carriers or as warehousemen.

4. His Honor erred in holding that a notice of the arrival of the goods was necessary to terminate the liability of the company as a common carrier.

(a) As a matter of custom, the proof establishes the fact that at Union, where there is only this one railroad, no notice was ever given, except under peculiar circumstances not affecting this case.

(b) As a matter of law the company was not bound to give any notice.

2 Redf. on Rail., p. 63, § 4, says: "And we understand the cases to have settled the question that the carrier by railway is neither bound to deliver to the consignee personally, or to give notice of the arrival of goods."

5. Upon unloading the cars and placing the goods in the depot, there being no custom or statute law requiring notice of the arrival to be given, the company immediately became relieved of its liability as common carriers, and only liable as warehousemen.

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*1 Gray 263. In this case it is distinctly held that no notice of arrival of goods need be given.

The same law as that laid down by the Supreme Court of Massachusetts is held in Indiana, in 12 Ind. 55; in New Jersey, in 5 Dutcher 394; in Iowa, in 25 Iowa 60; in North Carolina, in 6 Jones 343; and in Illinois, in the latest case that I can find, 42 Ill. 132, it is held "that the rule, though not the best that might be adopted in the premises, is well settled that a railroad company, to discharge its liability as carrier, on getting the goods to their place of destination is not bound to deliver them to the consignee personally, or give notice of their arrival; and after storing them in a suitable place to await the demand of the consignee, the liability is only that of a warehouseman."

I am also informed that the same rule obtains in Minnesota.

I think the argument contained in the last two paragraphs of the decision of Chief Justice Shaw, in the above-cited case from 1 Gray 263, unanswerable, and as furnishing the law, where the lex loci is not contra.

I admit that in other states the rule is different; but in some this notice is required by statute or custom; and in other states railroad charters uniformly require this notice. In South Carolina, Judge Whitner, in 11 Rich. 341, says: "Some future case may settle this question."

6. This, if held to be error in the charge of his Honor the Circuit judge, was one of so material a nature that no authorities are necessary to establish that the defendant is entitled to a new trial.

Mr. William Munro, for respondents.

The same point is involved in the seven cases, and is that made in the first ground of appeal, viz.: "Because his Honor charged the jury that unless there is a special exemption in terms of liability brought home to consignee, a common carrier retains its character as a common carrier until notice of the arrival of the goods is given the consignee, and he has a reasonable time afterwards to take the goods."

The liability of the defendant as common

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carrier continued *until notice to the plaintiffs of the arrival of the goods at Union, and until a reasonable time thereafter for their removal.

The obligation of the carrier is to deliver as well as to carry.

Delivery is either actual or constructive. "Constructive delivery consists of notice, tender, readiness and present ability to deliver according to the contract, all such conditions being reasonable as to time and place, and so constituting duty to receive." 23 How. 35. Mr. Cushing's argument and authorities cited.

Carriers by land must make actual delivery to the consignee at his dwelling or place of business. Story on Bail., § 543; 2 Kent 604, 605; 2 Redf. on Rail. 60; Chitty on Carriers 89, 90.

Carriers by ship deliver at the wharf, but due notice must first be given to the consignee. Story on Bail., §§ 544, 545; 4 Bing. N. C. 314; S. C., 3 Mann. & G. 642; 2 Redf. on Rail. 65, and authorities hereafter cited. The rule is stated in the case of The Eddy, 5 Wall. 495.

The delivery must be on a proper day as regards the weather, and must also be on a business day, and at a proper hour of such day, and the liability of the vessel continues until the owner or consignee has had a reasonable time to examine the goods and determine whether he will take them or not. 23 How. 39; Parsons on Maritime Law, Book I., ch. VII., pp. 152, 153, 154, and cases cited.

Notice must always be given. The carrier cannot relieve himself by storing in his or any other warehouse, without giving notice. 49 N. Y. 444; 15 Johns. 39; 5 Am. Law Reg. (N. S.) 692; 45 N. Y. 13; 1 Denio 45. Notice to the consignee or a due effort to find him, if he is unknown, is a condition precedent to the right to warehouse the goods. 14 Wall. 107; 49 N. Y. 444, supra.

The rule as to delivery is the same in the case of carriers by sea and inland waters. 52 N. Y. 45, 52; 2 Kent 605; 5 Am. Law Reg. (N. S.) 692, supra; Angell on Carriers 310; 3 N. Y., (3 Comst.) 322; 49 N. Y. 444.

As to what constitutes a sufficient delivery by a railroad company as common carrier, the decisions are conflicting, and the law is not definitely settled. In 16 Wall. 324, Justice Davis, speaking of delivery by rail-

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ways, says: "Different views have been *entertained by different jurists of what the carrier is required to do when the transit is ended, in order to terminate his liability." Justice Bradley, in a very recent case, (Grand Trunk Railway v. Stevens, Vol. V., No. 6, of The Reporter, 163,) says: "The business of the common carrier, in this country at least, is emphatically a branch of the public service, and the condition upon which that public service shall be performed by private enterprise are not yet entirely settled." In 11 Rich. 341, the court says: "Though it may well be claimed that the terms of the contract," (which limited the liability of the company to the unloading of the cars) "dispensed with a personal delivery, some future case may settle the question raised in the argument, whether it also dispensed with notice of arrival."

The Supreme Court of Michigan, in 16 Mich. 79, says: "Three distinct views have been taken by different jurists, neither of which can be said to have been, so far, generally accepted as to have become the prevailing rule of the courts." These are—First. That the liability terminates when the transportation is ended, and the goods are deposited in the carrier's warehouse, at the place of destination. Second. That the liability continues until a reasonable time has elapsed, after the arrival, for the consignee to examine and remove the goods. And, Third. That in addition to such reasonable time, notice of arrival must be given to consignee.

The first rule above mentioned was originated by the Supreme Court of Massachusetts in 1 Gray 263, and was re-affirmed in 118 Mass. 201. It holds that the delivery is complete when the goods are deposited on the platform, if in daytime, and in the depot if at night. It withdraws all protection from the goods at the moment when most exposed to hazard of loss.

The second rule is sustained by a majority of the cases, and probably grew out of dissatisfaction with the first. They generally condemn the Massachusetts rule, and in the greater number, if not all the cases, notice had, in fact, been received by the consignee of the arrival of the goods. And the reasoning which leads to the conclusion reached, would seem to lead to the rule of the common law. See the authorities collected in

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the argument *for plaintiff in 118 Mass. 201; S. C., 19 Am. Rep. 436, 437. See, also, 2 Wait Actions 50, 51.

But the strength of the argument is with the third rule. It is thus stated in 44 N. Y. 511: "If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight-house, and, after keeping them a reasonable time if the consignor does not call for them, its liability as a common carrier ceases." 49 N. Y. 225; 49 N. Y. 444; 45 N. Y. 13; 52 N. Y. 637.

It is the rule of the common law. Carriers were, at common law, held to actual personal delivery. But carriers by ship were excused from delivery at the consignee's warehouse, because the ship could proceed no further than the wharf; notice of arrival and of readiness to deliver were substituted in place of actual delivery to the consignee at his warehouse or dwelling. 44 N. Y. 510; 10 N. Y. 438; 34 N. Y. 501; 49 N. Y. 444, supra; Story on Bail. 545. In 2 Redf. on Rail. 65, it is said: "The course of doing business upon railways, their being confined to a particular route, having stated places of deposit, and generally erecting warehouses for the safe keeping of goods, all seem to require that the same rule as to the delivery of goods should prevail, which does in transportation by ships and steamboats."

Indeed, the similarity in the two modes of carriage is complete. Take the case of a line of sea-going steamers, or say river steamers, for the same rule applies to both. The steamer cannot leave the water, as the cars are confined to the track. One lands at the wharf, the other at the depot. There may be, and sometimes are, as many landings for the steamer as stations on the railroad. The time of arrival of the steamer is as reasonably certain as the train. And the consignee is as likely to know upon which steamer as upon which train his goods may be. Wherefore should not the same rule be applied to both? Why should the ship be required to give notice of arrival and the railroad not? Is there any reason why the rule which is

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applied with rigor in *the one case should be relaxed in the other? Is it because the railroad company deposits its freight in its own warehouse? And without charge? But the ship cannot relieve itself by depositing in its warehouse.

Besides, the depot is not built for the convenience of the shipper or consignee, but for the convenience of the railroad company. 2 Redf. on Rail. 56, 57, 58, 59, 67. Depots and warehouses are useful and necessary for the safety and protection of the railroad company as a carrier, but are not absolutely essential to its business or employment as carrier.

For goods lost or destroyed while in the depot awaiting shipment, the railroad company is liable as well as another. Why not also for freight awaiting delivery?

The shipper makes but one contract with the railway, as with the ship. It is to carry and deliver the freight. He makes no con-

tract for storage. Railroad companies are not warehousemen. They store no goods except such as are awaiting shipment or delivery. This is the purpose for which their depots and warehouses are built; to enable them to comply with the strict rule of the law as regards delivery with safety and advantage to themselves. Railways are constantly receiving and discharging freight, and as during those times goods would be liable to be damaged from exposure to all sorts of weather, for which the company would be responsible, depots and warehouses are necessary for the protection of the company. The process of unloading and separating the different consignments, and comparing with the bills, is necessarily tedious, and if carried on without doors would require great additional force, would cause vast accumulations of freight and entail heavy expense, besides multiplying the opportunities for theft. For this reason railways never deliver from the cars; and the consignee, even if present, is required to wait until the goods are placed in the depot and there assorted and compared with the bills, and until the company is ready to deliver.

In Wisconsin, the rule requiring notice to be given was defeated, and the rule limiting the carrier's liability to a reasonable time after deposit in the depot, was established by a divided court, Judges Cooley and Chris-

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tiancy favoring the former view, *and Campbell and another the latter. The argument on our side is ably put by Judge Cooley in 16 Mich. 79.

November 25th, 1878. The opinion of the court was delivered by

WILLARD, C. J. Each of the above-entitled cases rests in substantially the same state of facts, and involves the same legal questions. Counsel have presented these cases as if precisely the same proceedings were had and the same rulings given in each, and we must so consider them as it regards the questions raised. There are some minor differences in the facts that do not affect the questions raised by the appeals, and will not be noticed.

The facts are simply that the plaintiffs in the various cases shipped goods by the defendant corporation, as a carrier by rail, that were carried to their place of destination, but before actual delivery were consumed by fire, without fault on the part of the defendants, while in the defendants' depot. No evidence appears to have been offered tending to show that the place in which the goods were deposited was a safe and substantial warehouse, and no such question appears to have been submitted to the jury.

The court charged the jury "that unless there is special exemption, in terms of liability, brought home to consignees, a common carrier retains its character as a common carrier until notice of the arrival of the goods be given to consignees, and he has a reasonable time afterwards to take the goods;" also "that the liability of the common carrier, as such, must extend over the whole time of the existence of their lien for freight." To both of these propositions defendants excepted.

The question involved is, when, in the ordinary course of business of a carrier by rail, independent of any special features in the contract, does the liability of the common carrier, as such, cease after the goods have arrived at their place of destination? The rule as to the termination of the liability of a carrier by rail, as a common carrier, is unsettled in this state, as was recognized in Wardlaw v. Railroad, 11 Rich. 337. In the other states of this Union much conflict of authority exists. Such is the divided state of authority that the present decision cannot be largely influenced by any unbalanced

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weight of authority derived *from the adjudicated cases of the other states. We may, however, be largely aided in recognizing the principles fundamental to the question, by the able discussion it has received in the courts of various states.

The business of carrying passengers and goods by rail did not directly grow out of that of either the carrier by land or by water, as known to the common law. If the one had passed into the other by insensible steps, the legal identity of the relations would have been perfect. In that case it would only be necessary to ascertain whether any modification of the rule applicable to the ancient modes of carriage was rendered necessary by alterations, either in the means employed or the mode of transacting business, the foundation of the liability of the carrier remaining the same in both cases.

The business of a common carrier, as known to the common law, was a mere private undertaking, conducted on a limited scale. Goods were entrusted to the hands of private persons to be conveyed from place to place. The common law rule of liability took its present form while the highways of Great Britain were infested by predatory bands, and the carriage of persons and property attended with much hazard. No one but the carrier and his servants could know to what extent goods undergoing carriage might be unnecessarily exposed to depredation or destruction from the elements, and the law wisely placed the carrier in the attitude of an insurer against all injuries to the property, except such as happened by what was called the act of God and of the public enemies of the realm. He was compelled to seek out and make personal delivery to the consignee, unless by contract or local custom a substituted delivery was permitted in lieu of actual delivery.

What is just said of the carrier by land is

equally applicable to the carrier by water of early times, except that he was excused for damages that happened through the perils of navigation, and he was not bound to seek out the consignee.

It sometimes happened that both the carrier by land and by water could relieve himself of the special liabilities incident to his calling by depositing goods in a warehouse, but that was out of the due course of his

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contract, which called for personal de*livery and only happened when the consignee was either in actual or presumed fault for noncompliance with his part of the contract.

The introduction of railroads not only changed radically the nature of the means employed for carriage, but the character and responsibility of the carrier, the sanction under which his business was conducted, and the methods and habits of dealing between him and those transacting business with him. Public sanction was necessary before the business could be undertaken. Legislation was framed to mould the business to suit the public convenience. The necessity of a large capital to supply the means of conducting the business insures adequate responsibility. The mode in which goods were received, transported and delivered was the subject of rules and regulations publicly known. The consignee, instead of dealing with an obscure person, transacting his business either by himself alone or with the aid of one or more servants who might be in secret accord with him to wrong those entrusting their property to him, dealt with a conspicuous public body, transacting its business by the aid of a large retinue of railroad officials, amply sufficient to protect the property from depredation, and too numerous to unite as conspirators for any predatory purpose. Goods undergoing transportation, instead of being exposed in a wagon, poorly attended, upon a highway, or standing in the public yard of an inn, were received in substantial enclosures, locked up in safe cars, and delivered from depots or warehouses with as much safety as if in the storehouse of the owner.

The history of railroads is part of the public history of the country, and furnishes the means of tracing any relationship that may exist between the ancient and the modern calling. We do not find the wagon-road undergoing gradual change until it was converted into a railroad, nor the wagon gradually transmuted into a train of cars.

Railroad transportation displaced rather than modified the former modes of conveyance, and must be regarded in the highest sense a new method of transportation. In many respects it has been assimilated to the old, for the purpose of defining the legal relations of the carrier by rail. He has been

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called a com*mon carrier and subjected to the liabilities incident to that calling. This conclusion is universally adopted and cannot be questioned at this late day. But it is still competent to inquire to what extent this assimilation may be carried without running the risk of denoting as identical, things diametrically opposite.

The common law held both the carrier by land and water subject to his primary measure of liability until actual delivery, or where substituted delivery was allowed, until such substituted delivery was perfect. The reason of this was obvious. In the case of the carrier by land the goods were supposed to be exposed to the peculiar risks incident to that mode of conveyance until actual delivery. Neither general nor local custom regarded the carrier as fulfilling the double office of a carrier and warehouseman. He was not called upon to provide himself with any such means and appliances for guarding the goods committed to his custody. In legal contemplation the goods had no other security than the personal watchfulness of the carrier or his servants. He was not at liberty to divest himself of the duty of making a personal delivery by placing the goods in either a public or private warehouse, such a course not being contemplated by his contract. As a necessary consequence of this view the peculiar risks attending the transportation of goods did not cease when he reached the place of their destination, and accordingly the measure of liability remained unchanged notwithstanding such arrival.

So with the carrier by water. While goods were conveyed by sailing vessels, the duration of a voyage was too uncertain to allow the consignee to estimate with any degree of certainty the time of the arrival of his goods; besides in the imperfect and irregular modes of transmitting intelligence in early times a consignee in a remote or foreign port might be dependent on notice of the arrival of a shipment for his advices concerning it. Under such circumstances it is obvious that where the contract in its primary import was to make personal delivery, the shipowner could not discharge himself of its obligations without at least notice to the consignee, if he could with reasonable diligence be found. The reason why notice to the consignee was expected in the case of the carrier by water,

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was that his contract was to *make actual delivery on board his vessel or on a suitable wharf, lighter or other place according to the usual custom of such port of delivery, while the carrier by land was bound to convey to the consignee's usual place of receiving such goods. The carrier by water to get rid of his liability had to put the consignee in default, so that he might deposit the goods subject to his charge for freight, and to do so, notice was, in the nature of the contract, indispensable.

Thus we find that the mode of terminating the contract in case of the strict carrier by

both land and water depended upon the nature of the contract of carriage, and that the law treated the two contracts in a somewhat different manner corresponding to the difference in the means employed and the nature of the business; and we may reasonably conclude that any entirely new mode of conveyance, while still regarded in a general sense as giving rise to the known contract of carriage, would receive the same discriminating consideration at the hands of the law.

These considerations bring us to the conclusion that while a railroad company is to be regarded as a common carrier, yet not in the sense that no modification of the rule of liability of common carriers is to be indulged, but that the same measure of liability exists in both cases where, by parity of reason, like grounds exist for it, and that where the reason of the rule is inapplicable the rule itself cannot be applied. But, even if the railroad company is a common carrier in the strictest sense, still its business would have to be regarded as of a special class, distinct from that either of a carrier by land or water as understood at common law, and therefore entitled to such modifications as it regards the measure of liability as naturally springs from the altered terms of the contract of conveyance, this conclusion being justified by the consideration of the difference allowed between the two species of conveyance formerly comprising the whole ordinary means of transport. These views will find support in the adjudicated cases presently to be considered. It is generally conceded by the authorities that a railroad company as a carrier of freight is not bound to make delivery to the consignee at any other place than its own depot. The prevailing idea is that the company

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only agrees to convey to a place of *destination and hold safely there for the use of the consignee or owner. In other words, the railroad company is regarded not as contracting to convey generally, but by the special means of conveyance with which it conducts its business. As its carriages are made to run only on a road of particular construction they are regarded as strictly confined to such road, and therefore the points at which the company contract to take and deliver goods are regarded as identical with the terminal points of the road on which their carriages run, or with points intermediate such termini.

In the respect just mentioned, the contract of the carrier by rail differs materially from that of the ordinary common carrier by land, and as has been noticed in the cases, approximates more nearly that of the carrier by water.

Notwithstanding this fact, the liabilities imposed by the authorities, if those of the State of New York are excepted, are those that belong to the common carrier by land.

While, as has been said, it has become well settled that the measure of liability is the same under both contracts, yet it is clear that the time when that peculiar liability ceases, as it regards the carrier by rail cannot be fixed by reference only to the rule in the case of the ordinary common carrier, for the difference between the contracts is material as it regards the mode of terminating the risks by delivery.

It certainly would not be proper to say that the contract of the carrier by rail shall be referred to that of the ordinary carrier by land, for the purpose of determining the measure of primary liability, but to that of the carrier by water to ascertain when that primary measure of liability ceases. This would be dealing with the subject on merely arbitrary grounds and not rationally. There is another reason why we cannot look to the contract of the carrier by water as affording the tests for saying when the liability of a common carrier ceases in the case of carriage by rail. The carrier by water, although not bound to take goods beyond the customary landing-place, in search of the consignee or owner, is bound to give notice of the place of intended delivery, yet, according to the clear weight of nearly all the authorities, the railroad company is not bound to give such

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notice. It is proper *here to notice what will be more fully considered hereafter, that there are dicta in the judicial decisions of New York to the contrary of the proposition just stated, but the judicial authority of a single state is not sufficient to outweigh general consent in a matter depending on general considerations and not on local statute law. The reason of the distinction referred to is obvious. No particular place of delivery is usually fixed by the contract for carriage by water; but any customary point of delivery at the port or place of destination, is within the contemplation of the contract, so that while the consignee may know that at a certain port or harbor his goods will be found at the end of the voyage, yet at what particular place in such port or harbor cannot be ascertained from the terms of the contract of carriage. The port of delivery may be a large seaport town, where it would be practically impossible to keep himself informed, without notice, of the arrival of vessels or goods at all the points of delivery possible under the contract. On the other hand, the contract of the carrier by rail contemplates a certain known place as the point of delivery, namely, the depot of the road at the point of destination. In following the clear weight of authority and reason to the conclusion that the railroad company is not bound to give notice to consignees of freight, we depart materially from the terms and intentions of the contract of the carrier by water, and cannot rest upon it as a test of the present question.

We must, therefore, come back for such help as we can get from the principles and

analogies that are suggested by the contract of the ordinary common carrier by land.

The primary liability of the ordinary common carrier is only continued by the law of his contract so long as the goods are subject to the risks incident to that mode of carriage. This follows from what has been already said. To use a simple illustration, not far from the fact in early days, when the law was taking its final shape, the goods did not leave the carrier's wagon until they were put in the consignee's hands. In other words, the goods are assumed to be subject to the risks attending transportation until actual delivery, or what might be substituted for it. The primary liability lasted, therefore, no longer

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than the period *during which the property was subject to the risks of transportation.

Allowing the full force of this principle to the case of carriage by rail, and there still remains a question whether goods in the hands of a carrier by rail are to be regarded as subject to the risks of transportation at all times while they are in the hands of the carrier, even after their arrival at their place of destination and though placed in a safe and proper warehouse belonging to the carrier for the benefit of the consignee, and until the consignee takes them away or is in default for not complying with his part of the contract by paying freight and taking them away.

This is the exact question that has been discussed and variously decided in the courts of different states. Although the present case does not bring to view all the possible elements of this question, inasmuch as it is not made to appear that the goods of the plaintiffs on arrival were placed in a safe and proper warehouse, yet it is essential that the question should be discussed upon all its features, although a less extended consideration might suffice to dispose of the case as it stands.

That railroad companies who conduct their business in the most approved manner, have at command warehouses properly constructed and guarded for the safe custody of the goods of consignees appears to be conceded in all the cases as a matter of public notoriety. Assuming such to be the fact in a supposed case, and that at the arrival of goods the consignee not being in waiting to receive them, they are placed in such a well-constructed and guarded warehouse under the care of proper persons ready at all reasonable times to deliver such goods to the owner or consignee on demand and compliance with the contract of affreightment, could such goods be properly said to be subject to the peculiar risks of transportation while so placed? To make such an affirmation would only be possible through a confusion of terms. If, on the other hand, the goods have actually passed beyond the reach of the proper risks of transportation, what warrant is there from any principle or analogy furnished by the law of the ordinary carrier's contract, for insisting that the carrier shall remain bound as an insurer against a certain class of risks after such risks have ceased to exist? Clearly there is

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*none. If we are at liberty to follow the reason of the case, it is clear that we must come to the conclusion that the liability of a carrier by rail, considered as an ordinary common carrier, ceases the moment the goods have arrived at their place of destination, and are placed in a properly constructed and guarded warehouse subject to the demand of the consignee. The mere unloading of goods upon an open platform, accessible to persons who have no right to handle the goods, is clearly not contemplated by the proposition just stated, nor ought it so to be, for goods so placed are in every sense subject to the risk of transportation, and even more exposed than when locked up in cars either in motion or at rest.

It remains for us to consider how far a clear weight of authority must be allowed to influence our final conclusion. A question much discussed in the cases, as to whether the liability of a common carrier does not remain even after the goods have been securely placed in a proper warehouse at the point of destination until after the expiration of a reasonable time for the consignee to call and take them away, will be discussed in connection with the adjudicated cases.

Norway Plains Co. v. Railroad, 1 Gray (Mass.) 263. This is a leading case in Massachusetts and has been recognized as such by the courts of several of the states. It fully sustains the proposition that placing the goods at the place of destination, in a proper warehouse for the use of the consignee, without additional charge, provided he shall demand them in a reasonable time, is a complete performance by the carrier by rail of his duty as a common carrier, and his subsequent liabilities are those of a warehouseman. It indicates the proper effect of the delay of the consignee to take away his goods in a reasonable time, namely to authorize the carrier to charge as warehouseman for the subsequent custody of the goods, while, until the lapse of such reasonable delay, the sums agreed to be paid for transportation include the proper charges for storage. The carrier is, by this case, treated as a warehouseman from the moment that the goods are lodged in his warehouse.

This case illustrates the principle, that where the peculiar risks to which goods are exposed in the course of transportation

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cease, *the special compensations for such risks ought to cease also. Rice v. Hart, 118 Mass. 201; s. c., 19 Am. Rep. 436. This case follows the last-mentioned, but unless carefully read might create the impression that that case went to the extent of holding that

the mere unloading of the goods upon the platform of a depot at the place of destination of itself terminated the liability of the carrier, but a careful comparison of the cases shows that the Norway Plains Co. case treated the platform in that case as within and part of a suitable warehouse. The probable explanation of the peculiar language of Rice v. Hart is, that it intended an inquiry, whether conceding the platform in question to be part of a suitable warehouse, there was a termination of the contract of the carrier, as such until after the goods had been removed from such platform into a place fitted for more permanent storage.

In this point of view the Norway Plains case certainly holds that the platform, being part of the warehouse, deposit upon it was sufficient in itself. This is perfectly consistent with the general rule that goods delivered to a warehouseman, at the usual place for receiving goods, are regarded as stored, prior to their removal to a position for permanent storage. The rule established by the cases appears to be finally settled in the State of Massachusetts.

Railroad v. Ayres, 29 N. J. 393. This case does not involve the direct question under consideration, but merely the reasonableness of a by-law of a railroad company relating to the mode of discharging freight. Haines, J., however, undertakes to state the rule of duty by which the carrier by rail is affected. He says "the obligation of a common carrier by railway is, safely to transport the goods to the place of destination, to deposit them without delay, and without additional charge, in their warehouse, until the owner or consignee has a reasonable time to remove them. They are not required, as carriers by wagons, to deliver at the door or place of business of the owner or consignee, nor as carriers by water, to give notice of their arrival."

This is certainly a clear interpretation of the contract, but the statement of the consequences flowing from it is not equally fortunate. He says again: "Having the mer-

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chandise in good order *and safety, stored and protected from weather and from trespasses and ready for delivery, allowing a reasonable time for the owner or consignee to remove them, their duty as carriers ceases; and they were no longer liable as carriers." The case did not call for the statement of the consequences to flow from the carrier's contract; had it done so, doubtless some explanation would have been offered for the continuance of the carrier's liability as such, after the goods had been placed beyond the reach of the peculiar risks attending transportation, by being safely lodged in a warehouse at the place of destination. Accepting the interpretation here put upon the contract, that the carrier by rail is bound to put the goods at the place of destination in a suitable warehouse, what, we would ask, was the intent of such a stipulation, whether actually made or to be presumed? Clearly none other than that the goods, at their arrival at the place of destination, should forthwith be put in a state of security, freeing them from subjection to the risks of transportation. If the carrier complies with such obligation and places the goods beyond exposure to such hazards, there is no propriety in still holding him to the same responsibility as if the goods were yet exposed to those risks. Such a construction would be equitable, the carrier would gain nothing by providing a warehouse for the security of the goods, while the consignee would be under a motive to leave the goods stored at the cost of the carrier, protected by the double security of a proper warehouse and a carrier's liability as insurer up to the last moment that the law would adjudge reasonable.

Public convenience is often referred to as influencing the view to be taken of the contract of the carrier by rail, but if that consideration has any weight here, it would be on the side of furnishing railroad companies with an adequate motive for providing all their depots with safe warehouses, which might be afforded, could they know that their special liability as common carriers might be terminated by the proper use of such appliances.

Moses v. Railroad, 32 N. H. 523. The discussion of the general question of the mode by which a carrier by rail may discharge himself of liability as a common carrier, might well have been avoided in this case, for the jury had found actual negligence on the part of the railroad, and as the ver-

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dict in other *respects did not present all the elements necessary for a full discussion of the question, Sawyer, J., enters at length into the discussion. While seeming to assent to the proposition that the carrier by rail ought to provide suitable warehouses for the protection of goods awaiting removal, yet he holds that the full measure of liability as common carrier remains until a reasonable time for removing the goods has elapsed. The reason assigned for this is that the goods, though in a warehouse, were still subject to the exclusive control of the carrier and his servants. Doubtless this is true, but the nature of the risk remaining must be looked to, and this is the same and no other than all goods are subjected to that are undergoing storage in the hands of a bailee. The law properly estimates that class of risks when it places the liability of the warehouseman, on the ground of failure of due care. The risks attending transportation belong, in the estimation of the law, to an entirely different class, and call for a measure of liability that is exceptional, as

compared with the responsibilities incident to all other forms of bailment. No good reason is presented in the case or perceived why this exceptional liability should remain after the risks have been reduced from an exceptional character to the ordinary risks incident to a bailment for the purposes of storage. There is no propriety or authority for holding railroad companies to providing storehouses in addition to what is imposed on ordinary carriers, unless such is the contract of carriage; and if such is the contract of carriage, it is senseless unless compliance with the obligation to place in warehouses involves a release from that liability which would ensue if such obligation was not complied with. It would be equivalent to saying we will hold you as insurers of the goods unless you place them beyond the reach of the risks of transportation, but nevertheless, though you so place them, we will still continue to regard you as insurers. Judge Sawyer regards the claim of exemption from the liabilities of a common carrier by showing that the goods were placed in a warehouse, as a case of attempting to throw off the liabilities of the contract of conveyance without the fault of the consignee. How this can be reconciled with the concession that it is part of the duty of the carrier by rail to "protect the goods from weather and depredation," is

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*not apparent. It is probable that he had in mind the case of a carrier by water, who is not at liberty, by the terms of his contract, to place the goods of a consignor in a warehouse without attempting a direct delivery, but as he fully recognized the difference that exists between the contract to convey by water and that by rail in this respect, it might be supposed that he would have traced such distinction in the consequences flowing from the two contracts. The explanation given in the opinion for this conclusion is, that placing the goods in a warehouse, solely protected by warehouse responsibilities, is an act not called for by the contract of conveyance. But he had previously said that it was the duty of the carrier to protect the goods "from weather and depredation" while in the process of unloading and awaiting removal. This language certainly would not be applied to the carrier by wagon, considered as an insurer of safe delivery in good order, and its only force lies in the fact that railroad companies usually offered warehouse facilities for such purposes. If the learned judge in the language noted means merely that such discharge of the liabilities of the common carrier is no part of the contract, then the contract is left without that reciprocity of obligation that is demanded by the rules of sound interpretation. In other words, the contract is one-sided—increasing the duties of the carrier without any corresponding consideration for such accession of responsibility. The case just considered cannot be regarded as finally adjudicating the various matters discussed in the opinion of the court, as they were not necessarily involved.

Blumenthal v. Brainard, 38 Vt. 402. This case seems to have involved, principally, the question whether the defendant had modified his liability as a common carrier by notice relating to the mode of discharging goods. But the discussion of the question was carried beyond that view of the case. The contract of carriage was treated in this case, precisely as if it had been a contract to convey by water, with the single exception that it was conceded as the result of the authorities that no notice of arrival was necessary. The doctrine of the case is, in general terms, that the carrier by rail remains liable as a common carrier until the consignee has had a reasonable time to remove the goods. It admits of doubt, wheth-

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er the court had in mind the *case of goods placed on arrival in a suitable warehouse, but assuming that such was the intended meaning of the case, it certainly affords a striking illustration of the objection to continuing the strict liability of a common carrier after the goods are placed in safety. The necessity of determining what is a reasonable time within which the consignee should call for his goods, according to this case, renders necessary the introduction of a jury; that the law furnishes no other solution than that which can be afforded by the verdict of a jury. If the parties can come to an understanding as to what time shall be deemed reasonable, it must be by compromise, for no legal rule or principle, capable of being applied without a jury, can solve the problem according to this authority. It is certainly unfortunate, if no better mode can be found for adjusting the differences that must frequently arise, even without the fault of the parties concerned in the course of an immense commerce of this class, especially when arising, as it often does, out of a purely accidental event, such as the accidental burning of a building, a hardship equally to both parties. To require parties under such circumstances to add to their misfortunes a law suit, is certainly to be avoided if possible. It is true, that even under the view that a railroad company may discharge itself of the liabilities of a common carrier by storing the goods, yet if such storage is neglected, the question of what is a reasonable time within which the consignee should have called for his goods may arise, and have to be disposed of by means of a jury, but in that case the burden of the suit would be occasioned by the neglect of the railroad company to avail themselves of the means of discharging that liability. In that case the railroad company could only justly blame themselves, and not the

law for not providing them with the means of avoiding litigation. But the hardship is apparent when the railroad company having faithfully done all demanded by them for the security of the consignees' goods, still incurring this misfortune of an accidental destruction of its buildings by fire, are yet compelled to undergo the burden of ascertaining by a burdensome appeal to a jury whether there had been no delay in removing his goods by the consignee.

Still such considerations are not in themselves conclusive. We *must follow the contract and not abstract considerations of justice. If the contract bears the construction that appears reasonable, then this evil is avoided. And the question whether it is reasonable, looks to some extent to the character and mode of adjusting the ultimate rights growing out of it. If parties have in view a direct and simple way by which they may disentangle and adjust their relations, and another that leads to entanglement and needless litigation, all other things being equal it must be assumed that they intended the better and rejected the worse.

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If resort to the verdict of a jury in such cases is a hardship, it is all the more so when the mode of determining the reasonableness of the delay is unequal and arbitrary, as it is made by the language of the case under consideration. Kellog, J., holds that a reasonable time is such "as would give a person residing in the vicinity of the place of delivery, and informed of the usual course of business on the part of the servants of the company in unloading the cars and delivering the goods of that character, and also informed of the time when the goods may be expected to arrive, suitable opportunity within the usual business hours for delivering such goods after they had been placed in readiness for such delivery, to come to the place of delivery and inspect the goods and take them away." After all, as full as the statement of this rule is, it is virtually a negation of the rule that the consignee is entitled to reasonable time to call for his goods, except where the consignee is a resident immediately at the termini and intermediate stations of the railroad. All other consignees must be satisfied with the measure that fits those who reside in the immediate vicinity of a railroad station, although it may not afford a reasonable time considering their circumstances. In its application to land conveyance this statement of the rule must be regarded as purely arbitrary, having no antecedent in general or local custom. Perhaps it is the best that could be done to avoid the intrinsic difficulties of the position assumed, but that admission would be fatal to the construction of the contract of conveyance that calls for judicial interposition of such a character. Such a rule may be necessary in the case of vessels trading from port to port, having goods consigned to a port at which it can only make a temporary stay,

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and under the necessity *of discharging such freight either by immediate delivery to a consignee, or of depositing for his account in a public warehouse, but even in that case its form must come from general usage, but has no applicability to a railroad having a storehouse for freight at every point at which it can be called on to make delivery. It is the irresistible conclusion from the case just considered, that the view of the contract of the carrier by rail that holds him responsible as a common carrier after he has deposited goods at the place of destination in a suitable warehouse, is attended by difficulties theoretical and practical so numerous as to enforce the conviction that it is a departure from the beaten paths of the law.

Bausemen v. Railroad, 28 Ind. 434. This case fully sustains the proposition that the liability of the railroad company as common carrier ceases when the goods are placed in a warehouse at the point of destination, without notice to consignee.

Francis v. Railroad, 25 Iowa, 60, sustains the same proposition as that last stated. Wood v. Crocker, 18 Wis. 345, follows Moses v. Railroad, already commented on, but adds nothing to the strength of the reasoning of that case.

Railroad v. Scott, 42 Ill. 132. The rule, as applied by this case, is thus stated by Breeze, J.: "But the rule is settled that no notice is necessary to the consignee, and if he is not present to receive the goods, which he has no means, by the use of ordinary diligence, of knowing have arrived, the carrier can store the goods safely in a suitable warehouse and await the demand of the consignee. When thus stored, the duty of the railroad as a common carrier terminates and that of a warehouseman begins; the warehouse must be a safe and secure place."

This same proposition is again stated in Vincent v. Railroad, 49 Ill. 247, although not directly involved in that case.

McCarty v. Railroad, 30 Penn. 247. While this case can hardly be regarded as finally settling the rule for Pennsylvania, as it involved circumstances of a special character, yet the language of the case is explicit, and sustains the views presented above.

The New York cases do not appear to have

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received that clear *investigation that have usually characterized the treatment of commercial cases in the courts of that state.

McDonald v. Railroad, 34 N. Y. 497. This case related wholly to the duty of an intermediate carrier, as it regards transmission to the next carrier in line. The decision is not necessarily inconsistent with the doctrine that the carrier, at the point of destination, may discharge himself of liability by deposit

in a warehouse; but in the course of the remarks made by Smith, J., a different view was presented. He holds that, according to the weight of authority in that state, as applicable to both carriers by rail and water, notice to the owner or consignee of the arrival of the goods, and a reasonable time and opportunity after notice to remove them, would come in lieu of personal delivery. On examining the antecedent cases in that state, no such authority has been found as applicable to railroad carriage, although the rule, as applied to water carriage, has abundant support. Fisk v. Newton, 1 Denio 45; Ostrander v. Brown, 15 Johns. 39; Miller v. Nav. Co., 10 N. Y. 431. It is to be inferred that the learned judge assumed that the two cases were without distinction as it regarded the applicability of the rule, and that his reference has relation to the cases bearing on the liabilities of carriers by water. This case can, in no proper sense, be regarded as deciding the proposition thus commented upon.

Witbeck v. Holland, 45 N. Y. 13. Again, in this case a statement of the general rule as affecting carriers by rail was attempted, although the case was against an express company, and therefore involved a more strict application of the rule as affecting ordinary common carriers than is appropriate in the case of carriers by rail. Groon, J., incidentally remarks, in regard to carriers by boat and railway, that "such carriers discharge themselves from responsibility as such by transporting the goods to their nearest business station to the residence or place of business of the consignee, and notifying the consignee of their readiness to deliver the goods at such station." The object of making this statement is clearly disclosed as merely negative, by his adding that express companies were not entitled to this exemption. This case must be excluded from the list of those entitled to authority in the settlement of the present question.

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*Fenner v. Railroad, 34 N. Y. 505. In this case, the consignee was present when the goods arrived, and, at his request, the goods were placed in the defendant's warehouse and there consumed by accidental fire. It was clearly a case for the discharge of the defendant from liability as common carrier under either view that might be taken of the general rule, for it was the case of an independent bailment disconnected from the duty of the defendant as common carrier. The court might well have avoided discussion of the general rule, nevertheless, Earle, commissioner, states that the rule adopted in Massachusetts had not been adopted in New York. He holds the contrary of that doctrine, alleging, as the ground of that conclusion, certain considerations of public convenience. He says: "From the drift of the decisions in this state, I think we may fairly infer the following rules as to the delivery of goods at their place of destination by a railroad carrier. If the consignee is present upon the arrival of the goods, he must take them without unnecessary delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown or cannot be found, then the carrier can place the goods in its freight-house, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases. If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them and does not, he cannot hold the carrier as an insurer. The carrier's liability thus applied and limited, I believe, will be found consonant with the public policy and sufficiently convenient and practicable." Considered as a statement of the state of the law in New York, this is deficient. In the first place, because not essential to the decision of the case; and, secondly, because it professes to be matter of opinion alone. Its conclusion is not stated as constructed from the solid wood of adjudicated cases, but from the "drift" of the decisions. As a judicial inference, which, in terms, it professes to be, it lacks fundamental character, for, instead of reasoning from the terms and equity of the contract itself, it summons to its support only considerations derived from what is

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conceded to be public con*venience. When carefully considered, we think public convenience will be best promoted by the opposite rule, but, at all events, too great stress should not be laid on that consideration, as it is peculiarly the province of the legislature to conform the transactions between private individuals to such forms and modes as may be essential to promote public convenience.

Hedges v. Railroad, 49 N. Y. 223. This case depended upon special circumstances, that rendered a statement of the general rule unnecessary. The question actually considered was whether the consignee had used due diligence in removing his goods before the burning of the defendants' depot by fire. The appeal appears to have been based on a charge, that the question of negligence was for the jury. On appeal it was held that this was erroneous; on an admitted state of facts it was for the court to say whether there was or was not negligence. This conclusion is in conflict with Blumenthal v. Brainard, supra, and assumes that the law supplies a fixed standard of what is to be considered negligence in such a case—a proposition that needs better support, as it regards carriage by rail, than any that has been found in the adjudicated cases. In this case Folzer, J., states the general rule on the authority of Fenner v. Railroad alone,

the authority of which case has just been considered.

It is singular that this question does not appear to have received in the courts of that state the consideration that its importance demanded. This is to be regretted, for the decisions of the courts of New York, especially on commercial questions, are consulted with great interest wherever its able judiciary bestow full consideration upon them. It is also singular that the view of the New York judges should run counter to the general current of the authorities elsewhere on the subject of the duty of the carrier by rail to give notice.

On the whole, the weight of best authority appears to be with the conclusion already stated, as naturally flowing from the contract of the carrier by rail. Certainly the reasons that induce that conclusion have not been shaken by the positions assumed in the various cases by those holding opposite views.

The Circuit judge was clearly in error in holding the defendants liable, as common car-

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riers, until notice was given and a *reasonable time elapsed for removing the goods. Notice was not necessary, and the question whether the liability as a common carrier remained after the arrival of the goods, and until the consignee had a reasonable time to remove them, depended on whether the goods remained exposed to the risks of transportation or were safely stored in a suitable warehouse.

The judge also erred in holding that the liability of common carrier subsisted as long as the lien of the carrier subsisted for freight. Had the goods, on default of the consignee to claim them in due time, been deposited in a public warehouse, the liability of the carrier would have ceased without destroying the lien for freight, and this is sufficient to render the statement of the proposition erroneous without regard to the effect of other modes of terminating the carrier's responsibility. There must be a new trial.

McIVER, A. J. I concur fully in the result of the opinion, filed by the CHIEF JUSTICE, in these cases. I think he has conclusively demonstrated that there was error in the charge of the Circuit judge in both points embraced by the exceptions. But I am not prepared to assent to the proposition contained in the opinion, "that the liability of a carrier by rail, considered as an ordinary common carrier, ceases the moment the goods have arrived at their place of destination, and are placed in a properly constructed and guarded warehouse subject to the demand of the consignee." And on the contrary, as at present advised, I am inclined to the opinion that while the carrier by rail is not bound to give notice to the consignee of the arrival of his goods, yet that his liability as carrier continues until the consignee has had a reasonable time after the arrival of the goods to remove them. The error, therefore, of the Circuit judge, according to my view, consisted in fixing the period when such reasonable time would begin to run, at the time when notice was given instead of at the time of the arrival of the goods. The rule as to a carrier's liability has been too long and too well settled to admit now of any dispute, even though we might, upon abstract principles, be disposed to regard it as a harsh and unjust rule. That rule is based largely upon considera-

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tions of public policy. As Best, *C. J., says in Riley v. Horne, 5 Bing. 217: "Where goods are delivered to a carrier they are, usually, no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their master and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer." This language implies that the reason of the rigid rule as to the liability of carriers rests, mainly, upon the fact that the evidence of the cause of the loss or injury to goods, while in the hands of the carrier, must be sought for from those who are supposed to be under the influence or control of the carrier.

Now while it is very true, as abundantly shown in the opinion of the Chief Justice, that the introduction of this new mode of carriage, by rail, differing so essentially, in many respects, from any mode of carrying known at the time the rule was established, demands some modifications of the rules regulating the contract for carriage by land, yet the same reason as that above indicated, applies with equal, if not greater, force to a carrier by rail as to a carrier by wagon or other primitive mode of tansportation.

The rule was established not merely, as seems to be assumed, for the purpose of protecting the shipper while his goods were in the course of transportation, or as it is expressed, while exposed to the risks of transportation, but also while they were in the possession and under the control of the carrier for the purpose of being transported and until they were delivered. It is obvious that if the goods of the shipper are destroyed after being placed in the depot of a railroad company, it would be quite as necessary for him to resort to the servants and employees of the company for evidence showing the

cause of the loss, as if they were destroyed in the cars before they were taken out and

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placed *in the depot. It will not do to say that the carrier's liability, as such, exists only while the goods are exposed to the risks of transportation, which must mean only while the goods are in the course of transportation, for goods in a depot, awaiting shipment, are certainly not in the hands of the railroad company, as a warehouseman, but as a carrier. Suppose cotton is hauled to the depot of a railroad, and deposited either on the platform or placed in the depot in the evening to be shipped the next day, and the railroad agent gives a receipt to the shipper for the cotton; if, during the night, it is destroyed by an accidental fire, would not the company be liable? If so, why? Because the carrier has received the cotton under a contract to carry it to a certain point, and although it is destroyed before the transportation commenced, and therefore before it was exposed to any of the risks of transportation, having so received it the liability of carrier immediately arose. This is adverted to merely for the purpose of showing what is conceived to the defect in the argument in support of the view taken by the Chief Justice, viz., that the carrier is only liable, as such, while the goods are exposed to the risks of transportation. It is said, however, that the obligation of a railroad company to provide safe and suitable warehouses or depots is one-sided and without any corresponding advantage, unless it is allowed to use these depots for the purpose of relieving itself from liability as a carrier. To this it may well be answered that these depots are erected for the convenience and security of the company, and are required by the exigencies of its business demanding that its vehicles of transportation should make only short stops at the various stations, which forbid delivery directly from such vehicles to the consignee; and that, as it is exempted from the obligation of making actual delivery of the goods intrusted to it, at the place of business of the consignee, as in the case of carriers by wagon, and from the obligation of giving notice, as in the case of carriers by water, such exemptions afford it ample compensation for the additional obligation imposed upon it. It seems to me that there is an obvious inconsistency in the proposition laid down in the case of Norway Plains Co. v. Boston and Maine R. R. Co., 1 Gray 263, which may be regarded as

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the leading case in support *of the view presented by the Chief Justice. In that case the proposition is laid own, that placing the goods, at the place of destination, in a proper warehouse for the use of the consignee, without additional charge, provided he shall demand them in a reasonable time, is a complete performance by the carrier by rail of his duty as a common carrier, and his subsequent liabilities are those of a warehouseman. This proposition involves the idea that the freight money is a sufficient compensation not only for the actual transportation of the goods, but for the subsequent care of them between the time of their deposit in the warehouse and the expiration of a reasonable time thereafter, within which the consignee may take them away without paying anything for storage during that time. It follows, therefore, that during such reasonable time within which the consignee is allowed to remove them, that the railroad company could not charge for storage as a warehouseman. If this be so, how can it be said that during that time the railroad company holds the goods as warehouseman? If it did, then clearly it ought to have the right, which is denied by the terms of the proposition under review, of charging for storage as a warehouseman.

The theory upon which the case rests, as is said in the subsequent case of Rice v. Hart, 118 Mass. 201; 19 Am. Rep. 433, is "that delivery from themselves [the railroad company] as common carriers to themselves, as keepers for hire, discharges their responsibility as common carriers." If so, then the company must be considered as though it were two separate and distinct persons—a carrier and a warehouseman—and by what authority one can be regarded as under an obligation to perform the duties incident to his calling as a warehouseman, among which is that of securely keeping the goods entrusted to his care, for a single day or a single hour, without any compensation whatever, simply because he may have received compensation for performing duties incident to another and altogether different calling, I am unable to understand. If, at the moment that the goods are delivered by the railroad company, as a common carrier to itself as a warehouseman, its liabilities as a carrier cease, and its liabilities as a warehouseman begin, it would seem necessarily to follow that at the moment when its liabilities as a

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warehouseman begin, its *rights, as such, among which is the right to charge for storage, would also begin; for it would be a strange anomaly to subject one to the liabilities incident to a calling or position without, at the same time, conferring upon him the rights incident to such calling or position. And yet both of these Massachusetts cases necessarily involve this result. During the period between the deposit of the goods in the warehouse and the expiration of the reasonable time within which the consignee is permitted to remove them without charge, the goods are in the possession of the company, in the one capacity or the other, either as carrier or warehouseman. If the former, then the liability is that of a common carrier. If the latter, then the right is that of a

warehouseman, to charge for storage. The only possible way of avoiding this inconsistency would be to push the doctrine to its legitimate result, by holding that the consignee must not only pay the freight for the transportation of his goods, but also storage from the moment they are placed in the depot until he is able to take them away. To this result, so glaringly unjust, the courts of Massachusetts do not seem willing to go, and hence the inconsistency which has been pointed out. If it is conceded that this question has never been decided in this state, and that the decisions elsewhere are conflicting, I do not propose, now, to enter upon a review or analysis of the cases, my only object being to indicate some of the reasons why I am unable to assent to the proposition above stated.

HASKELL, A. J. I cannot concur that there was error in the first proposition charged, but believing that there was error in the second, I concur in the result.

New trial granted.

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11 S. C. *190

*(Case No. 658.)

R. C. McFADDEN v. A. A. GILBERT & F. E. DINGLE.

(April Term, 1878.)

[*Bills and Notes* ⇐131.]

A sealed note for $1397, dated March 30th, 1870, and payable November 1st, 1871, "in currency at its gold value on the 10th day of January last passed," *held* to mean that the obligor would pay to the obligee at the maturity of the note so much money in currency as $1397 in gold would have commanded on January 10th, 1870. Haskell, A. J., dissented.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 311; Dec. Dig. ⇐131.]

Before Shaw, J., at Sumter, September, 1876.

This was an action by Robert C. McFadden against Allen A. Gilbert and Francis E. Dingle to foreclose a mortgage of real estate given by the defendant, Allen A. Gilbert, to secure the payment of four sealed notes, dated March 30th, 1870.

The main question in the case was as to the construction of two of the said notes, one for $1397, payable on November 1st, 1871, "in currency at its gold value on the 10th day of January last passed, with interest from that date payable annually until the whole is paid;" and the other for the same amount and in the same terms, except that it was payable November 1st, 1872.

Upon the question as to the construction of the two notes above-mentioned, the decree of his Honor the Circuit judge is as follows:

I come now to the main question of law in the case, to wit, the construction of the contract to pay two sealed notes each for the sum of $1397 "in currency at its gold value on the 10th January, 1870."

As stated, in the finding of facts, it was argued by counsel that on January 10th, 1870, gold stood at a premium of twenty per cent. being worth $120, and currency at a discount of sixteen and two-thirds per cent. being worth eighty-three and two-thirds per cent. Either amount in a calculation, will bring the same result. The contract to pay "$1397 in currency, at its gold value, on 10th January, 1870," is not a contract to pay $1,-

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397, but a different *sum, either more or less; whether more or less, depends entirely upon the wording of the sealed instrument itself and cannot be varied or altered by any parol agreement or calculation between the parties, if any such had been proved.

The words of the contract "in currency at its gold value" make evident the intent of both parties that the defendant, Gilbert, was not to be bound to pay in gold, nor to deliver to Mrs. Dingle so much gold as a commodity, but that he should have the privilege of paying, in currency, the amount the contract bound him to pay. The whole is, therefore, reduced to the single question, what amount does the contract bind him to pay in currency?

By admission of all parties $1 in currency on January 10th, 1870, could have commanded in the market only eighty-three and one-third cents in gold; Mr. Gilbert therefore had the right to tender currency, but was bound to tender so much as would command $1397 in gold.

A promise to pay $1397 in currency would be performed by the payment of so many dollars in United States treasury notes, called legal tenders, or in bills of national banks. But the promise in this case is not such a simple one. The value of the currency which was to be used in the payment, was not one hundred cents to the dollar, but its value in gold on a certain day, which value in gold was eighty-three and one-third cents.

The court cannot see how the contract is to be performed except by the payment of so much currency, as estimating each dollar at gold value on January 10th, 1870, to wit, eighty-three and one-third cents, will amount to the sum promised to be paid; upon the principle above enunciated, there was due on December 28th, 1874, on one of said notes the sum of $1507.62, all of which was principal, and on the other note, the sum of $2340.16 of which $1676.40 was principal, and $663.76 was interest.

A decree of foreclosure according to the foregoing opinion was duly entered and the defendant, Gilbert, appealed.

Messrs. Moise & Lee, for appellant.

Messrs. Blanding & Earle and Fraser, Haynsworth & Cooper, contra.

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*November 25th, 1878. The opinion of the court was delivered by

WILLARD, C. J. The question in this case depends upon the construction to be put upon the language of two sealed notes, as it regards the amount to be paid. One of these notes is as follows:

"On or before the first day of November, 1871, I promise to pay to Joseph A. Duffin or order, thirteen hundred and ninety-seven dollars, in currency, at its gold value on the 10th day of January last past, with interest from that date, payable annually, until all is paid, for value received."

The other note is payable in 1872, but is, in all other respects, identical with that recited. The notes bear date March 30th, 1870, and cover the consideration of a sale of property.

It was evidently the intent of the parties that the payee should be put in the same position, as it regards the extent of his pecuniary interest under it, as if the money had been actually paid on the 10th day of January next preceding the date of the note, and the money put at interest at the rate contemplated by the contract. They were dealing in a fluctuating currency, and the parties, no doubt, intended to eliminate the fluctuations that might occur subsequent to the 10th day of January, 1870. If this conclusion be correct, then the instrument is to receive the same construction that would have been given had the parties contracted together on the 10th day of January, 1870, in the following terms, viz.: "I promise to pay J. A. D. this day $1397 in currency, at its present gold value." It is not disputed but that the parties could legally contract with reference to gold as the sole standard of value under the contract, nor that they might contract for payment in currency, according to its market value, in terms of gold instead of its nominal value, so that the amount of currency called for would be that which might be required to bring it to a purchasing value equal to the amount of gold coin called for by the terms of the note. The question placed before us for determination is, simply, what was the intention of the parties? When there are two standards of value of unequal purchasing power, and parties are at liberty to adopt either for their contracts, it is not unusual to find them

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so *doing. Where one of these standards is a fluctuating one, and the other is practically stationary, the motive to select one or the other of these standards as the rule of their dealing, is strong, according as the parties desire certainty in their dealings or the speculative advantage of fluctuations. It is evident that in the present case the parties desired a result certain on the 10th day of January, 1870, but at the same time the payor desired the convenience of liquidating the amount to become due at the maturity of the note in currency, more readily accessible than gold. It is, therefore, clear that they intended to refer the ascertainment of the amount to be paid in currency to the standard of gold value prevailing at that day. The question is, in what manner did they intend to apply this standard? The view taken by the Circuit decree is based on the fact that on the 10th day of January, 1870, $1 in gold was worth "one dollar and twenty cents in currency."

This fact is not disputed. The decree holds that each dollar called for by the notes was to be paid at maturity by $1.20 in currency. On the other hand the appellants contend that in order to ascertain the amount of currency required at maturity, the amount called for must be taken at the gold value of $1397 of currency, according to the value that prevailed on January 10th, 1870; that as each dollar of currency was worth only eighty-three and one-third cents at that time, the actual amount to be paid, measured by gold value, was $1164.12; that this is to be paid in an amount of currency worth at maturity that sum in gold. It follows that, as currency had appreciated at the maturity of the notes as compared with its value January 10th, 1870, a less sum was required in currency than was required by the face of the notes. The difference between the two views is, that, according to the Circuit decree, the value of the contract was fixed in terms of gold, and the quantity of currency required for payment to be ascertained by comparing the value of currency with that of gold on the 10th day of January, 1870, its nominal amount to be increased accordingly; while the appellants contend, in effect, that the amount of $1397 was nominal, merely, the gold value of that currency being the real agreed sum; and that the terms "at its gold value" were not used to estimate the value

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of the *currency by which payment might be made, but to convert a nominal liability, stated by the parties, into a real liability for a diminished sum. The Circuit decree rests on the idea that by "dollars" the parties meant legal dollars of the United States, fixed in reference to a certain quantity of gold of a certain fineness, while the appellants hold that "dollars" means something that was neither according to the standard of gold nor of currency at the date or maturity of the contract, but was an amount agreed on for that purpose, namely, eighty-three and one-third cents. Had the parties contracted in the terms above supposed, viz., to pay, on the 10th day of January, 1870, $1397, in currency at its gold value, the amount called for would have certainly been

that arrived at by the Circuit decree. In that case the words "at its gold value" would have been senseless if the debt could be discharged by currency at the nominal value of $1397 that being less than gold value. To give these words any efficacy in the case supposed, it is necessary to assume that the amount to be paid was to be fixed according to the gold value of "dollars," and the currency to be taken for what it was worth relatively to gold. The result would have been that the amount of currency required on the 10th day of January would have been greater than the amount stated on the face of the notes by twenty per cent. The effect of this rule would be that the amount of currency required to discharge the contract would be unaffected by any subsequent fluctuations in the value of currency relative to gold, and this is the only motive that can be assigned to the parties for fixing a day certain as the basis for computing the relative value of currency and gold. Under the view taken by the appellants, the fluctuation of currency would not be alienated from the calculation of the amount due, for the more the purchasing value of currency increased, the less amount of it would take to satisfy the terms of the contract. On this view the payee would take the whole consequence of present depreciation without the benefit of future appreciation. Thus, as currency was in the course of appreciation, the payee would neither get the benefit of a gold contract nor a pure currency contract, but a mongrel less valuable than either. That the parties had in mind any such artificial rule of dealing is not for one moment to be sup-

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posed. What *were the essential characteristics of a gold contract was well understood by the community, and they often had recourse to such contracts. They also understood what was meant by a currency contract. The idea that "dollar," as used in this contract, should mean the amount of gold that a depreciated currency dollar would sell for on a particular day, is too metaphysical to suppose that it would influence practical dealings. Habits of dealing always enter largely into the construction of contracts. Disputable language in a contract is to be solved, if possible, by reference to familiar habits of dealing.

Fanciful and unusual intentions cannot be ascribed on merely inferential grounds, and without a necessity imposed by the sense of the terms employed.

In the present case there is no difficulty in the language employed to prevent placing the contract in question in the familiar class of "gold contracts," as dealt in by the people, and therefore we are not at liberty to assume intentions of a very special and unusual kind.

We are satisfied with the conclusions of the Circuit decree, and the appeal must be dismissed.

Appeal dismissed.

McIVER, A. J., concurred: HASKELL, A. J., dissented.

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11 S. C. 195

(Case No. 660.)

THE STATE v. F. L. CARDOZA.

(April Term, 1878.)

[1. *Criminal Law* ⟸911, 1156, 1159.]

This court cannot set aside the verdict of a jury on the ground that the verdict was against the evidence, or unsupported by it: such right belongs exclusively to the Circuit Court. The decision of that court is final and conclusive, unless it has committed some error of law.

[Ed. Note.—Cited in State v. Smalls, 11 S. C. 277; Hornsby v. South Carolina Ry. Co., 26 S. C. 191, 1 S. E. 594; State v. Prater, 26 S. C. 206, 2 S. E. 108; State v. Glover, 27 S. C. 608, 4 S. E. 564; State v. Haines, 36 S. C. 514, 15 S. E. 555; Webber v. Ahrens, 36 S. C. 587, 15 S. E. 732; State v. Rhodes, 44 S. C. 331, 21 S. E. 807, 22 S. E. 306; State v. Chiles, 44 S. C. 344, 22 S. E. 339; Jones & Williams v. Fitzpatrick, 47 S. C. 58, 24 S. E. 1030; Gillman v. Florida Cent. & P. R. Co., 53 S. C. 215, 31 S. E. 224; State v. Hayes, 69 S. C. 299, 48 S. E. 251.

For other cases, see Criminal Law, Cent. Dig. §§ 2134, 3068, 3074; Dec. Dig. ⟸911, 1156, 1159.]

[2. *Jury* ⟸70.]

Additional jurors being required at a Circuit Court held in October, 1877, it was proper for the board of jury commissioners in the

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presence of the *Circuit Court, to take from the names of jurors legally in the jury box the names of such as resided within five miles of the court-house, and place them in a separate apartment of such jury box, and then to make their drawing of additional jurors from such apartment.†

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 324; Dec. Dig. ⟸70.]

[3. *Jury* ⟸135.]

Defendant was put upon his trial under an indictment for conspiracy. Jury No. 1 was called, and the state challenged two jurors, and two other jurors were drawn in their stead from the supernumerary list, who were challenged by defendant, before he indicated his acceptance or rejection of any other jurors. *Held*, that the challenges thus made were properly disallowed.†† Willard, C. J., dissenting.†

[Ed. Note.—Cited in State v. Smalls, 11 S. C. 287.

For other cases, see Jury, Cent. Dig. § 606; Dec. Dig. ⟸135.]

[4. *Jury* ⟸79.]

Quere: What is the proper mode of empaneling a jury for the trial of a misdemeanor? Legislation and cases reviewed.

Willard, C. J., and McIver, A. J., hold, that they should be drawn anew, in every case, in open court, and in the presence of the accused, from the whole number of persons serv-

† S. P., State v. Smalls, post page 262.

†† See separate opinion of McIver, A. J., post page 287.

ing as jurors. Haskell, A. J., holds, that the juries should be drawn by lot and organized into juries Nos. 1 and 2, for the trial of misdemeanors, at the commencement of a term of the Court of General Sessions; that when the defendant is put upon his trial, the proper jury in course, in its entirety, should then be presented to him: to supply vacancies caused by challenge, or otherwise, names should be drawn by lot from the list of supernumeraries, and the parties, unless they can show cause, must take them as they are thus drawn.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 349; Dec. Dig. ⟸79.]

[5. *Conspiracy* ⟸33.]

A conspiracy on the part of a public officer, and others conspiring with him, with intent to cheat and defraud the state, through the forms of his own office, is a conspiracy to injure the public, imports a crime under the law of this state independently of the means used for that purpose, and is indictable at common law.

[Ed. Note.—Cited in State v. Davis, 88 S. C. 233, 70 S. E. 811, 34 L. R. A. (N. S.) 295.

For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⟸33.]

[6. *States* ⟸81.]

A false voucher, manufactured by a state treasurer in order to cover the unlawful abstraction of state funds in his hands, is of the very essence of deception, and thereby the state is cheated and defrauded.

[Ed. Note.—For other cases, see States, Cent. Dig. § 82; Dec. Dig. ⟸81.]

[7. *Conspiracy* ⟸43.]

When a conspiracy is formed, which has for its object the issuing of a pay-certificate on the state treasury to a fictitious person, for the purpose of defrauding the state, the crime is then complete, and an indictment which charges a conspiracy to this extent is sufficient, although it does not give a specific description as to numbers, date, &c., of the pay-certificate issued in accordance with such agreement.

[Ed. Note.—Cited in State v. Williams, 35 S. C. 354, 14 S. E. 819.

For other cases, see Conspiracy, Cent. Dig. § 97; Dec. Dig. ⟸43.]

[8. *Conspiracy* ⟸43.]

An indictment charging a conspiracy to defraud the state, as it regards its property or revenue, sustained; although no agreement was alleged to the definite means to be employed for that purpose. Cases reviewed.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43; Officers, Cent. Dig. § 212.]

[9. *Courts* ⟸64; *Grand Jury* ⟸30.]

An extra term of the Court of General Sessions, duly convened, for which no petit jurors were drawn and summoned, *held*, to be a legally constituted court, at which an indictment might be found by the grand jury.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 222; Dec. Dig. ⟸64; Grand Jury, Cent. Dig. § 68; Dec. Dig. ⟸30.]

[10. *Criminal Law* ⟸427.]

It is not error to admit evidence of the

declarations of persons who are *charged as co-conspirators with the defendant, not made in his presence, in advance of any proof of the conspiracy other than the testimony of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1013; Dec. Dig. ⟸427.]

[11. *Witnesses* ⟸255.]

A witness may refresh his memory by memoranda made by himself at the time of the transaction about which he is testifying; and it is not an objection to his use of such memoranda, that they are written in characters capable of being translated only by himself.‡

[Ed. Note.—Cited in State v. Collins, 15 S. C. 379, 380, 40 Am. Rep. 697.

For other cases, see Witnesses, Cent. Dig. § 876; Dec. Dig. ⟸255.]

[12. *Conspiracy* ⟸45.]

On the trial of A under an indictment for conspiracy committed by A, B, and C, entries in the books of B and C, a partnership, made by their clerk, a stranger to the conspiracy, may be received as evidence tending to strengthen the testimony connecting B and C with the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 100; Dec. Dig. ⟸45.]

[13. *Criminal Law* ⟸696.]

It is no ground for striking out evidence, that it fails to amount to proof of what was intended by the party introducing it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1639; Dec. Dig. ⟸696.]

[14. *Witnesses* ⟸277.]

Where defendant's counsel, in a criminal trial, on the cross-examination of a witness for the state, introduces a subject affecting the defendant, he cannot complain if the state's counsel cross-examine the defendant himself upon the same subject, and introduces witnesses in reply, following in the same line of proof.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 980; Dec. Dig. ⟸277.]

[15. *Criminal Law* ⟸510½.]

Where parties to a conspiracy give testimony for the state on the trial of a co-conspirator, entries in their books, corroborating their testimony, alleged to have been made contemporaneously with the transactions which constitute the conspiracy, may be considered by the jury, and if made at the time and for the purpose stated, should be regarded as circumstances in support of their oral testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1131; Dec. Dig. ⟸510½.]

[This case is also cited and reaffirmed in State v. Small, 11 S. C. 262.]

Before Townsend, J., at Richland, October Term, 1877.

This was an indictment against Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff, A. O. Jones and Francis L. Cardoza, for conspiracy.

At a special term of the Court of General Sessions for Richland county, duly convened, which was begun to be holden in Columbia on August 27th, 1877, Judge J. B. Kershaw presiding, the grand jury being in attendance, but no petit jurors having been drawn or summoned or being in attendance, a true bill was found against the parties above named, for a conspiracy to cheat and defraud the State of South Carolina out of $4000, by means of a false warrant or legislative pay-certificate, drawn in favor of C. L. Frankfort, a fictitious person.

‡ S. P., State v. Smalls, post page 262.

The indictment contained four counts. The first count read as follows:

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*That at the times hereinafter mentioned, and before and afterwards, Richard H. Gleaves was president of the Senate of the General Assembly of the State of South Carolina, Samuel J. Lee was speaker of the House of Representatives of the General Assembly of the said state, Josephus Woodruff was clerk of the said Senate of the said state, A. O. Jones was clerk of the said House of Representatives of the said state, and Francis L. Cardoza was treasurer of the said state.

That the said Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff, and A. O. Jones, and Francis L. Cardoza, late of the county and state aforesaid, on the tenth day of January, in the year of our Lord one thousand eight hundred and seventy-four, with force and arms, at Columbia, in the county and state aforesaid, unlawfully, falsely, fraudulently and corruptly, did conspire, combine, confederate and agree together, by divers false pretences, to cheat and defraud the said State of South Carolina of a large sum of money, to wit, the sum of four thousand dollars, by means of a certain false and fraudulent paper, in the form of and purporting to be a warrant on the state treasurer, commonly called and known as a pay certificate, drawn by the said Richard H. Gleaves, president of the senate as aforesaid, and the said Samuel J. Lee, speaker of the house of representatives as aforesaid, on the treasurer of the State of South Carolina aforesaid, and attested by the said Josephus Woodruff, as clerk of said senate, and said A. O. Jones, as clerk of said house of representatives, in favor of one C. L. Frankfort, for the said sum of four thousand dollars for account of legislative expenses, they, the said Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff, A. O. Jones, and Francis L. Cardoza, then and there falsely pretending and asserting that the said warrant was lawfully drawn by the said Richard H. Gleaves and Samuel J. Lee in favor of the said C. L. Frankfort for an amount due to the said C. L. Frankfort by the said State of South Carolina, whereas in truth and in fact, the said warrant was not lawfully drawn by the said Richard H. Gleaves and Samuel J. Lee; and whereas, in truth and in fact, the said warrant was not for an amount due the said C. L. Frankfort by the said state, there being no such per-

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son as the said C. *L. Frankfort, the said name being the name of a fictitious person, and the said warrant being false and fraudulent, as they, the said Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff, A. O. Jones and Francis L. Cardoza, each of them, then and there well knew; and that in pursuance of the said conspiracy, combination, confederacy and agreement so had amongst themselves, the said Richard H. Gleaves, as president of the senate as aforesaid, and the said Samuel J. Lee, as speaker of the house of representatives as aforesaid, on the tenth day of January, in the year of our Lord one thousand eight hundred and seventy-four, at Columbia, in the county and state aforesaid, with the knowledge and consent of the said Josephus Woodruff, A. O. Jones and Francis L. Cardoza, did draw and sign the warrant aforesaid, and thereupon the said Josephus Woodruff, as clerk of the senate as aforesaid, and the said A. O. Jones, as clerk of the house of representatives as aforesaid, did, with the knowledge and consent of the said Richard H. Gleaves and Samuel J. Lee and Francis L. Cardoza, then and there attest the warrant aforesaid, and the said Francis L. Cardoza, with the knowledge and consent of the said Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff and A. O. Jones, did then and there, in payment of the said warrant, give, deliver and issue and divide between them, the said Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff, A. O. Jones and himself, the said Francis L. Cardoza, certain evidences of indebtedness of the State of South Carolina, commonly called and known as certificates of indebtedness, to the amount of four thousand dollars, and of the value of four thousand dollars, the money and property of the said State of South Carolina, they, the said Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff, A. O. Jones and Francis L. Cardoza, and each of them, then and there well knowing that the said warrant so drawn, used and paid as aforesaid, was not a legal and valid warrant, but was false and fraudulent, to the great damage of the said State of South Carolina, to the evil example of all others in like cases offending, and against the peace and dignity of the state.

The second count was substantially the

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same as the first, *except that it charged that the pay-certificate was paid in money, instead of in certificates of indebtedness, as is charged in the first count. The third count differs from the two preceding, in that it omits to allege any payment at all of the pay-certificate.

The fourth count read as follows:

And the jurors aforesaid, upon their oaths aforesaid, do further present: That Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff, A. O. Jones and Francis L. Cardoza, late of the county and state aforesaid, on the tenth day of January, in the year of our Lord one thousand eight hundred and seventy-four, with force and arms, at Columbia, in the county and state aforesaid, unlawfully, falsely, fraudulently and corruptly did conspire, combine, confederate and agree together, by divers false pretences and indirect means, to cheat and defraud the said State of South Carolina of a large sum of money, to wit, of the sum of four thousand dollars,

to the great damage of the said State of South Carolina, to the evil example of all others in like case offending, and against the peace and dignity of the state.

John R. Abney, Solicitor Fifth Circuit.

At general term of the Court of General Sessions for the county of Richland, begun to be holden at Columbia on the 22d day of October, 1877, there were present the Honorable C. P. Townsend, presiding judge, the grand jury, and thirty-one petit jurors, who were drawn and summoned in the manner prescribed by law. There being a deficiency of five, the court ordered a venire to issue for five additional jurors. A majority of the jury commissioners drew from a separate apartment in the jury box, into which had been placed the names of persons resident within five miles of the court-house, long after a proper and legal list of jurors had been prepared for this county for the year 1877, and from such separate apartment returned five names. Two of the jurors drawn on the original panel were then excused, leaving thereby a deficiency of two upon the panel, to fill which deficiency the court ordered a venire to issue for two additional petit jurors. A majority of the jury commis-

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sioners drew from a *separate apartment in the jury box, prepared as hereinbefore set forth, and returned the names of H. P. Green and John Crowley. The said additional jurors were duly summoned and appeared. The petit jurors were then organized by drawing twelve names, including those of Green and Crowley, to constitute jury No. 1, twelve other names to constitute jury No. 2, and the remaining twelve names were put on the list of supernumeraries.

On November 1st the case was called for trial. A nolle prosequi was entered by the attorney-general‡‡ as to the defendants, Samuel J. Lee, Josephus Woodruff and A. O. Jones. Richard H. Gleaves not having been arrested, the trial proceeded against Francis L. Cardoza alone.

Jury No. 1 was called; whereupon the state peremptorily challenged two jurors, and two others were then drawn from the supernumerary list to fill their places. The defendant then challenged these two. The court ruled that the defendant did not have the right to challenge jurors who were drawn to fill the vacancies on the panel—to which ruling the defendant excepted. The defendant objected to jurors H. P. Green and John Crowley, on the ground that they had not been drawn in accordance with law—their names having been drawn from the separate apartment in the jury box prepared as aforesaid. The court overruled the objection, and the defendant excepted. Defendant then challenged five jurors peremptorily, all of whom were on the jury as first organized, and including Green and Crowley. During the progress of the trial several questions upon the admissibility of evidence were raised, which are noticed in defendant's exceptions.

Counsel for the defendant submitted instructions for the jury, upon which the court charged as follows: [Those not brought to the attention of this court being omitted.]

5. "That the fourth count of the indictment is fatally defective in this, that it does not contain a statement of the means by which the alleged conspiracy was effected and consummated; and that upon the said count the defendant should be acquitted."

The court said: "I think, on the authorities, that this count can be sustained."

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*7. "That the facts and circumstances relied on for corroboration must be such as are altogether independent of the accomplice, and taken independently lead to the inference, not only that the offence as charged has been committed, but that the prisoner is implicated in it; that the entries in the book produced by the witness, Woodruff, and the entries in the books of the Republican printing company, do not constitute evidence in corroboration of the evidence of the accomplices, Woodruff and Jones, as against the defendant now on trial, being nothing as against him beyond the mere declarations of the accomplices themselves."

The court said: "This has been charged in part, and in part it has not.

"This evidence has already been admitted by the court for this reason, that when those entries were made in the note book of Josephus Woodruff the conspiracy had not been consummated, and therefore they were the declarations of Woodruff and Jones in furtherance of the conspiracy. The court adheres to that ruling, and they are proper matters for your consideration.

"The same objection was made in the progress of the trial on questions of evidence, and I have already charged you on the first point of this instruction; that is, that those circumstances in corroboration of the accomplices must be independent of the accomplices. That instruction is, therefore, given you again. The latter part of the instruction the court does not feel inclined to give; that is, that the entries in the book produced by the witness Woodruff, and the entries in the books of the Republican printing company, are nothing but the declarations of those accomplices. I charged you that where an accomplice is simply corroborated by declarations made anterior to the date of the transactions, that evidence does not go in corroboration. But these entries were made contemporaneously with the transaction, and they are not unsupported corroboration, but they are facts noted down at the time of the transaction, and, therefore, may go in corroboration of the accomplices."

‡‡ Hon. James Connor.

8. "That the defendant should be acquitted upon the second count in the indictment, unless the jury should conclude from the evidence that the conspiracy alleged to have been consummated was effected by means of

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a false token or counterfeit letter within *the meaning of the statute, and by a payment of money, the property of the state, to the co-conspirators, as therein stated and charged, and, moreover, that such payment was made in pursuance and in furtherance of such conspiracy."

The court said: "This I decline to charge."

9. "That the declarations and admissions of a co-conspirator, made after the plot of a conspiracy is consummated, and not in furtherance thereof, do not constitute competent evidence of the fact of the conspiracy as against others, co-conspirators, and that, therefore, the entries upon the books of the Republican printing company, made after the alleged conspiracy was consummated, and relating only to the distributing of the plunder, should not be considered by the jury as against the defendant."

The court said: "This instruction is refused."

10. "That it being the duty and office of the treasurer of the state to pay joint certificates drawn by the president of the senate and the speaker of the house of representatives of the general assembly of the state, and attested by the clerk of each house, respectively, the fact that the joint certificate referred to in the indictment was paid by the defendant, as such treasurer, ought not to be considered as in confirmation of the evidence of the accomplices in the case."

The court said: "This I decline to charge."

11. "That deception is a necessary element of the offence of cheating; that to the commission of this offence against the state, it is necessary that the means employed should be calculated to deceive, and should actually deceive the state; that in respect of this offence, the state can be deceived only by deceiving the officer or officers of the state with whom the transaction is alleged to have occurred; that where such officer is not deceived, and, within the technical meaning of the term, cannot be cheated; that an officer cannot be convicted of conspiracy to cheat the state where the means employed are not such as, if the conspiracy be consummated, would be sufficient to convict him of the offence of cheating the state; and that upon the charge of conspiracy to cheat the state, as averred in the indictment herein, by means which were not calculated to deceive the defendant, the said defendant cannot be convicted."

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*The court said: "On this, I charge you I do not think it has anything to do with the case."

12. "That in determining the verdict in this case, evidence in reference to other and distinct offences alleged to have been committed by the defendant at times either before or after the transactions alleged in the indictment, must be deemed incompetent, and, therefore, is not entitled to any weight whatever, and should not be considered by the jury."

The court said: "I still charge you on this point, and it is in reference to the 'Merriam' certificate and other fraudulent transactions which the state pretends this defendant had with other parties; the substantive defence is, that this defendant, as an official, was incorruptible. I admitted this testimony in regard to the 'Merriam' certificate in reply to that defence, and, therefore, I charge you now that I still think the testimony is competent as a matter of testimony, and you can take it into consideration."

The case was then given to the jury, who returned a verdict of guilty.

The defendant thereupon submitted a motion for a new trial upon the following grounds: [Omitting such as were not brought before this court for review.]

3. Because the court admitted the evidence of the declarations of R. H. Gleaves as a co-conspirator, not made in the presence of this defendant, before evidence other than that of an accomplice had been introduced to establish the conspiracy, and before evidence of any character had been introduced to connect A. O. Jones with the conspiracy, as charged in the indictment.

4. Because the witness, Josephus Woodruff, was allowed to refresh his memory by reference to a book, purporting to be a diary written in phonographic characters peculiar to the witness, and such as could not be verified in court; and because the said book was received in evidence as against this defendant, and matters said by the witness to be therein contained were translated and read by him to the jury.

5. Because the books of a partnership, known as the Republican printing company, to which the defendant was a stranger, were received in evidence, and entries therein read

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to the jury; *although it appeared that such entries were made by one W. H. Jackson, who was not produced as a witness, and not proved to be dead or absent from the state.

6. Because the entries in the books of the said Republican printing company were received in evidence against this defendant, on the ground that in one instance an entry of $800 to the credit of Josephus Woodruff, should be regarded as a declaration of the said Woodruff, and in another instance an entry of a like sum to the credit of A. O. Jones, as a declaration of the said Jones; although the said entries were made by the said Jackson, without evidence of the knowledge or assent of the said Woodruff and

Jones, and although they contained nothing to establish the privity of this defendant.

7. Because the said entries on the books of the Republican printing company were received in evidence as declarations in corroboration of the evidence of the said Woodruff and Jones as accomplices, before such evidence had been confirmed by the introduction of any independent fact; although the said entries were nothing more, in any point of view, than the mere evidence of the accomplices themselves, and could not be treated as independent facts and circumstances; and although they were declarations, if at all, made after the consummation of the conspiracy, not in furtherance thereof, and with reference solely to a division of the plunder.

8. Because an entry in the ledger of the said Republican printing company, of $9750, "paid to Sunday-school fund, C. L. F.," was received in evidence against this defendant, although the said entry was made by the said W. H. Jackson, an employee of the said company, and was not contained in a book of original entry, and although the witness, Woodruff proved that it did not refer so far as he knew, to the subject matter of the conspiracy in question, but to other and wholly different transactions by the said company with this defendant.

9. Because evidence was admitted in reference to a pay certificate, alleged to have been issued to one F. L. Christopher, which, if connected with this defendant, was irrelevant to the issues herein, and tended to establish a distinct substantive offence, wholly uncon-

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nected with the offence charged in this *indictment; but which, according to the evidence, was issued and paid without the knowledge or consent of this defendant, in the regular order of business and to a reputable banking-house in the city of Columbia.

10. Because the court, during the cross-examination of the defendant as a witness, ruled as competent for the purposes of contradiction, questions in reference to facts and circumstances irrelevant and not pertaining to any of the issues of the case; and for the declared purpose of contradiction, admitted evidence in reply wholly immaterial to the issues, and tending solely to establish against the defendant other and distinct offences, and thereby prejudice the minds of the jury against him.

11. Because evidence was admitted in reply ostensibly for the purpose of contradicting the evidence of the defendant, as a witness, in reference to facts and circumstances wholly irrelevant and immaterial to the issue, as to which the defendant had not been interrogated, and which tended, not to contradict the witness, but solely to establish against the defendant other and distinct offences, and thereby prejudice the minds of the jury against him; and because, for such purpose, entries in phonographic characters in the diary of the witness, Woodruff, were translated by him and read to the jury.

12. Because evidence was admitted in reply which did not tend to establish any fact inconsistent with the defence, but which was cumulative in its whole character, and if competent at any stage of the trial, could only have been introduced as evidence in chief.

14. Because the witness, Hardy Solomon, was permitted to testify, as evidence in reply, to facts and circumstances wholly irrelevant to the material issues of the case, not in reply to evidence introduced by the defence, and with reference to which the witness for the defence had not been interrogated; and upon the admission of this witness that he had testified to the same subject matter before a legislative committee, the printed report of which, in the volume of legislative reports, he presumed was correct, the defence was not permitted to show by reference to the printed report, a material variance in his evidence in this, that whilst the witness testified on the trial that he had paid to

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*Moses $7000, and to Gleaves and Lee, each, $5000, and to the defendant either $3000 or $4000, he testified before the legislative committee that the total amount of his payments on this account was $15,000 or $17,000.

15. Because evidence was admitted to show that a statement in writing was delivered some time early in 1874 to the witness, A. O. Jones, of the assets of the Republican printing company, in the handwriting of Le Grand Benedict, the business manager, containing reference to a certificate of "C. L. Frankfort, $2400," and the entries upon such statement were received in evidence, although it was not proved that Benedict was dead or absent from the state, or that the settlement was true, or that any other fact existed to connect it with the material issues of this case.

16. Because the verdict in the case is contrary to and against the weight of the evidence.†

The motion for new trial was refused; whereupon the counsel for the defence excepted.

A motion in arrest of judgment was then made upon the following grounds:

1. That the jury rendering the verdict herein was not a legal and competent jury, and was not drawn, summoned, and empaneled according to law: In this, that to fill the deficiency in the number of jurors required by law, the names of five persons were drawn from an apartment of the jury box separate from the apartment containing the legal and proper list of jurors prepared

† Under this head six specifications are set forth, but want of space forbids their insertion; and they cannot be material to the case, inasmuch as the court disposes of them "in the first paragraph of its opinion, without reference to their merit.—REPORTER.

at the time and in the manner prescribed by statute; that the jury commissioners of the said county were not authorized by law to place the names of jurors in such separate apartment, and to draw therefrom "the jurors to supply the deficiencies" in the regular panel; and that the persons so drawn were not in law competent to act as jurors. And in this, that the defendant was denied the right of peremptory challenge of jurors

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called to *take the place of other jurors removed from the panel by challenge.

2. That the indictment in each and every count thereof is fatally defective, in that the statement of the offence charged does not contain an averment of a conspiracy to cheat by means of "a false token or a counterfeit letter in another man's name."

3. That the indictment is fatally defective, in that the averment of the purpose and object of the conspiracy charged does not import a crime under the laws of this state.

4. That the indictment is fatally defective, in that the certificate therein referred to as the means by which the offence is charged to have been done and consummated, is not averred to be, and is not in law, either "a false token or a counterfeit letter in another man's name."

5. That the indictment is fatally defective, in that the acts charged against the defendant are repugnant and contradictory; and in that the defendant is charged with having conspired to cheat the state by means which were not calculated to deceive, and did not deceive, the state, because not calculated to deceive, and not such as could deceive, the defendant as the officer of the state charged with the performance of the act necessary to the consummation of the offence.

6. That the indictment is fatally defective, in that the offence therein charged is not set forth and stated with sufficient clearness and certainty; that the means by which, as it is alleged therein, the offence was intended to be, and was, consummated, are not set out either in substance or according to the tenor thereof; that the warrant or pay-certificate, described as the said means, is not set out with sufficient precision and certainty, and by such special and specific description as to number, date, and other peculiar and distinguishing marks as to identify the charge, and fully, fairly, substantially, and formally to describe to the defendant the crime for which he is held to answer.

7. That the special session of the Court of General Sessions, at which, as it appears, the indictment herein was found by the grand jury, was not a legally constituted court for such purpose; in this, that petit jurors were not drawn and summoned, and in attendance, upon the said session of court.

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*The motion in arrest of judgment was denied. In denying the motion for new trial and in arrest of judgment, the court entered the following decision:

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The third ground alleges error in the court in admitting the declarations of R. H. Gleaves, as a co-conspirator, before evidence had been introduced to establish the conspiracy, and before evidence of any character had been introduced to connect A. O. Jones with the conspiracy charged. The court in its ruling distinctly stated the rule of evidence to be, "that when there was prima facie proof of a conspiracy, then the declarations of co-conspirators distinctly relating to and in furtherance of the conspiracy were admissible." There was proof sufficient to establish prima facie the fact of the existence of the conspiracy, and on this ground it was ruled that the declarations of R. H. Gleaves were competent evidence. It was ruled by the court that it was not necessary to the conviction of the defendant to prove a conspiracy on the part of all of the parties mentioned in the indictment, but only in reference to any two or more of them. In the judgment of the court, it was not considered necessary for the state to connect A. O. Jones with the conspiracy, as a prerequisite to the admission of the declarations of Gleaves.

The fourth ground objects to the ruling of the court, in allowing the witness, Woodruff, to refresh his memory, in regard to the conspiracy charged, by reference to a private book containing contemporaneous entries of the transaction. It was ruled by the court, that the witness should be entitled to refer to this book to refresh his memory as to the transaction. The testimony of Woodruff was, that he had made the entries at the time in the book, and he was only allowed to refer to them for the purpose of refreshing his memory. The book was not introduced in evidence.

In regard to the fifth ground, it is only necessary to state that the testimony of Woodruff showed that W. H. Jackson, the party who had made the entries in the books referred to, was absent, and it was not known, nor could it be ascertained, where he was. His handwriting was proved. The books were admitted upon two grounds: 1st, a book containing original entries relating to

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*transactions connected with and in furtherance of the alleged conspiracy; 2d, as containing declarations of co-conspirators relating to and in furtherance of the conspiracy.

The sixth ground is akin to the fifth. Woodruff and Jones were the partners constituting the Republican printing company. The books introduced were the books of the concern. Knowledge of their contents may have been presumed on the part of the two partners. Besides, there was evidence to show that both Woodruff and Jones had full knowledge of the two entries referred to in this ground.

The seventh ground assails the admissibility of the books of the Republican printing company, because they contained declarations of the co-conspirators made after the consummation of the conspiracy, and not in furtherance thereof, and were not independent facts and circumstances of such a character as to render them admissible in corroboration of the accomplices. The entries in the books were not admitted solely for the purpose of corroboration. Even if they had been, having been made contemporaneously with transactions to which they related, they were in the nature of independent facts, because of the impossibility of their fabrication for the purpose, and might have gone in confirmation of the evidence of the accomplices. That they were not made until after the consummation of the conspiracy, and could not have been in furtherance of it, does not appear from the testimony relating thereto, until the entries were made and proper credits for the amounts received by each in the division of the fruits of the conspiracy had been given, it had not been entirely consummated. But the fact, that the books were not admitted to furnish corroboration solely to the accomplices, disposes of this ground.

The eighth ground assails the correctness of the ruling of the court in reference to an entry in the books of the Republican printing company, of $9750, when it was made by one W. H. Jackson, an employee of this company, and Woodruff testified that it did not relate, so far as he knew, to the conspiracy in question. The entry in the book was accompanied with the letters S. S. F. and C. L. F. As the alleged means of consummating the conspiracy charged was a pay-certificate,

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payable to *C. L. Frankfort, and the initials of the payee occurred in connection with the entry, the court ruled that the entry in the books, with the accompanying letters and testimony of Woodruff, should go to the jury, and if they found it related to the conspiracy in question, then they might consider it as competent testimony. It was not admitted as evidence by the court, only to this extent.

The ninth ground alleges error in the ruling of the court, that the pay-certificate issued to one F. L. Christopher was allowed to be introduced by the state. The main defence of the defendant was that he had been a faithful and incorruptible officer. To establish this fact, while Woodruff was on the stand, and in his cross-examination, he was interrogated in reference to a pay-certificate issued to one Merriam, and the paper was produced and introduced in evidence. It was shown by Woodruff that this was a fraudulent claim, and had been presented to the defendant by him, who, instead of accepting it, required Woodruff to mark it cancelled and unused. To meet this general defence, set up while the state was developing its case, this pay-certificate, and others of a like character, issued at the same time with the Merriam certificate, were admitted in evidence.

In the tenth ground, there is error alleged on the part of the court in allowing questions upon the defendant for the purpose of his contradiction in regard to facts and circumstances irrelevant and not pertaining to the issues of the case. It was ruled by the court that the matters about which the defendant was interrogated, for the purpose of laying the foundation for a contradiction, had been rendered material and relevant by the testimony extracted by the defendant's counsel from the witness of the state, as well as that delivered by the defendant himself. A reference to the evidence will disclose the materiality of these matters to the issues of this case.

The eleventh ground contains a general complaint against the admissibility of the evidence in reply for the state. No witness in the reply contradicted the defendant as to any matters except those in relation to which the defendant was specially interrogated. Woodruff, in the reply, did not read to the

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jury from a *book introduced in evidence as such, but referred to it for the purpose of refreshing his memory.

The twelfth ground is general. A review of the testimony admitted in the reply will not sustain the allegation that it was cumulative and incompetent.

The fourteenth ground alleges error, first in admitting the testimony of Hardy Solomon to contradict the defendant in regard to matters not relevant and pertinent to the issues of the case; and second, that according to the report of the testimony of Hardy Solomon before a legislative committee, there was a variance between his testimony then and on this trial, and there was no contradiction in fact. The court ruled that it was competent to contradict the defendant by the testimony of Solomon, because the foundation to do so had been properly laid when the defendant was on the stand, and the matters about which he was interrogated were material, and had been made so by the testimony of the defendant, to the issues of the case. In regard to the proof of the testimony delivered by Hardy Solomon before the legislative committee, the counsel is clearly mistaken. The report of the committee containing the evidence was offered and ruled to be incompetent. But the court distinctly ruled that the witness, Solomon, could be interrogated in reference thereto, and the report might be read in order to refresh his memory.

The fifteenth ground raises an objection to the admissibility of evidence after the trial. When it was introduced, there was no objection made, and it is now too late to assail its competency.

After a careful review of all the testimony,

and a consideration of the objections suggested to the rulings of the court on questions of law, I am satisfied that the motion for a new trial should be denied, and it is so ordered and adjudged.

The motion in arrest of judgment is likewise based upon various grounds. These will now be considered.

* * * * * * * *

The motion in arrest of judgment is refused, and it is so adjudged.

C. P. Townsend.

November 22d, 1877.

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*The sentence was then pronounced upon the defendant as follows: "The sentence of the court is, that the defendant, Francis L. Cardoza, be confined in the county jail for two years, and do pay a fine of four thousand dollars; and in default of the payment of the fine that he be confined in the county jail for one year, to commence after the expiration of the two years imprisonment imposed as a part of this sentence."

(Signed) C. P. Townsend,

November 26th, 1877. Presiding Judge.

The defendant gave notice of appeal.

The grounds of appeal cover the same grounds that are taken in the motions of new trial and in arrest of judgment, and in the exceptions to the judge's rulings and charges.

Messrs. Melton & Wingate, for appellants.

Hon. L. F. Youmans, Attorney-General, Hon. James Connor, late Attorney-General, and Mr. C. R. Miles, for respondent.

Mr. Samuel W. Melton, for appellants.

It is admitted that a motion for a new trial upon the ground of insufficient evidence, is not well made, unless it appear that the preponderance of evidence is so strong against the verdict as to induce the impression that the jury were actuated by motives outside of the case, as made by the evidence; that "negligence, caprice, partiality, corruption, misunderstanding or other such cause, has been disturbing the just exercise of their judgments." 15 Rich. 219.

The learned counsel then reviewed the testimony, and deduced the conclusion that "the judgment is without one jot or tittle of evidence to support it."

The motion in arrest of judgment presents three leading points: 1. That the jurors summoned to complete the panel were not drawn according to law; 2. That the right of challenge to jurors was denied to the defendant; 3. That the indictment is fatally defective in the particulars set forth in the motion in arrest of judgment.

First. Petit jurors for the term had been

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regularly drawn and *summoned from the jury box, properly prepared in January. Gen. Stat. 518. To complete the panel venires were issued for five, and, afterwards, for two more, additional jurors. These additional jurors were drawn from a separate apartment in the jury box, prepared in the manner indicated in Section 4 of act of June 8th, 1877. 16 Stat. 260. But nothing in this act applies to counties, for that year, where proper lists had been legally prepared in January. Under section 23, Chapter CXI. of General Statutes, additional jurors were drawn "from the bystanders or from the county at large, to complete the panel." Section 24 of this act was amended November 19th, 1873, (15 Stat. 485,) and in such amendment the proper mode was indicated of summoning jurors from the bystanders; but the provision relating to the selection of jurors from the "county at large" remained without amendment; and it was the established practice for the officers, when additional jurors were needed, to draw them from the jury box. The act of June 8th, 1877, in its first section, applies only to counties where there had been a failure to prepare a proper list for the year 1877. The second section repeals all laws which provide for the summoning of jurors from the bystanders, and directs that additional jurors shall be drawn, "such jurors to reside within five miles of the court-house." The fourth section provides for a separate apartment in the jury box to be filled when the jury lists are prepared for the year, with the names of those living within five miles, &c. The fourth section can only apply to the preparation of the jury list for each year—that is, in January.

Whilst the second section repealed the law as to bystanders, it did not affect the statute providing for selection from the "county at large." This continued in force, and the second section was intended to qualify it by restricting the selection to such jurors drawn from the box as were resident within five miles of the court-house.

The objection here taken is not to a mere irregularity. It appears upon the record and goes to the substance. The accused was entitled to trial by a jury drawn, summoned and impaneled according to law.

The law is familiar and the cases are abun-

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dant where courts *have interfered thus to protect the integrity of the jury box with an uncommon strictness. 2 N. & McC. 29; 15 Rich. 47; 5 Ired. 58; 1 Gr. & Wat. 171. The cases in this state make such ground good in arrest. 2 Sp. 216; 1 Rich. 189; 15 Rich. 47, supra; 15 Rich. 42.

In those cases which treat lightly certain irregularities, as they are termed, in the impaneling of juries, the irregularities were such as could not by any possibility affect the verdict; and the cases go off rather on the principle that the objection came too late after verdict. 2 McC. 12.

Second. The right to challenge peremptorily two jurors was denied.

At common law, the right of challenge was carefully guarded, and for good reasons. 4

Bla. Com. *353; 12 Whart. 480; 1 Bish. on Crim. Pro., § 935. And the courts are compelled to allow it. 1 Chit. on Crim. Law 534; 1 Denio 310. The court below was possibly misled by hasty reference to decisions under the act of 1841. 11 Stat. 168, and Gen. Stat. 522. The decisions upon this statute are 2 Sp. 418 and 2 Rich. 191, both civil cases. But the wording of the act, as applied to civil and criminal cases, is very different. But this act is repealed under the operation of the act of 1871. 15 Stat. 690, §§ 37, 38; Gen. Stat. 830. So much of act of 1841 as relates to civil cases, is re-enacted in General Statutes, § 26, p. 523. As to criminal cases, it was not re-enacted; but act of 1871 is, and right to challenge to the extent of five is given in cases like this. p. 747.

It is clear that such right in cases of misdemeanor was to be exercised in the same mode as in cases of felony, where it has always been without restriction, except as to number.

Third. There are several defects in the indictment.

1. In indictments for conspiracy, it is necessary, generally, that either the object or the means be criminal. 1 Bish. on Crim. Law, § 174; Whart. on Am. Crim. Law, §§ 2, 291, and note d; Rosc. Crim. Ev. 381. Wharton classifies conspiracies—1. To commit indictable offences; 2. To effect an object by indictable means; 3. To affect the community injuriously. 2 Prec. Ind., ch. 11. The third class is elaborately discussed in 2

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Whart. *Prec. Ind., bottom, p. 97, et seq. It has been also recognized in this state. 2 Hill 282.

Outside of this third class the definition of a conspiracy is easy. 9 Cow. 571; 1 Cush. 223; Whart. on Am. Crim. Law, §§ 2297 or to 2305.

2. A combination to cheat is not criminal, unless the means intended to be employed are criminal; and to be criminal, they must come within the definition and meaning of "a false token or counterfeit letter in another man's name."

This offense is not and could not be included in the third class. It is confessedly referable to the second class, and will be found in 2 Whart. Prec., No. 614, following the sanction of Rex v. Gomperty, 9 Ad. & El. 823. See 2 B. & Ald. 204. But there was no statute of false pretences in South Carolina in 1874, and hence these cases have no application. 2 Whart. Prec. Ind. 93–103. 2 Hill 282, supra, was a case of the third class, and wholly out of this line.

In this state cheating is confined, as at common law, to a fraud accomplished through a false symbol or token, of a nature against which common prudence cannot guard, and which may affect the public, (1 Bish. on Crim. Law, § 571; Dud. 275;) or by statute "by color and means of a false token or counterfeit letter in any other man's name." Gen. Stat. 717. The terms cheat or cheat and defraud, do not, of themselves, import a crime; the object and the means must unite to constitute the offence.

3. An indictment for conspiracy to cheat is, therefore, fatally defective, unless it contain the averment of a combination to effect the object by means of "a false token or counterfeit letter in any other man's name;" and of means which, in law, come within the definition of these devices. 2 Hale P. C. 169; 1 Chit. on Crim. Law 168; 2 Bail. 69; Archb. Crim. Pr. 41; 4 Rich. 194; 3 McC. 190; 1 Bish. on Crim. Proc., §§ 508–530; 5 Barr 60; 49 Ind. 186. The argument is well put in 1 Cush. 189; and see 4 Metc. 111; 7 Cush. 514. The paper in this case may be fraudulent, but in the technical sense of the word cheat, it is not false. 2 Bish. on Crim. Law, §§ 145, 146; 1 Rich. 247; Dud. 275.

4. The indictment is fatally defective, be-

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cause the offence, de*pending upon the character of the means employed, is not set forth with clearness, precision and certainty; and because the means constituting the essential element of the offence charged, are not set out, either in substance or according to the tenor, and by special and specific description as to numbers, dates and other peculiar and distinguishing marks, sufficient to identify the same, and fully, fairly, plainly, substantially and formally to describe the crime for which the defendant is held to answer. Const., Art. I., § 13; Bish. on Crim. Proc., ch. 28; Whart. on Crim. Law, §§ 285–304; 3 McC. 190; 3 Hill 63; 1 Bish. on Crim. Proc., §§ 515–520; Whart. on Crim. Law, §§ 285, 306, 307, 606–608, 1468, 2068, 2598, et seq.; 2 McC. 248.

5. The indictment is fatally defective for repugnancy. The state could have been cheated only by deceiving Cardoza, its agent, who is alleged to have had knowledge. 1 Cush. 33; 7 Car. & P. 352; 4 Barb. 151; 14 Ward. 546; 1 Rich. 244, 247; 2 Mill 135; 2 Bish. on Crim. Law, §§ 144–146.

Errors were committed in the admission of evidence.

Entries of a partnership were introduced without any proof of the death or absence from the state of the clerks who made them; and entries in a book were read by a witness, made by himself in phonographic characters, capable of being translated only by himself.

See remarks of Marshall, C. J., in 7 Cranch 290, 295. Entries may be proven only when made in ordinary course of business. 2 Brev. 156; 4 McC. 76; 2 McM. 306; 1 Strob. 135; 2 N. & McC. 436; 2 Speers 284; 1 Rich. 223; 2 Hill 584; 1 Bay 33; 2 Hill 677; 4 Strob. 193; 2 Phil. on Ev. (C. & H.'s notes) 754. These entries must be established by the oath of the party making them. 2 McC. 157. Nothing but death can excuse the absence of the clerk

who made the entry. 4 McC. 257; Hill & Cow. notes to 2 Phil. on Ev. 694. This privilege of proving entries cannot be extended to strangers to the entry; and as a charge against one, it must be brought home to his knowledge. 1 Sm. Lead. Cas. (6 Am. ed.) *392, *394; 1 N. & McC. 131; 2 Id. 19; 2 Wheat. 117, and note; 1 Phil. on Ev. 320; 2 Id. 674-679, note 489 to p. 265; and note 432 to p. 558. A witness may be permitted

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to refresh his memory by *memoranda, but the memoranda themselves are not evidence. 1 Greenl. on Ev., § 437; 2 Phil. on Ev. 421, 528; 1 Whart. on Ev., §§ 516-526; Ros. Crim. Ev. 134; 2 C. & P. 603; 3 T. R. 749; State v. Rawls, 2 N. & McC. 331; 1 Rich. 234. As to the kind of memoranda which may be used, see 1 Sm. Lead. Cas. *402; 1 Mill 336; 5 Wend. 301; 1 Barb. 535. But it must be the original, not a copy. 1 Rich. 234, supra; 2 C. & P. 196; 2 Whart. on Ev. § 578; 2 Phil. on Ev. 756. A translation is no better than a copy; the courts will never extend the rule. Moreover, the memoranda refer to matters subsequent to the conspiracy, and are, therefore, inadmissible. Whart. on Ev. § 1206.

Evidence was admitted of distinct matters wholly irrelevant to and disconnected with the issues of the case. 2 Russ., by Graves, 772. A witness may not be questioned concerning an irrelevant fact, with a view to discredit or contradict. 1 Phil. on Ev. 210; 7 East. 108; 2 McC. 230.

Entries made in the Republican printing company's books were admitted as declarations of Jones and Woodruff. Facts which are regarded as confirmation of an accomplice, should be wholly independent of his testimony. 2 Stark. on Ev. 233, et seq.; 1 Bish. on Crim. Proc., § 1081, and notes; 2 Archb. *662; 3 Phil. on Ev. 1504.

The court refused the eighth instruction to the jury, asked for by defendant. It should have been charged in whole or in part. 1 Bish. on Crim. Proc., § 980.

Mr. C. R. Miles, contra.

Motion in Arrest of Judgment.—Of the seven grounds taken on this motion, the first and seventh relate to the jury, and the other five to the indictment.

The Jury.—1. The jury were drawn in conformity with the law as declared by act of June 8th, 1877—16 Stat. 259. See §§ 2, 4. The fifth section repeals all acts and parts of acts which are inconsistent with this. Before that, supernumeraries were drawn under Section 19 of act of 1871 (Gen. Stat. 522, § 23), but the act of 1877 declared that no jurors should be summoned from the bystanders: so that they could be drawn in this case only under act of 1877.

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*1(a). The defendant objects that he was not allowed to challenge peremptorily the jurors called to take the place of the other jurors challenged by the state.

The jury act of 1871 (14 Stat. 692; Gen. Stat. 522) does not apply to the impaneling of juries in criminal cases: that must be according to the established practice. Sec. 19, Act of 1871. Under this act the defendant was entitled to five challenges, and the state to two. Previous to 1856, the established practice in making up a jury for the trial of one entitled to challenges, was to call the names of jury No. 1, beginning with the foreman, next jury No. 2, in the same way, and then the names of supernumeraries were drawn from a box. 3 Strob. 508, recognized in 10 Rich. 412. Then followed the rule of court (No. 97) for drawing in cases of felony (10 Rich. 549), which was sustained in 10 Rich. 351, 407, and 11 Rich. 581. The same rule was adopted in 1870, as Rule 26. This indictment not being for felony, the rule of court does not apply.

The right of challenge to jurors was extended to misdemeanors and civil causes by act of 1841. 11 Stat. 154. This act has been construed in civil cases. 2 Speer 418; 2 Rich. 191. The course pursued in this case was thus conformable to principle and practice.

The 7th ground in arrest of judgment is based on matter not appearing on the record, and came too late after verdict; the objection should have been taken by plea, before the grand jury at the trial term had been discharged, in analogy to the plea of misnomer, so that if sustained a new indictment might have been given out. But the objection is disposed of by statute—see Sec. 28, Gen. Stat. 570—showing that special sessions may be held for special cases; and Sec. 10, Gen. Stat. 520, showing that there may be special sessions not requiring a jury.

The indictment.—The five other grounds for the motion in arrest of judgment allege defects in the indictment. We take issue with appellant on each and every of these propositions, and submit—

1. That this indictment does sufficiently charge a conspiracy to cheat by a false token or counterfeit letter.

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*2. That an indictment lies in this state for cheating by means other than a false token or counterfeit letter.

3. That indictment lies for a conspiracy to do an illegal act which is not indictable.

4. That the deception in this case consisted in the false and fraudulent official representation that the state was indebted to C. L. Frankfort, and drawing a certificate therefor in the form of a public certificate or voucher, as prescribed by law, which was calculated to deceive the public, and did actually deceive the officer of the treasury who paid it.

5. That the means are fully and sufficient-

ly alleged in the indictment; but that it is not necessary to set forth the means.

1. Even if it was necessary to charge the conspiracy to cheat to have been by means which would sustain an indictment to cheat by a false token or counterfeit letter in another man's name, this indictment would be sufficient. The legislative pay-certificate was "a false public token," and the fictitious endorsement of C. L. Frankfort constituted "a counterfeit letter." 2 East P. C. 383, 832, 833; 1 Bish. on Crim. Law, § 571; 2 Id., § 543; 1 Rich. 244; 4 East 164. If the indictment shows the instrument to be a false token, it is not necessary to aver it. Cro. Car. 564; 3 Chit. on Crim. Law 199; 2 East P. C. 838; 2 Archb. C. P. & P. 1421.

2. An indictment lies in this state for cheating by means other than a false token, &c. See act of 1791—5 Stat. 177, and Gen. Stat. 719. 5 Strob. 159; 1 Bay 353; Dud. 275; 2 Mill 138.

3. An indictment lies to do an act which is not indictable. A conspiracy is a confederacy of two or more persons to accomplish some unlawful purpose, or a lawful purpose by unlawful means. 2 Bish. on Crim. Law, §§ 171, 175, and note, and 180; L. R. C. C. 274; 5 Har. & J. 317.

4. In an indictment for conspiracy to cheat, it is not necessary to allege or prove an actual deception, but only that the means used were calculated to deceive.

Although the defendant was not deceived, he was not the state, and the state was ac-

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tually defrauded. 2 Arch. C. P. & P. *[618], note; 5 Har. & J. 317; 2 Bish. on Crim. Law, § 175, note.

5. The indictment is drawn in conformity with the precedents of highest authority.

1 Chit. on Crim. Law, 1145, 1185; 2 Whart. Prec., ch. 11, p. 606; 2 Archb. C. P. & P. [618.] The indictment was drawn in accordance with the advice of Wharton. 2 Whart. on Am. Crim. Law, § 2297, (a); Whart. Prec. (1st ed.) 339, 340. An indictment merely averring that "defendants conspired by divers false pretences and indirect means to cheat and defraud" is sufficient. It is not necessary to insert overt acts—the conspiring is the offence, and the overt acts are merely matter of evidence to prove the charge. 1 Leach 274; 2 B. & Ad. 204, the leading case; 7 Ad. & El. (N. S.) 721; 9 Id. 824. For the history and discussion of the decisions, English and American, see 2 Archb. C. P. & P. [616], and notes; 3 Whart. on Am. Crim. Law, §§ 2299–2305, 2335; 2 Bish. on Crim. Law, ch. XI., § 199–201; 4 Wend. 232; 5 Har. & J. 317; Whart. Prec. of Ind. 33. The only cases of conspiracy in the South Carolina reports are 2 Hill 282; 4 Strob. 266; 8 Rich. 72; 7 S. C. 283.

The judge did not err in refusing defendant's second request to charge. 3 Whart. on Am. Crim. Law, § 2339; 2 Bish. on Crim. Law, § 188.

Motion for New Trial.—1. The evidence of the declarations of Gleaves and Jones was not admitted until after proof of the conspiracy. There is no rule which requires the conspiracy to be first proved by evidence other than that of an accomplice. 1 Greenl. on Ev., § 111.

2. The diary of Woodruff was used only to refresh his own memory, and it mattered not that it was in language or characters which the court or jury could not read. 1 Greenl. on Ev. 437.

3. Entries in the Republican printing company's books were independent facts, which corroborated the evidence of Lee and Woodruff, that the conspiracy was to be carried out by exchanging the Frankfort certificate with Cardoza for certificates of indebtedness of the Republican printing com-

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pany, and evidence of *them was therefore admissible. 1 Greenl. on Ev., § 120; 2 Whart. on Ev. 1206.

4. The report of Woodruff's evidence is inaccurate. The judge submitted it to the jury to say whether the initials and other circumstances showed that this entry related to the conspiracy.

5. The statement made up by the business manager from the books of the company was a fact in corroboration, and admissible. Besides, no objection was made to the production of the paper.

6. The Christopher and other certificates were properly admitted in contradiction of the defence attempted to be set up upon the subject of the Merriam certificate. 1 Whart. on Crim. Law, § 649; 1 Greenl. on Ev., § 53; 1 Whart. on Am. Crim. Law, § 631; 2 Tread. 776; 1 Bail. 300; 3 Whart. on Am. Crim. Law, § 2358. And it was not objected to.

7, 8, 9, 10 and 11 are sufficiently answered by the rulings of the judge. We submit that the rulings of the judge upon all material points were correct.

13. The judge charged this instruction as asked.

The instructions prayed all relate to the testimony of accomplices and its corroboration. Upon this subject see 1 Greenl. on Ev., § 379, et seq; 1 Archb. C. P. & P. 154; 3 Strob. 517; Id. note; Joy on Ev. Accom. 98, cited 1 Greenl., § 381, note; 2 Russ. on Cr. 330; 3 Strob. 519–21, 526.

November 29th, 1878. The opinion of the court was delivered by

WILLARD, C. J. It has been so often held that this court cannot set aside the verdict of a jury in a case in the nature of an action at law or in a criminal case, on the ground that the verdict was against the evidence, or unsupported by it, that it is not necessary to consider that portion of the appeal that

makes such a demand, farther than to say that it is not competent for this court to say, on appeal in such a case, that a discrepancy between the evidence and the verdict based upon it, is so great as to warrant the inference that the jury were influenced by improper consideration. The proper place to examine questions of that nature is at the Circuit, and the decision of the Circuit Court,

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*so long as no error of law is committed by it, is final and conclusive.

The first point to be considered relates to the regularity of the drawing and impaneling of the petit jury. Section two of the act of June 8th, 1877, (16 Stat. 259), provides that "when, by reason of challenge or otherwise, there is a deficiency in the number of grand or petit jurors duly drawn and summoned at any term of the court in any county of the state, the judge of the Circuit Court shall order the board of jury commissioners, or a majority thereof, forthwith to attend in court and to draw, in the presence and under the direction of the court, such number of jurors as the court shall deem necessary to fill such deficiency; the jurors so drawn to reside within five miles of the court-house." It is conceded that such a case of deficiency arose in the present case, and that a majority of the jury commissioners, under the direction and in the presence of the court, drew from among the names of such persons as the law contemplated for that purpose, the number required to supply such deficiency. It is not alleged that the names from which such drawing was made included any that did not properly belong there, or excluded any that should have been subjected to such drawing.

The objection is that the names drawn were contained in a compartment of the box separate from that which contained the names of the jurors from the county at large, and that such names were not selected and placed in such compartment by the authority of law. It must be assumed, though not distinctly stated, that the selection of the names from those of the jurors at large was made by the jury commissioners, and such names placed by them in the compartment of the box from which the drawing was made, inasmuch as to allow that selection and interference with the jury box by an unauthorized person, would be a breach of official duty on the part of the jury commissioners that cannot be presumed. It is not stated when the names of such jurors were placed in the partition from which the drawing was made, the only statement of irregularity being that it was done "long after a proper and legal list of jurors had been prepared for this county for the year 1877." We are at liberty to assume that such selection and transfer to

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the separate compartment was made *by the jury commissioners in the presence of the court for the purposes of such drawing. The proposition on which the appellant relies is, that there was no authority of law for the selection and removal of the names of the jurors residing within five miles of the court-house from the other names of jurors into a separate compartment of the box and making the drawing therefrom. It is contended that the only authority for such an act is that contained in the fourth section of the act of June 8th, 1877, which contains as follows: "When the jury lists are prepared by the jury commissioners for each year, they shall place in a separate apartment in the jury box the names of fifty persons, qualified by law to serve as jurors, who reside within five miles of the court-house, from which shall be drawn the jurors to supply the deficiencies provided for in the second section of this act." By this section the number to be so placed for the county of Richland is fixed at one hundred. It is also contended that as the jury lists in question were prepared prior to the passage of the act of June 8th, 1877, no opportunity ever existed for the exercise of the power conferred by section four. No question is made here as it regards the number of names placed in the separate compartment. It is not stated that such number was in excess of one hundred, the number provided for in section four, nor that it was less than that number. Had the whole number of names of persons liable to jury duty residing within five miles of the court-house exceeded one hundred, and had the jury commissioners, at the time of drawing, confined the drawing to a less number than that of the whole number of persons having the qualifications indicated by the statute, a question might have been presented here, whether such a rejection from the drawing of the names in excess of one hundred could be made at any other time or in any other manner than that pointed out by the law. But as it neither appears that names of jurors residing within five miles of the court-house were excluded, nor the number of one hundred exceeded, no such question arises for consideration.

We cannot assent to the proposition that the action of the jury commissioners had no other sanction than that of section four of the act mentioned. Assuming that the jury commissioners, when called upon to draw from the persons residing within five miles

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*of the court-house the names of a certain number to supply deficiencies, found that no such discrimination among the names in the box had been made, as it was essential to the discharge of the duty imperatively imposed upon them by section two of the act, that such a discrimination should be made, they had clear implied authority to make it. Whether they selected in the first instance from the whole number of the names in the box those subject to the drawing to supply

deficiencies, and from among such made the drawing, or drew from the box at large, rejecting such as were not subject to such drawing as their names were drawn, is entirely immaterial. The difference between the two modes of procedure is formal and not substantial, and, as in case of a drawing at such time and place, form is not made material by the statute, we can only look to the substance of the act. State v. Jennings, 15 Rich. 42, for this reason, does not apply to the case in hand. It is matter of indifference whether a previous opportunity for making such selection had been afforded by the law and neglected, or had not been afforded, the duty of selection was equally inoperative. The jury commissioners were not performing an act for their own benefit, permitted to them on conditions, but an act essential to the administration of justice, and every intendment must be made in favor of the sufficiency of their authority.

There was not, in any legal sense, an irregularity, as affecting the legal results of the drawing, and therefore it is not necessary to examine the authorities cited by the appellant bearing on the question of what irregularities in the drawing and impaneling of juries are fatal. The exception to the drawing and impaneling of the jury was not well taken.

The next exception to be considered affirms that, upon the trial, the court denied the accused the right of peremptory challenge as allowed by law. The defendant was entitled to five peremptory challenges. Gen. Stat. 747, § 3. He claimed the right to challenge four of the persons drawn and returned as petit jurors. His challenge was allowed as to two of the jurors and disallowed as to the other two. The consequence was that the jury by whom he was tried included two to whom he had peremptorily objected, notwithstanding

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the whole number of chal*lenges allowed by law had not been exhausted at the time of the attempted challenge.

The ground on which such exclusion is defended is that the two persons who were permitted to sit as jurors, notwithstanding such peremptory challenge, had been drawn from the supernumerary list to supply the places of two others who belonged to jury No. 1 who had been excluded by challenges. This virtually confines the right of challenge in criminal cases so as to affect only the persons placed in one of the juries organized for the trial of civil causes. It assumes that other persons drawn and impaneled are not to be excluded, whatever objection may exist in the mind of the accused, to their occupying that relation to him.

It is too clear to admit of doubt that the right of the accused to challenge any five of the persons drawn and returned as jurors could not be affected by the peculiar constitution of the regular juries and the supernumerary list for the trial of civil causes. In the first place, there must be a new jury impaneled in each criminal case. Gen. Stat. 747, § 8. The direct and intended effect of this section is to make the selection of jurors in criminal cases depend wholly on the results of a drawing in open court, in the presence of the accused, from the whole number of persons serving as jurors. The occasions of its adoption were that a different rule prevailed in civil causes. In the last-named case parties were required to take a standing panel, deficiencies arising to be supplied from the list of supernumeraries.

Accordingly in presenting to the accused in the present case jury No. 1, only competent for the trial of civil causes, for his peremptory challenges, it was assumed that the jury thus constituted was competent to try the case. Such was not the fact independently of the assent thereto of the accused. It is true that the appeal does not present to us any objection to the mode in which the jury was impaneled other than that of the disallowance of the challenges, and therefore we are not called upon to say that there was error in constituting the jury otherwise than by a new drawing; but upon the question of the right of peremptory challenge, this consideration cannot be decisive. It may well be that the accused was content to waive a

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new draw*ing, but he has evinced no intention to waive the right of peremptory challenge and its proper incidents. The right of peremptory challenge is not a formal right merely, but substantial and vital to the proper administration of criminal justice. The fact that the accused was willing to waive any advantages that might arise from an impartial drawing in his presence is no ground to assume that he intended to waive objection to the sitting of persons whom he considered unfit, for reasons satisfactory to himself, to sit as jurors in a matter affecting him. The state could not well insist that one concession should embrace the other, because they were not necessarily connected or dependent on each other.

If the state and the accused should agree together that the jury should be impaneled in alphabetical order, or in any other way that might mutually suit them, while it is not for the court to deny them that right, still we cannot travel beyond the terms of their concession and make out a new law for the case, composed in part of rules governing civil procedure and in part of the rules applicable to criminal proceedings.

On the contrary, the right of challenge being a distinct and substantive one, must be deemed unaffected by such concession, and must be administered in the mode prescribed by the law applicable to the case. Charleston v. Kleinback, 2 Speers 418. The method of drawing jurors in civil cases is stated and distinguished from the mode of drawing in

criminal cases in this case. It was material that such distinction should be pointed out, as it was a qui tam action and had to be referred to either the one class or the other. It was held to appertain to the class of civil causes.

The principal question in the case appears to have been whether the plaintiff could challenge peremptorily unless that right was fully exercised before the defendant was called upon to make his peremptory challenges. It was held that where in civil causes it was necessary to have recourse to supernumeraries they were considered as talesmen, and that if either party desired to exercise the right of challenge there should be a new drawing among such persons. This undoubtedly implies that the right of peremptory challenge might be exercised against persons

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on the *supernumerary list. The object of redrawing was to prevent the party intending to challenge peremptorily from virtually selecting a jury by means of his challenges, as he might to some extent do if the supernumeraries were called in their order on the list, that order being known to the party intending to challenge. Whatever may be considered the ruling of this case, it is in terms confined in its application to civil causes.

Durant v. Ashmore, 2 Rich. 184. In this case O'Neall, J., says: "After jurors have been challenged and others have been drawn in their places, neither party can, under the act of the legislature, challenge the jurors so drawn." State v. Kleinback, 2 Speers 418. It is to be presumed from the error in this citation that it was made from general recollection.

The report of the case of Charleston v. Kleinback, which it is presumed is the case to which reference was here intended, does not appear to go to the extent or even in the direction claimed for it. However this may be, both were civil causes, and the rule laid down must be confined to such causes. Although the distinction is not clearly drawn in Durant v. Ashmore, independently of the nature of the case itself, yet what is there said is so said on the authority of Charleston v. Kleinback, and the latter case pointedly enforces such distinction. It is not necessary to consider the rule stated in Durant v. Ashmore in its application to civil causes, but clearly it has no application to criminal causes. Whatever may have been the proper construction of the act of 1841, (11 Stat. 154,) that act is inapplicable to criminal cases at the present time, the right of peremptory challenge being governed at the present time by the General Statutes, § 3, p. 747. By the terms of the present law no limitation, except as to number, is imposed upon challenges in criminal cases.

As it regards the crimes of murder, manslaughter, burglary, arson, rape and grand larceny, reference is made to pre-existing laws in the following words: "In the manner prescribed by law;" but these words are not used in the subsequent part of the section that relates to the right of peremptory challenge in all other criminal cases.

It must be concluded, therefore, that the right as conferred by the General Statutes in cases other than those specifically enumer-

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*ated above, was intended to be complete as thus quoted without dependence on any preceding statute of limitation, and to be interpreted only in the light of the rules of law applicable to the subject. It must be concluded that the challenges were improperly refused.

The appellant alleges that the indictment is defective, "in that the statement of the offence charged does not contain an averment of a conspiracy to cheat by means of false tokens or a counterfeit letter in another man's name."

This is connected with the next objection, to the effect "that the averment of the purpose and object of the conspiracy charged does not import a crime under the laws of this state." If the latter proposition is unfounded, the first stated is immaterial. The precise question, then, is whether a charge of conspiracy against a public officer and others conspiring with him, with intent to cheat and defraud the state, as it regards matters appertaining to the duties of such public officer, imports a crime by the laws of this state independent of an averment of the employment for that purpose of a "false token or a counterfeit letter in another man's name." This is a much narrower question than that discussed at bar, but includes all that need be considered in the present connection. In considering what may or may not be regarded as an indictable conspiracy, the question must be asked whether the object of the conspiracy was to injure the public or private individual. If it was to injure the public, then the public has a direct interest, either residing in the community at large or in the state as a corporate body; if to injure an individual, then the public has an indirect interest only, as concerned in the maintenance of order, the administration of justice, and the like. As an indictment is, in its nature, one of the modes of redressing public wrongs, it is material to inquire whether the wrong alleged in its direct and primary intent tended to the public injury, or became such only through the intervention of statutes and rules of law, defining what private injuries should be regarded as detrimental to the public.

A conspiracy to injure or defraud the public is indictable as such, independent of the special character of the means employed for that purpose.

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*This will be found abundantly supported by the authorities. The authorities are uni-

form that a conspiracy to injure or defraud the public is indictable at common law. Johnston, J., in State v. De Witt, 2 Hill 282 [27 Am. Dec. 371], correctly says: "All agree that a combination to do a public mischief is indictable." He instances the cases of injuries to health, vending unwholesome food, manufacturing base articles for public sale, imitating good ones, and to defraud the revenue.

All the counts of the indictment charge a conspiracy of the defendant, as state treasurer, with divers persons, to cheat and defraud the state out of a large sum of money. If, therefore, the charge is sufficiently full and clear, there can be no doubt but that it sets forth an indictable offence. It is contended, however, that, independently of a statement that such conspiracy to defraud was intended to be carried out by the use of a "false token or counterfeit letter in another man's name," the facts charged do not constitute a crime. This argument ignores the important distinction between acts tending directly to the public injury and acts primarily affecting individuals, made criminal only as they affect the administration of justice, or as they are to be accomplished by means of false tokens and pretences. The causes illustrating this distinction are numerous. State v. De Witt, 2 Hill 282 [27 Am. Dec. 371], and State v. Shooter, 8 Rich. 72, are cases of this class. In the first-named case the act in question was the destruction of a deed, while the latter case was one of the attempt to fabricate evidence by procuring a deed through false pretences. In both the injury intended primarily affected individuals alone, but became indictable through the fact that the creature of false testimony and the destruction of true testimony, tended to injure and impair the administration of justice.

In Lambert v. People, 9 Cow. 578, Senator Spencer, who delivered the leading opinion, holds that an indictment will not lie for a conspiracy to produce a private injury, "which is not a crime in itself, and does not affect the public or obstruct further justice." If the question is as to the character of the conspiracy, as judged by the nature of its object, this statement is free from objection. The mere fact of intending to cheat or defraud an individual is not, in itself, criminal,

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whether on the part of one *or many. When it becomes criminal it is through the means intended to produce such effect. A false token and counterfeit letter are means of that character. A false token and counterfeit letter are things that may affect others than the immediate object of the cheat; they may be capable, to some extent, of maintaining a credit with the public. A forged note or bill, receipt or letter, attired so that it may become detrimental to the community at large, is a clearly recognized injury to the public. It is not distinguishable from the case of spurious goods offered for public sale, in principle. State v. Rickey, 9 N. J. 293. This subject is fully discussed and the authorities reviewed at large in this case. It is conceded that when the injury is against the public the conspiracy is indictable; but that when the injury is intended to an individual only, it is not indictable, unless the means employed are criminal.

The objection of appellant, that the certificate referred to in the indictment is not in law "a false token or a counterfeit letter in another man's name," is disposed of by what has already been said.

It is alleged that the indictment is defective, for the reason that the acts charged against the defendant are repugnant and contradictory. This is connected with the further statement that the defendant is charged with having conspired to cheat the state by means which were not calculated to deceive, and not such as could deceive the defendant, as the officer of the state charged with the performance of the act necessary to the consummation of the offence.

The first, second and third counts of the indictment allege the means by which it was intended that the state should be defrauded, namely, by a forged pay-certificate, representing that a fictitious person was entitled to payment on account of an appropriation to pay legislative expenses, attested by the officers of the legislative bodies authorized by law to attest demands of that nature. If there had been such person as C. L. Frankfort, and the state had been indebted in the manner stated in that certificate, then it would have been the duty of the defendant, as state treasurer, to have paid such certificate in such manner as might be provided by law. On such payment being made, in

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the due *course of his duty at that time, such certificate would have been retained in the treasury as a voucher for such payment, and on its production it would have appeared that such payment had been properly made.

The substance of the appellant's objection is, that a false voucher by a disbursing officer, in order to cover the unlawful abstraction of funds in his hands, is not so to be regarded as a means of deception. Possibly it may be that it does not come up to the conception of a false token as essential for the foundation of a criminal charge in the case of an attempt to cheat a private person, when it was not intended, or of a nature to be so placed that the community at large might be affected by it as a means of obtaining credit; but as to this we are not called upon to decide. That such a means of covering a delinquency is not repugnant or contradictory to the idea of deception, is too clear to admit of argument. To manufacture a false voucher for the payment of money is of the very essence of deception.

The next objection to be considered is,

"that the indictment is fatally defective in that the offence charged is not set forth and stated with sufficient clearness and certainty; that the means by which it is alleged therein the offence was intended to be and was consummated, are not set out either in substance or according to the tenor thereof; that the warrant or pay-certificate described as the said means, is not set out with sufficient precision and certainty, and by such special and specific description as to numbers, date and other peculiar and distinguishing marks, as to identify the charge, and fully, fairly, substantially and formally to describe to the defendant the crime for which he is held to answer." It will be considered with reference to the fourth count whether a specification of the means intended for the consummation of the fraud alleged is essential to an indictment of this character. As it regards the first, second and third counts, the state has assumed to set out such means, and assuming such a statement to be necessary, it is clear that even the stringent rule claimed for the appellant has been complied with. The character of "the pay-certificate" is described as a warrant on the state treasurer for a sum certain on account of legislative expenses; the name of the fictitious person to be employed is stated; the persons to sign

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and *attest the certificate are stated. The crime was consummated when the parties to the transaction agreed together as to the purpose of defrauding the state, although the intended injury remained to be consummated. If the conspiracy had related to an instrument existing prior to the time of such conspiracy, there might be a propriety in pointing out the instrument intended by indubitable marks. Had this been the case, the identification afforded by the description in the indictment would still have to be regarded as complete. There would be no reason to assume that more than one such certificate as that described in the indictment existed rendering further specification necessary to identification. But as the conspiracy had for its object the production of such a certificate, all that could be averred with propriety was what the conspirators may have agreed concerning it. If numbers, names and marks subsequently put on the paper were not then in contemplation of the parties as material features of the certificate, they could not properly be alleged as comprehended in the direct objects and intents of the conspiracy. Looking at these three counts in the light of the charges in the indictment alone, this court cannot say that more nor less than is stated was comprehended in the terms and intention of the agreement of conspiracy.

The objection here is to the indictment and not to the character and sufficiency of the proof under it, and, looking at the indictment alone, we cannot affirm that anything is wanting that we have a right to assume as existing and forming part of the scheme of conspiracy. The crime charged is fairly, substantially and formally described, so that no possible doubt could exist in the mind of the defendant as to the nature of that for which he was held to answer. As it regards the fourth count, the objection assumes a different character.

This count charges that the persons indicted, on a certain day unlawfully, falsely, fraudulently and corruptly did conspire, combine, confederate and agree together, by divers false pretences and indirect means, to cheat and defraud the State of South Carolina of a large sum of money, to wit, "the sum of four thousand dollars, to the great damage," &c.

This count affirms two things. First. An

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unlawful conspiracy *to defraud the state out of a certain sum of money. Second. That the means of accomplishing it was to be by false pretences and indirect means.

Now, assuming that this was all that was agreed upon among the conspirators, an assumption that we are bound to make for the purpose of considering this count, did such act amount to an indictable offence?

That such an act of conspiracy is indictable, the authorities afford abundant means of establishing; but there are not wanting sufficient reasons why the common law, that seeks to afford a public remedy for every public wrong, should furnish the means of punishing such a conspiracy. To illustrate the principle involved, suppose that a conspiracy had been formed to rob on the highways, but no person had been designated as the special subject of such robbery, and no definite place or means of overpowering the victims of the plot formed part of the agreement of conspiracy. Money and arms are collected to carry out the conspiracy, the band is divided, distributed and posted, some for purposes of direct attack, others to watch against surprise, and others to reinforce a weak party. No action has yet appeared to put in exercise the formidable combination of force and skill. At this stage of the operation the parties are arrested and charged with a conspiracy to rob. Must the charge fail because the terms of the conspiracy did not embrace circumstances of time, place and person, as it regarded the accomplishment of its purpose? If so, then it would not be possible, even after the plan had been carried out, to punish the conspiracy, for, in the first place, the crime was consummated, if at all, at the moment the agreement was made, and if conviction in any such case could not take place prior to the actual commission of the intended crime, it was because no crime had been committed, nor could the character of the conspiracy in that respect undergo any change after it was consummated by an unlawful agreement. In the second place, the moment the right to punish the

conspiracy arose it would be destroyed by merger in the offence of higher grade flowing from it. It would be a just reproach to the common law if it afforded no means of dissipating combinations threatening the destruction of legal security, however formida-

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ble *they might be, because the objects were general and threatened the community indefinitely, and were not aimed at some particular member of the community, or to some other limited and defined sphere. On the contrary, as we have seen, one of the great objects of this jurisdiction is to protect the community at large; and the protection of the individual is subordinate to that end.

The principle just illustrated applies with equal force but under altered circumstances in the case under consideration. Here the protection demanded is for the public property of the state, and those who confessedly violate the law by conspiracy to obtain unlawful possession of such property ought not to be permitted to shield themselves by saying that the object of their conspiracy was to lay hold of any property of the state they could reach by any means, and not to appropriate any designated piece of property by predetermined means. Yet this is the position the defendant must assume in order to ask that the fourth count may be adjudged bad. The question must be brought to the test of the authorities which will now be considered.

King v. Ecles, 3 Doug. 336. This was an indictment for a conspiracy to impoverish "H. B." and to deprive and hinder him from following and exercising his aforesaid business of a tailor. It was moved in arrest that the charge was general. It was held that it was not necessary to state the means, as the end was well stated. It is clear that the court regarded the conspiracy as indictable in respect of its object alone, and therefore a statement of the means was not essential to the description of the offence. It is not necessary to examine the assumption on which the conclusion rested, as the conclusion itself is clear that it is not essential in order that a conspiracy should be indictable that the means should be predetermined. Rex v. Gill, 2 B. & Ald. 204. This case is to the same effect, and the remarks made in regard to King v. Ecles are applicable to it. King v. Turner, 13 East 123. Lord Ellenborough, in this case, says of King v. Ecles, that it "was considered as a conspiracy in restraint of trade, and so far as a conspiracy to do an unlawful act affecting the public." He distinguishes the case in hand as an in-

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dictment *for a conspiracy "to commit a civil trespass," and as such not criminal.

Considering King v. Ecles in the light of this case, it must be regarded as holding broadly that a conspiracy to do an injury to the public is indictable independent of any agreement as to the precise means by which it is to be carried out. Lambert v. People, 9 Cow. 578. The indictment here was for conspiracy to cheat a company. The statement of the means was general, as that the defendant agreed, by "indirect and unlawful means," to cheat and defraud such company. It was held that the indictment was bad, but solely on the ground that the act of wrong was against a private person, and in such case an allegation of a false token was indispensable. The reasons assigned for the judgment rest on the idea that a statement of the means is not essential when the act intended to be performed is a crime or an injury to the public. Commonwealth v. Prius, 9 Gray 127. The question in this case is identical in principle with Lambert v. People and received the same solution. State v. Rickey, 9 N. J. 293. The conspiracy in this case was to defraud a bank. It was held that the bank was to be regarded as a private person, and that the indictment did not charge a crime. The same concession is made in this case as in Lambert v. People, that a conspiracy to cheat the public is indictable as such without regard to the nature of the means intended for that purpose. State v. Mayberry, 48 Maine 218. The conspiracy was to obtain possession of securities by false pretences from private persons. It was held that such a conspiracy was not indictable independently of the means by which it was intended that it should be consummated. Rice, J., says: "When the act to be accomplished is itself criminal or unlawful, it is not necessary to set out in the indictment the means by which it is to be accomplished." This is a clear recognition of the rule in question although it does not allude to that feature of the rule that places attempts to defraud the public as within the class indictable in themselves. The case did not suggest so full a statement of the cases to which the rule applied, but holding it as principle it must be regarded as a clear authority, as it regards all the consequences resulting from the application of the rule.

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*Commonwealth v. Shedd, 7 Cush. 514. Dewey, J., holds "that a general allegation that two or more persons conspired to effect an object criminal in itself, or to commit a misdemeanor, or a felony, is quite sufficient, although the indictment omits all charges of the particular means used."

It is clear on the authorities as in reason that charging a conspiracy to defraud the state, as it regards its property or revenue, is indictable as such, although no agreement as to the definite means to be employed for that purpose is alleged. The appellant's exceptions, based on the supposed insufficiency of the indictment, should be overruled. The appellant's exception, alleging that the Court of General Sessions, at which the indictment was found, was not duly and legally conven-

ed, because no petit jury was summoned or in attendance, is bad. To hold that would be equivalent to holding that if for any reason the venire for petit jurors or its return to the court fails, the court is without legal power to proceed with its business, a proposition so obviously unfounded that it does not need particular consideration.

The grounds of appeal urged for a new trial will next be considered. The first is that the court erred in admitting evidence of the declarations of R. H. Gleaves and A. O. Jones, as conspirators, not made in the presence of the defendant before evidence other than that of an accomplice had been introduced to connect A. O. Jones with the conspiracy, as charged in the indictment. Counsel for appellant has not pointed out in his argument one exception on which this ground of appeal rests, and none has been found resting on the precise ground advanced. Even on the assumption that corroborating evidence was necessary, and that evidence of acts done and declarations made by the conspirators in pursuance of the conspiracy, had been offered and duly objected to on the ground that the testimony corroborating the evidence of the defendant's accomplice had not been offered and it had been admitted, that would not constitute an error.

It would involve a question of the order of proofs under the control of the court. When proof of an independent fact is requisite to entitle a party to the introduction of certain evidence, the admission of such evidence, without demanding such proof, is erroneous. That is not a question of the order of proof

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merely, *but of the right to make the proof at all. The object of corroboration is to strengthen proofs already adduced, and not, primarily to introduce new and independent facts, and as the evidence offered by way of corroboration must go to the jury with the evidence of acts performed and declarations made by the conspirators in pursuance of the conspiracy, the order in which they were introduced cannot be so material to the defendant as to be ground for exception.

The next ground is that the court allowed the witness, Woodruff, "to refresh his memory by reference to a book purporting to be a diary, written in phonographic characters peculiar to the witness, and such as could not be verified by the court, and to admitting the said book in evidence as against this defendant, and allowing entries, said by the witness to be there contained, to be translated and read by the witness to the jury." The case shows that the book in question was referred to solely for the purpose of refreshing the recollection of the witness. The witness, it is true, read from the book, but that is not inconsistent with the use of the book for refreshing his memory; it was, at most, only anticipating what would probably have taken place under cross-examination at the defendant's request had it not been called for by the counsel for the state. Nothing is found warranting the conclusion that the court and jury regarded the book as resorted to for any purpose other than that of refreshing the memory of the witness. To hold the doctrine contended for by the defendant would be to give immunity to witnesses locking up the contents of their memory in entries contrived to be intelligible to themselves only, to which they could always refer for their own advantage, but to which the court would have no access, however important that might be to the ends of justice.

Such a proposition cannot be tolerated unless established by authority that cannot be shaken.

The counsel for appellant produces no case holding that in order to have resort to such memoranda for the purpose of refreshing the memory of a witness, it must appear that such memorandum is made in characters intelligible to the court and jury without the aid of testimony. It must be presumed that no such case can be found, for it would be

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inconsistent with the *principle of the rule allowing the memory to be refreshed by memoranda made at the time of the transaction to which the inquiry relates. The memorandum must be the act of the witness and contemporaneously with the event noted, otherwise it would not necessarily be associated with the state of mind that existed when the impression on the memory was made, but, independently of this, it is of no importance, so far as it regards its capability of refreshing the mind of the witness, whether it was written in characters intelligible to the whole community, or in such as were capable of being translated only by the party himself.

The witness could, doubtless, have given the key to the translation of the memorandum and showed how his method of phonography agreed with and differed from each of the systems commonly practiced, and counsel might have required such information on cross-examination. Had he done so the statement of the witness would have gone to the jury, so as to enable them to judge whether the entry was what the witness represented it to be. This is all defendant could properly ask. It is unnecessary to notice in this connection the discussion drawn from the rule of hearsay evidence and the rule governing the introduction of merchants' books as against third parties, as these rules have no application to the present case. It is contended the strength of testimony as refreshed is the clearness and certainty of the recollection of the facts recorded, after having examined the memorandum, and independently of the memorandum itself, and it was the right of the defendant to test this by cross-examination. The only way to get before the jury such legal considerations as should have weight in determining the force of the testimony, was through the charge of the court,

which might have been directed to such considerations. This ground of appeal should be overruled.

The next objection to the verdict relates to the admission of entries made in the books of the Republican printing company. It was proved that Woodruff and Jones, two of the conspirators, constituted the Republican printing company. It appears that the books were the business records of Woodruff and Jones. It was claimed that these books con-

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tained memoranda of various *transactions that belonged to the acts done by the conspirators in furtherance of the conspiracy. Among other entries $800 was passed to the credit of Woodruff and the same amount to Jones on February 5th, 1874, the day on which the certificate in question was paid as claimed. It was also claimed that the amount thus paid to Jones and Woodruff corresponded with the amount to which they were entitled under the terms of the arrangement between the conspirators. It was clearly competent that such an entry in the books of Woodruff and Jones should go to the jury as evidence tending to strengthen the testimony connecting them with the conspiracy. The presumption was that the entry was made under their direction, and the way of disproving that presumption lay in one asserting the contrary. The admissibility of the evidence there did not depend on its competency as a declaration of a conspirator to affect his co-conspirator. It was enough to render the testimony competent that it was admissible for any legitimate purpose. This objection is not well taken.

The fourth objection on the motion for a new trial referred to the circumstance that the attention of Woodruff was called to an entry in the books already referred to, and inquiry made as to whether it related to the transactions in question, and which appears to have been negatively answered. The appellant's counsel moved to strike out the evidence, which was refused, but no exception appears to be noted. At all events the counsel for the state had the right to call the attention of the witness to any particular memorandum and inquire if it related to the transaction in question, and it was not competent to strike out what was said in reply thereto. It is no ground to strike out evidence that it fails to amount to proof of what was intended by the party introducing it. It does not appear that the memorandum was claimed or read as affording evidence of the matters noted, but was noticed for the purpose of attracting the attention of the witness to the matters referred to in it. This objection is groundless.

The fifth objection, relating to the admissibility of testimony, is based on a ruling of the court admitting in evidence an account from the books of Woodruff and Jones. Although the court placed its decision admit-

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ting such entry on the broad ground *that as a declaration of a co-conspirator, written by a party beyond the jurisdiction of the court, it was admissible, yet it does not appear that the question submitted involved any such question or consideration. The real question appears from the case to have been identical with the exceptions already disposed of, and the conclusion of the court appears to be correct, whatever view may be taken of the proposition submitted in deciding it.

There does not appear on the record any exception to sustain the appellant's sixth objection, as it regards the admission of evidence relating to the Christopher certificate, and therefore that matter cannot be considered.

The seventh objection relates to questions propounded to the defendant by way of cross-examination, alleging that irrelevant matter was gone into, and that cumulative matter material to the issue was offered in reply to the testimony elicited by such cross-examination.

The only exception that appears in the course of the cross-examination of the defendant is to certain evidence called for by the state, and to which the defendant's counsel made objection. The memorandum, as to the decision of the court, is as follows: "The court held the testimony competent, being rendered so by the introduction of the Merriam certificate."

The objection is not to any particular matter of evidence sought to be introduced, but as it is expressed, "to this line of questions." The counsel for the state had called the attention of the defendant, who was undergoing cross-examination, to a class of payments made in certificates for legislative expenses, among which was the certificate called the Merriam certificate. This Merriam certificate was first introduced to notice by the counsel for the defendant upon the cross-examination of the witness, Woodruff. The fact with regard to it, as testified to by Woodruff, was that it was drawn as part of a series of certificates to fictitious persons, intended as the means of drawing money from the treasurer for the personal benefit of different state officers, and that the Merriam certificate was for the share of the defendant, Cardoza. Woodruff, in response to the inquiries of the counsel for the defendant,

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testified that on the presentation of *this certificate of the defendant, he, the defendant, caused it to be torn in pieces. Subsequently, when the defendant was examined in chief by his counsel, this certificate was produced, marked "canceled," but not torn, as stated by Woodruff; such evidence being intended to destroy the credibility of the testimony of Woodruff, not confined, however, to the statement of the destruction of the certificate, which appears to have arisen as

an incidental circumstance merely. On the cross-examination of the defendant the counsel for the state recurred to this subject, and endeavored to show that certificates of the same class with the Merriam certificate had in fact been paid by the defendant under circumstances that tended to charge him with guilty knowledge of the objects with which they were drawn. It must be fairly considered that the whole subject was opened by the counsel for the defendant by the introduction of the Merriam certificate. It would naturally be concluded, from the conduct of the defendant in the case of the certificate drawn for his own benefit, that he was a party to the frauds of which that formed a part, and thus Woodruff's testimony, as a whole, would be shaken by proof of such part obtained from that witness himself. It must be assumed that this formed part of the object of the counsel for defendant in opening that subject. Such being the case the question of relevancy cannot be considered on the part of the defendant's counsel, who first opened it. The only inquiry is, whether the evidence elicited followed in the line of that introduced by the counsel for the defendant, so that the whole can be considered as a single subject, and it appears very clear that it did. In fact the defendant's counsel limited his objection to the line of proofs, thus drawing attention away from the particular matters involved to the general bearing and tendency of the questions. After having entered upon that line of proof he was not in a position to object to its continuance in the same direction by the opposite side, so long as a new subject was not entered upon. This involves a very different proposition from the one familiarly understood, that the introduction of irrelevant testimony by one party does not justify the introduction of irrelevant testimony by the other side. It is enough to say that the counsel for the defendant introduced the sub-

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ject, and he has no right *to complain of its continued consideration. This view disposes of all the matters embraced in the seventh objection to the verdict.

The eighth objection is to testimony given by Solomon and Woodruff in reply. No exception appears to any part of this testimony, so far as it regards that of Woodruff. The only exception that appears to the testimony of Solomon was to his stating a conversation with Governor Moses, but it does not appear that any such conversation as the objection contemplated was actually produced in evidence. The exception must be regarded as limited by the character of the testimony received under it. The other matters alleged to have been gone into, stated by the defendant as prejudicial to his case, cannot be considered for the want of an exception to cover them. What has just been said disposes of the matter of the ninth, tenth and eleventh objections.

The remaining objections relate to the charge of the court. Many objections to the charge are stated in the grounds of appeal, some of which are not noticed in the points and argument, and as all matters intended for consideration are required by the rules of this court to be noticed in the points submitted, we must assume that the matters not so presented are intentionally abandoned by the appellant and they will not be considered. The various points made by the appellant will be considered in the order stated in the points and argument.

The sixth objection is that the court instructed the jury that the fourth count of the indictment could be sustained. This ruling is in accord with what has already been said.

The seventh objection states that the court instructed the jury that the entries in the books of the Republican printing company were made before the conspiracy had been consummated, and contemporaneously with the transactions, and were entitled to be considered in the corroboration of the accomplices. This statement does not exactly conform to the statements of the record. A request to charge was made on this point by which it was sought to exclude the entries in the diary of Woodruff and the books of the Republican printing company from operating as corroborating evidence.

The record states that this had been charg-

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ed in part and in *part had not, but as the charge, as given, is not set forth, we cannot infer what that charge was, unless such is the necessary inference from what follows on the record.

The court said: "This evidence has already been admitted by the court for this reason, that when these entries were made in the note-book of Josephus Woodruff the conspiracy had not been consummated, and, therefore, that they were declarations of Woodruff and Jones in furtherance of the conspiracy." This statement appears to relate wholly to the note-book of Woodruff, with which it does not appear that Jones had anything to do, and yet the statement follows, "and therefore that they are the declarations of Woodruff and Jones in furtherance of the conspiracy."

There is evidently something omitted from this statement that it is probable might be supplied if the whole charge was produced. Subsequently the court states: "But these entries were made contemporaneously with the transactions, and they are not unsupported corroboration, but are facts noted down at the time of the transaction, and, therefore, may go in corroboration of the accomplices." It is very evident that corroboration was here meant in its general sense as something tending to produce conviction of the truth of previous testimony. There was no technical

question before the jury as to whether corroborating evidence existed in the case sufficient to warrant the jury in finding according to their conviction, as to the truth or falsehood of the oral testimony given. They must have understood the court as charging that as it regards the degree of credibility to be ascribed to the testimony of the parties where memoranda were produced, it was in support of their credit that they made such memoranda contemporaneously with the transactions to which the testimony related.

There was other corroborating testimony than that afforded by these memoranda; such, for instance, as the undisputed fact that the defendant paid the certificate drawn to a fictitious person, without inquiry as to the truth of the endorsements thereon. No question could arise as to whether the state was at fault for want of evidence to corroborate the testimony of co-conspirators. Whether necessary or unnecessary, such corroboration had been *submitted, and its force alone was to be determined by the jury. Nor did the actual issue before the jury depend on acts and declarations of co-conspirators done and made in pursuance of the conspiracy. Such acts and declarations are of importance where the terms of the conspiracy have to be made out presumptively from the nature of the transactions following such conspiracy, and where the fact of such conspiracy is established. In the present case the terms of the conspiracy were the subject of direct proof, and the only real issue was the credibility of the co-conspirators. So the question was really narrowed down to that of the credibility of the witnesses, Woodruff, Jones and Lee; and, as bearing on the credibility of the parties who made or authorized the memoranda, the entries were proper to be considered by the jury, so that if made when and for the purpose they imported, they should be considered as circumstances giving support to such oral testimony.

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This objection is not well taken. State v. Brown, 3 Strob. 508.

The eighth objection, as to the necessity of proof of a false token, has already been disposed of.

The ninth objection relates to the ninth request to charge, which was refused. This instruction was properly refused, as it involved the charge of the judge as to matters of fact.

The tenth objection is based on the refusal of the judge to charge that the payment of the check in the ordinary course of business in the office of the state treasurer, was not to be considered as confirmation of the evidences of the accomplices in the case. It cannot be considered that payment of a certificate or draft by the state treasurer, without any attempt to verify the identity of the person claiming to be entitled to payment, is in the due and ordinary course of business. It was clearly an act for which the defendant must be presumed responsible, and it was competent for the jury to weigh the circumstances as bearing on the question of guilty knowledge on the part of the defendant as to the character of such paper. This would lead to the conclusion that a charge excluding the jury from such examination, such as was requested by defendant, would not have been proper.

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*The matter of the eleventh objection has already been considered, and the conclusion reached that the means employed were of a nature to cheat and defraud the state.

There was no error in the charge made upon the twelfth request. The whole matter was left for the consideration of the jury with remarks on the part of the court that have already been explained. It is not possible that the jury could have drawn any conclusion from these remarks prejudicial to the defendant. The court stated its former ruling in regard to the Merriam certificate, and its adherence to the ground on which that decision was made, but gave no instruction as to the legal effect of such testimony. It would have been manifestly improper to charge that such evidence was entitled to no weight, as it might have a bearing on questions of credibility as affecting the testimony of the witness, Woodruff, and defendant.

The majority of the court having overruled all the exceptions, the appeal must be dismissed.

We concur in the judgment herein announced, but cannot concur in the reasonings on the question of peremptory challenge, on which point we have filed our separate opinions, differing between ourselves in the reasons but agreeing in the results.

HENRY McIVER, A. J.
A. C. HASKELL, A. J.

Separate Opinion by McIVER, A. J. I concur fully in the conclusions reached by the Chief Justice except that in reference to peremptory challenges of jurors claimed by the defendant and disallowed by the Circuit judge. As to that matter I am entirely satisfied that the ruling of the Circuit judge, in refusing to allow the defendant to challenge peremptorily the two jurors, Wiley and Fields, was correct, whatever differences of opinion may exist as to the reason given for such ruling.

In my judgment the act of 1871—re-enacted in General Statutes, Chapter CXI.—was designed to effect, and did effect, a radical change in the mode previously established of organizing a jury for the trial of a misdemeanor. The purpose was to establish marked differences in the mode of obtaining a jury for *the trial of any criminal case, whether capital or not, from that prescribed for civil cases.

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In Section 19 of that chapter, (being Section 16 of the original act,) the mode of obtaining juries for the trial of civil cases is distinctly pointed out, and the distinguishing features of this mode are:

1. That the persons summoned as jurors shall be arranged in alphabetical order, the first twelve constituting the first jury and the next twelve the second jury.

2. That this arrangement shall be made "on the day when the jurors are summoned to attend;" that is, the first day of the term.

The effect of this mode of organizing the juries is that it is distinctly known from the beginning of the term who are the persons that will compose the two juries for the trial of civil causes during the whole of that term. But in Section 22 of that chapter, (being Section 19 of the original act,) it is declared that "nothing contained in the preceding section shall apply to the impaneling of juries in criminal cases, but the jurors shall be called, sworn and impaneled anew for the trial of each case, according to the established practice," &c. This, to my mind, evinces an intention that the juries for the trial of all criminal cases shall not be organized in the mode prescribed for civil causes; that is, shall not be arranged in alphabetical order, and shall not be organized on the first day of the term, but that they shall be organized "anew for the trial of each case," according to the established practice, viz., by lot, and not in alphabetical order. So that for the trial of any criminal case, whether capital or otherwise, the law requires: 1. That the persons who are to compose the jury shall be selected by lot; and, 2. That they shall not be so selected on the first day of the term, but such selection must be made "anew for the trial of each case." These two requirements are not formal, but material in their character.

It certainly is not necessary to show this in regard to the first, and it seems to me that it is equally unnecessary to enter into any argument to prove that the second is material; for it manifestly is very material for the accused to know beforehand who are the persons to be presented to him for chal-

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lenge, and the *order in which they will be presented; for that was one of the main reasons why the ninety-seventh rule of court was so rigorously assailed in the case of State v. Price, 10 Rich. 351, and in State v. Boatwright, 10 Rich. 407.

Section 22 of this chapter, (being Section 19 of the original act,) having thus declared that in criminal cases the selection of jurors should be made by lot, and should be made anew for the trial of each case, and not on the first day of the term, proceeds to declare how the lot shall be conducted, viz.: "According to established practice." This, it seems to me, is tantamount to declaring that the lot shall be conducted in the manner pointed out by the ninety-seventh rule of the former court, re-adopted by the present court in practically the same language as the twenty-sixth rule of practice in the Circuit Courts. For, prior to the adoption of the act of 1871, incorporated in the General Statutes, the "established practice" in obtaining a jury for the trial of criminal cases was different in misdemeanors from that in capital cases. In the former the juries were organized on the first day of the term by lot, and, as so organized, they constituted the juries for the trial of all cases of misdemeanor which might come up for trial during that term, subject only, just as in civil cases, to such changes as might be occasioned by challenges either peremptorily or for cause, while in capital cases the jury was organized anew for the trial of each case in the mode prescribed by the ninety-seventh rule of court.

To which practice, then, do the words "according to the established practice," as used in the section under consideration, refer? They cannot refer to the practice previously prevailing in cases of misdemeanor, because, according to my understanding of that practice, the juries were not organized anew for the trial of each case, but were organized on the first day of the term for the trial of all cases of misdemeanor which may be presented for trial during the term, and this mode of proceeding is distinctly forbidden by the previous part of the section.

These words, therefore, must necessarily refer to the practice in capital cases, as every one will admit that, under that practice, the jury was organized "anew for the trial of each case." This being so, it follows that the Circuit Court erred in the mode

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*which it adopted in presenting the jurors for acceptance or rejection, but as no exception was taken upon this ground, possibly for the reason that it operated in favor of the defendant, as it informed him beforehand who were the first twelve persons to be presented, such error can furnish no ground in this court for granting a new trial.

If, then, I am right in concluding that the proper mode of presenting the jurors in this case was not adopted, and that they should have been drawn anew and presented according to the established practice in capital cases, it follows necessarily that there was no error in refusing to allow the defendant to challenge peremptorily the two jurors above named. For, according to that practice, it was necessary for him to dispose of each juror as he was presented, either by accepting or rejecting him, before he could proceed to challenge any juror subsequently drawn; and if, as in this case, twelve jurors instead of one be presented at once, it would have been equally necessary for him to dispose of the twelve so presented, or of the ten which remained after the challenges on the part of the state had been allowed, before he could

reach the two. Wiley and Fields, who were drawn subsequently to the drawing of the original twelve. If he had accepted the remaining ten and they had been sworn, as would have been proper under the established practice, then unquestionably he would have had the right to challenge peremptorily the two jurors above named as well as the three next who might have been drawn. But in this case, before he could, under the established practice, reach these two jurors, he had exhausted his right of peremptory challenge by challenging five of the original ten. His real ground of complaint, therefore, is, not that he was denied the right of challenge—for as the record shows he actually did exercise such right to the full extent allowed by law, by challenging five of the jurors who were originally drawn and presented—but that he was denied the right of selections, which, as is said in State v. Wise, 7 Rich., at page 416, upon the authority of United States v. Marchant, 12 Wheat. 480 [6 L. Ed. 700], is an altogether mistaken view of the right of challenge, which is a mere right of exclusion and not a right of selec-

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tion, and the right *of exclusion will not be allowed to be exercised in such a way as to draw after it the right of selection.

The judgment of the Circuit Court should be affirmed.††

Separate Opinion by HASKELL, A. J. I concur in the conclusions arrived at by the Chief Justice on each point submitted for consideration, except his conclusion upon that which relates to the exercise of the right of peremptory challenge. From that conclusion I am compelled to dissent, and will state my reasons briefly, first tracing an outline of the law and established practice on which those reasons depend. When the act of 1841, "to extend the right of challenge to jurors," was passed, the law on the subject of impanelment of jurors was as follows: "The jurymen attending, under the venire being called, their names are put in a hat and juries Nos. 1 and 2 are formed by alternately putting down the names as they are drawn, and when the number of each is completed it is usual for the clerk to have a list of the supernumerary jurors made out as their names are drawn for the ordinary business of the court, where vacancies are filled up under the order of the court and in capital cases." City Council of Charleston v. Kleinback, 2 Speers 418.

These juries, one and two, were organized and sworn at the commencement of the term and were ready for the trial of civil causes and misdemeanors, the only difference being that in misdemeanors the jurors were sworn anew in each case to try the traverse. In cases of felony the rule was different. The juries Nos. 1 and 2 were not presented in their entirety as ready for the trial of a capital case, but in such cases it was "the practice to present to the prisoner the jurors for challenge, beginning with the foreman of jury No. 1 and running through the petit and plea jurors Nos. 1 and 2 impaneled and sworn, and then to present successively the supernumeraries as drawn on Monday." State v. Brown, 3 Strob. 508. The act of 1841 made no change in the manner of organizing the juries. It enacted "that hereafter in all civil cases in which a jury shall be impaneled, before they shall be charged with the trial of any issue, each party shall have the right to challenge, without cause

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shown, two of the jury so *impaneled, and in all criminal cases in the Courts of General Sessions wherein challenge without cause is not allowed by law, the defendant shall have the right to challenge, without cause shown, two of the jury before they are sworn to try the traverse; and the places of the jurors so challenged shall be supplied as now provided by law for completing a panel." Stat. at Large, Vol. XI., p. 154.

The last clause providing for the completion of the panel of necessity applied to both the preceding portions, and embraced alike civil cases and misdemeanors.

In the first place, it would be impossible in a misdemeanor case to complete the panel by the mode pursued in a capital case, as appears without argument upon comparison of the two systems of practice. And, in the next place, there was, at the time the act was passed, a settled practice, applicable alike to civil cases and cases of misdemeanor, (this is not disputed,) which regulated the filling of vacancies in the jury occasioned by removal for cause shown, or by absence or otherwise. The circumstances are precisely analogous where a juror is removed by peremptory challenge, for another juror must be supplied to complete the panel; and there can be no doubt that the mode already of force in the case of a juror removed for cause, is the mode referred to in the act of 1841 by the words "as now provided by law." What was the practice as then provided by law? The ordinary practice was to fill the place by taking the name next in order on the supernumerary list, but it was held to be "entirely competent for the court to order any supernumerary juror in attendance to take the vacant place. This will be done in all instances where there is no objection made by one of the parties. Where there is any just reason to believe that a seat has been vacated by one juryman to enable a party to supply his place with another, or where such vacancy has been procured by one of the parties, it would be proper to require, and either party in such case might always require, the names of the jurymen referred to to be subjected to another draw-

†† See separate opinion of Judge McIver in State v. Smalls, post page 287.

ing." Council v. Kleinback, supra. That was the practice prior to the act of 1841, and it is not questioned that the practice was the same in civil cases and misdemeanors up to that time, except that in misdemeanors the

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juries were *sworn anew to try the traverse. The latter rule of practice above indicated seems to have been deemed necessarily the proper course where, by the exercise of peremptory challenge, it was put in the power of parties to "procure" a vacancy, and the court proceeds to say: "It is necessary, as it respects challenges under the act of 1841, that a somewhat different practice should prevail, and that a more uniform rule should be laid down. Under that act the parties themselves are actors, and they should not be permitted to make their challenges with any view to looking to any particular juror on the supernumerary list as a substitute for the one that may have been withdrawn by challenge. In this respect the challenge should be made as though it were founded in some positive objection to one or two of the panel, and with no view of acquiring undue advantages by having certain others substituted in their place, which might frequently be the case were the list from which they were to make their selection to remain unchanged—that is to allow the jurymen to be called as their names had been previously set down. To obviate all objections of this kind, and to remove all temptation on the part of juries and parties from entering into a criminal understanding, we would lay down this as an uniform rule of practice, that whenever either party on the record claims the right of challenge the names of the jurors not impaneled, if they have been previously drawn and set down, shall be subjected to lot again, and the parties, unless they can show cause, must take them as they stand thus drawn." Id. The principle which is contained in the law as thus announced was afterwards extended to capital cases by the ninety-seventh rule of court, adopted in 1856, (10 Rich. Eq. 549,) and sustained in State v. Price, Rich. 351, and State v. Boatwright, Id. 407. In the case just cited (Council v. Kleinback) the court laid down what it understood to be the manner "as now provided by law for completing a panel," and applied that manner to fit the act of 1841, and thus established the practice which has never been changed, unless by the act of 1871, which will hereinafter be considered. The only subsequent case directly in point is that of Durant v. Ashmore, 2 Rich. 184, also a civil case. In that case "the plaintiff's counsel then challenged, under the act, the foreman, and

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he came off. The *counsel for the defendants challenged, on their part, another juryman, which made two vacancies. The names of the supernumerary jurors were put in a hat and two were drawn, when the plaintiff's counsel claimed the right to challenge one of them, when, an objection being made, his Honor overruled the right to challenge except for cause made." The ruling was by Butler, J., who had delivered the opinion of the court in City Council, &c., v. Kleinback. In the Court of Appeals, (opinion by O'Neall, J.,) it was held that "after jurors have been challenged and others have been drawn in their places, neither party can, under the act of the legislature, challenge the jurors so drawn." State v. Kleinback, 2 Speers 418; Durant v. Ashmore, 2 Rich. 184.

It is contended, first, that this case fixes the rule only as to civil cases; and, second, that the principles it sustains admit of question, because they are founded upon a misapprehension of what really was decided in City Council v. Kleinback. It is enough, on this point, to say that the probability is strongly against any such mistake as that which must be presumed to sustain such a proposition. The act of 1841 was recent, its constitutionality was in doubt, and was afterwards decided in Cregier v. Bunton, 2 Strob. 487, by a majority of the court, O'Neall, J., and three other members of the court dissenting. Thus it is apparent that the act had been subjected to jealous scrutiny from its inception. Further, the same eminent judge who had delivered the opinion in Council, &c., v. Kleinback, and had there undertaken to expound the whole jury system as it stood, and to apply thereto the act of 1841, was the judge who ruled on Circuit in the case of Durant v. Ashmore. All the probabilities are against the supposition that he was governed by any misapprehension as to what had been announced as law by him in Council v. Kleinback, and his ruling was affirmed by the Court of Appeals. Not only, therefore, are the principles sustained in Durant v. Ashmore, but the decision in that case was final upon the point, and has never been overruled. Butler, J., lays down the rule in the language above cited. "and the parties, unless they can show cause, must take them as they are thus drawn." There can be only two constructions to this sentence.

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One is, that the *parties must submit to such mode of drawing unless they can show cause against it. The other is, that they must accept as jurors the parties thus drawn, unless they can "show cause" against them as jurors, such as legal disability, partiality or the like. The latter seems to me to be the construction fully sustained by the context, and to be the most reasonable.

The real question, therefore, is not about what is the rule established in Council v. Kleinback and Durant v. Ashmore, but whether that rule applies to the whole act of 1841, and therefore embraces misdemeanors, which are described in the act as "criminal cases in the Courts of General Sessions, wherein challenge without cause is not allowed by law." It has been already said

and cannot be questioned, that when the act of 1841 was passed the law was exactly the same in civil cases and misdemeanors with regard to the formation of a jury and the manner of completing the panel in the event of a vacancy occurring. The only difference being, as already said, that in a misdemeanor, after the panel was completed, the jurors had to be sworn anew. The rule, as above stated, was the law in civil cases, not because it was so announced, but because it was made law by the act. The rule therein announced was the law for the completion of a panel as the law stood at the time the act was adopted, and by the act the same was made law for the completion of the panel when a vacancy occurred under the act. The same was the pre-existing law in misdemeanor cases; the same was the provision for vacancies occurring by reason of the act in misdemeanor cases, and the conclusion is unavoidable, that the rule, as laid down by the court, must be applied in a misdemeanor case exactly as it was applied by the court in a civil case. Besides, if the rule of challenge and completing the panel, in misdemeanor, is not the same as in civil cases, there can be no other rule than that which prevails in capital cases; and, as already shown, the application of the practice in capital cases to a jury organized to try a misdemeanor, was, as the law then stood, a practical impossibility. This is forcibly illustrated by examining the forms and details of practice contained in Miller's Compilation, pp. 140, 149, Nos. 24, 28, 59, &c. In case of misdemeanor: "Of jury No. 1, E. D. is excused from sitting. E. L. being a kinsman

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of defend*ant, is challenged for cause on the part of the state, and G. T. and T. L., supernumeraries, substituted. E. P. and M. J. are peremptorily challenged by the defendant, and A. R. and S. B. drawn from the supernumeraries in their room, the jury then consisting of," &c. Miller 149. The authority of the forms in Miller is unquestionable. Many of the rules of practice which had descended from hand to hand for many generations would have been lost during the years of revolution recently passed, had they not, by the unselfish industry of one of the best-versed and most accurate members of the former bench, been collected and perpetuated in this invaluable little volume of practice and forms. By comparison it will be seen that the ruling of the Circuit judge in the case before us, and the entire proceeding with regard to the jury, was mutatis mutandis, in exact conformity to the old practice under the act of 1841, and the law as it stood at that time. The question, therefore, to be considered is, whether the law, in such respect as affects the point in question, has been changed since 1841.

The act of 1871, p. 690, "An act to regulate the manner of drawing juries," repeals the jury act of 1868–9, "and all other acts and parts of acts in any way conflicting with the provisions of this act." This act is re-enacted in the revised statutes, and is of the same force and effect as when it was passed, notwithstanding the repeal of the pre-existing jury acts by the act which established the revised statutes. We must endeavor to ascertain to what extent the law, as it stood in 1841, after the passage of the act, is in conflict with the act of 1871. Rev. Stat., § 19, 522. It is patent that an important change is effected by the act of 1871, with regard to the formation of juries for civil causes, and that the right of peremptory challenge in misdemeanor cases is enlarged to two on the part of the state and five on the part of the defendant. But the question is whether the manner of forming a jury or of exercising the right of challenge is changed as to misdemeanor cases by the act of 1871. Section 19 of the act (Rev. Stat., § 22, 522,) is as follows: "Nothing contained in the preceding sections shall apply to the impaneling of juries in criminal cases, but the juries shall be called, sworn and impaneled anew for the trial of each case, according to the

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established *practice, and their foreman shall be appointed by the court or by the jury when they retire to consider their verdict." All the preceding sections relate to the drawing and summoning of jurors or to the formation of juries for the trial of civil causes. It is well to note that they contain no provision for the formation of juries for the trial of criminal cases, either misdemeanor or felony. It cannot be said that the provisions for the formation of juries for civil causes extend to misdemeanors, for the words are imperative: "Nothing contained in the preceding sections shall apply to the impaneling of juries in criminal cases." The succeeding sections relate to other subjects. We are, therefore, forced to conclude that juries for the trial of cases both of felony and misdemeanors must be formed out of the jurors summoned in the manner provided by law prior to the passage of the act of 1871, subject only to the change as to the right of peremptory challenge, (Section 37 of the act, and Rev. Stat. 748, § 3,) and to any change or modification that may be contained in Section 19, which is above cited in full. As regards that section it is argued that the words "called, sworn and impaneled anew for the trial of each case" limit the meaning of the words "according to the established practice" to cases of felony; because, as it is said, under the former practice the jury was not "called, sworn and impaneled anew" in each case of misdemeanor, but was so "called, sworn and impaneled anew" in each case of felony.

There are two answers to this. First. I admit that the nineteenth section embraces all criminal cases, for although the two class-

es are more properly designated by the terms "crime" and "misdemeanor," yet, in common language, both are described by the word "crimes," as in the act of 1841 that the word is used to express misdemeanors alone. It will not be disputed that there were, prior to the act of 1871, and subsequent, if not affected by that act, two distinct, established modes for the organization of juries—one for the jury in misdemeanor cases; the other for the jury in cases of felony. If it had been the intention to abolish one of these two modes, and subject both classes of cases to the other mode, it would have been easy to have expressed it definitely, as by saying, in this

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instance, "according to the estab*lished practice in capital cases." It is against all rule to construe by implication the repeal of an important law, if it can be reasonably avoided. If the words "called, sworn and impaneled anew" can be shown to apply in part to each class of cases, so as, when taken in the light of a general act, it makes provision for each, and such construction is not repugnant to the context, and will prevent the repeal of laws which are not expressly repealed, we are bound to adopt it and give to the law its full force and effect. To illustrate: No one will deny that, under the law as it was, in each misdemeanor case the jurors who had been previously generally sworn were sworn anew to try the traverse. Now, suppose that in a capital case the jury was only called and impaneled anew, and a general act was passed, as in the present case, not repealing distinctive acts relating to the two classes of cases, but containing words thus descriptive of each class. I contend that these words "called, sworn and impaneled" would be descriptive of the separate classes in their distinct character, and would not of necessity reduce them to one class, and thereby by implication repeal the distinguishing or conflicting statutes—one class being designated by the descriptive word "sworn," the other by the words "called" and "impaneled."

But secondly: I go much further, and think that under the then established practice the jury was "called, sworn and impaneled anew for the trial of each case" of misdemeanor, as well as each case of felony. Any one who is at all familiar with the practice is aware that the term "call" is entirely distinct from the "drawing" of jurors. In every case the jury is "called" by the clerk of the court to ascertain who of the jurors are present, and whether the jury is ready for the trial of the cause. The word has absolutely no other significance. The order of the court is familiar, "Mr. Clerk, call over the jury," and incident to every trial, and can properly only be done after the jurors have been drawn and the jury organized. Under the practice prior to the rule of court adopted in 1856, Rule 97, which is Rule 26, adopted in 1870, the following was, in a capital case, the form at the trial: "Clerk—Having a list of all the jurors in attendance arranged in order, ([State v. Sims] 2 Bail. 32,) to wit: First, jury No. 1; second, jury No. 2; third, supernumeraries,

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*as they were originally drawn, * * * and having called all over to ascertain which are in attendance, addresses the prisoner in the dock," &c. Miller, p. 155. That expresses the whole meaning and purpose of the "call" of the jury, even in a case of felony. This was not changed by the Rule 97 or Rule 26, for before the jurors' names could be put in the hat or box to be drawn it had to be ascertained who were in attendance, and the clerk had to go through the call of jury No. 1, jury No. 2, and the supernumerary list, which had to be previously organized under the law, for the rule of court could not dispense with the previous formation of the respective juries and the supernumerary list. The conclusion, therefore, is plain that the requirement that the jury should be "called" anew for the trial of each case, does not of necessity mean that a misdemeanor case shall be governed by the rules of practice regulating the formation of juries in cases of felony.

The second requirement, "sworn anew," does not demand argument. It is the recognized law that in every case of misdemeanor the jury has to be sworn to try the traverse before it can be charged with the case. It is equally well known that under the jury law then in force, (and still of force, if the views here expressed be correct,) the jurors had been previously sworn to organize juries No. 1 and No. 2, and, consequently, that by administering the second oath the jury is as well sworn anew in a misdemeanor case as in a capital case.

On the third point, that the jury shall be "impaneled anew for the trial of each case," there appears to be nothing inconsistent with the proposition that it is met by the practice in misdemeanor as well as in capital cases. The jury was originally formed by the selection of twelve men by the sheriff, their names were written on a schedule and the jury was then said to be "impaneled," and that of "twelve men" was to try the case. Therefore a jury, in the strict sense of the word, is said to be "impaneled" when it is ready to be charged with the case. 1 Whart. on Am. Crim. Law, § 590. The right of challenge subsequently arose and additional jurors had to be summoned to complete the panel, in the event that any members of the jury first impaneled and ready to try the

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cause should be removed by *challenge or otherwise. Thus the panel of a jury can be formed or "impaneled," and the panel can be broken and be re-formed or impaneled anew, according to the rules or requirements in every case. And again in a capital case, prior to Rule 97 or Rule 26 of 1870, if neither

the state nor the prisoner challenged a juror —although the panel had not been broken, and the case would be tried by the entire panel as it was first organized—it was nevertheless considered to be "impaneled anew," because it had been organized anew by the ceremony of presenting the jurors to the prisoner and swearing each juror anew. There is no difference in principle between that case and the practice in misdemeanor, where the jury is presented in a body or as a whole, instead of one by one, and subjected to a challenge, and then, and not until then, sworn anew to try the traverse and ready to be charged. It may be admitted that this is so, yet that the case does not apply, because, under the rule of court, the jury No. 1 or No. 2 could not be accepted as a whole, for the names are put together and drawn by lot. The answer to that is, that the rule of court is not a part of the statutory law and is distinct therefrom. The rule could be repealed at any time, and then the proposition could not be disputed. It is certain that the legislature did not contemplate the rule of court as affecting a statute, and certainly it would be very extraordinary for the court to recognize it in any such light.

My conclusion, therefore, is, that the jury having been "impaneled" when jury No. 1 and jury No. 2 were organized, and being then presented for objection to the prisoner and to the state, and having to be re-sworn before it can be charged with the trial, it is, of necessity, impaneled anew for the trial of each case, whether it be felony or misdemeanor, independently of Section 19 of the act of 1871.

I am, for these reasons, unable to perceive any force in the argument that the eighteenth section of necessity brought misdemeanor cases within the rules applicable to the formation of juries in capital cases. Nor do I perceive any such effect from the thirty-seventh section of the act of 1871, re-enacted in Revised Statutes, p. 748. The only argument is that the number of challenges is increased and the right extended to the state,

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and *that the act of 1841 is repealed by the act of 1872. Rev. Stat. 830. The act of 1841 was not repealed by the act of 1871, according to my opinion, and the provision contained in the Revised Statutes 748 was the Section 37 of the act of 1871. The act of 1871 not having repealed the act of 1841, was governed by its provisions where not in conflict with its own, and the act of 1871 was not repealed by the act adopting the Revised Statutes, and is, therefore, still of full force and effect, and its construction must be principally governed by what was manifestly its meaning at the time when it was adopted. The right of challenge, as given in the act of 1871, was unquestionably to be governed by the provisions contained in the said act and by the law as it then stood, not repealed by or in conflict with said act. But apart from this, if all the acts with regard to jurors prior to the act of 1871 be repealed in form by the Revised Statutes act, they are all brought into force in criminal cases of both clauses by the words of Section 19, "according to established practice," and to that practice we must look for our rule, and in each case where there is no statute now of force be governed by the "established practice." I am, therefore, for the reasons thus briefly and too crudely stated, led to the unavoidable conclusion that there was no error in the ruling of the Circuit judge on the point submitted, and therefore that the appeal should be dismissed and motion refused.

But suppose that my construction as to the jury law is erroneous, and that the opinion which I understand to be entertained by the Chief Justice and the other Associate Justice on that subject is correct, viz.: That by the act of 1871, Section 19, the jury law is made the same in cases of misdemeanor as in cases of felony. Then, such being the premises, I fully concur in the conclusion deduced therefrom by the other Associate Justice, for, in my opinion, it rests upon principle. In the organization of a jury in a case of felony the principle which governs the exercise of peremptory challenge is, as I understand it, as follows: That the state and the prisoner must dispose of each juror in the order presented before the right of peremptory challenge can be exercised with respect to any other juror. Now, whether by law or by irregularity (no objection being taken at the

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time and the *irregularity not affecting any substantial right), several jurors be presented at once, or the whole twelve being presented at once, the same principle must govern, and the state and the accused must accept or object to and in effect dispose of the entire number thus presented, and those not objected to be sworn before either party can challenge peremptorily any other juror. In this case the whole twelve were presented together, and when the defendant attempted to challenge two supernumerary jurors who had been drawn to fill two vacancies occasioned by peremptory challenge on the part of the state, he, the defendant, had not accepted or objected to any of the remaining ten of the twelve originally presented, and, therefore, the twelve had not been disposed of, although presented. The defendant then proceeded to dispose of the remaining ten, and did not after disposing of them renew his objection to the first two drawn to fill the vacancies. The ruling of the judge was, therefore, right at the time when the objection was made, and whether he stated a wrong reason is immaterial; the defendant was bound to make his objection at the proper time. But the defendant could not renew his objection because he had exhausted his right of peremptory challenge by having challenged peremp-

torily five of the jurors originally presented. He, therefore, by his own action, waived his exception to the ruling and has no ground in either view on which to rest his appeal.

The irregularity in the presenting of the jurors, (for it certainly was irregular if the practice in capital cases was to govern,) so far from affecting a substantial right, was in favor of the defendant, for it was directly in face of Rule 97 adopted in 1856 and Rule 26 adopted by the court in 1870, and informed the defendant in advance of the order in which twelve jurors would be presented, and made the right of peremptory challenge an instrument for the selection of, instead of objection to, jurors which the rule of court was meant to prevent. So again the irregularity in the order in which the two supernumeraries were drawn, (if it was an irregularity,) did not affect a substantial right of the defendant, but was favorable to him, and as is indicated in State v. Brown, 3 Strob. 508, was really an advantage to the defendant, for he thereby knew in advance who

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would be the *first two presented to him after the ten who were then before him had been disposed of, and to that extent gave him the means of selection in addition to his right to object. This, of course, is said upon the presumption that the practice in capital cases is to govern, in which I cannot agree. But upon either of the legal premises submitted the appeal should be dismissed and the judgment of the Circuit Judge affirmed.

Appeal dismissed.

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11 S. C. 262

(Case No. 661.)

THE STATE v. ROBERT SMALLS.

(April Term, 1878.)

1. Numbers 2, 3 and 11 of the syllabus in State v. Cardoza,† re-affirmed.

[2. *Removal of Causes* ⇐70.]

A defendant under prosecution in a state court is not entitled to have the cause removed to the Circuit Court of the United States, under Section 641 of the Revised Statutes of the United States, (p. 114,) under a petition for that purpose alleging the existence of prejudice against him on account of his race and color and other causes, and alleging further, without any more specific statement of facts, that he is denied, and cannot enforce in the judicial tribunals of the state where he is being tried, the rights secured to him by the laws of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 127; Dec. Dig. ⇐70; Criminal Law, Cent. Dig. § 198.]

[3. *States* ⇐28.]

An indictment for bribery against a member of congress is not arrested by the privileges secured to representatives by Article I, Section 5, of the Constitution of the United States.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 34–36; Dec. Dig. ⇐28.]

† See ante page 195.

[4. *Indictment and Information* ⇐125.]

The corrupt acceptance of a gift and gratuity and of the promise to make a gift, are not inconsistent, and there is no duplicity in so charging in a count of an indictment for bribery.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 342, 379; Dec. Dig. ⇐125.]

[5. *Indictment and Information* ⇐73.]

An indictment is not defective for repugnancy, because it charges the corrupt acceptance of a bribe to vote for "a question which was and might be, by law, brought before" the defendant as state senator.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 200; Dec. Dig. ⇐73.]

[6. *Bribery* ⇐6.]

In an indictment charging the acceptance of a bribe by a state senator to vote for a certain joint resolution, it is sufficient to designate the joint resolution by its title only.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 8; Dec. Dig. ⇐6.]

[7. *Statutes* ⇐285.]

Journals of the state senate, published under the requirement of Article II., Section 26, of the Constitution, are the highest legal proof of the pendency of a matter before that body at any particular time.

[Ed. Note.—Cited in State ex rel. Lindsey v. Tollison, 100 S. C. 173, 177, 84 S. E. 821, 822.

For other cases, see Statutes, Cent. Dig. §§ 17, 27, 384, 385; Dec. Dig. ⇐285; Evidence, Cent. Dig. § 1230.]

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[8. *Criminal Law* ⇐510½; *Witnesses* ⇐414.]

*Where an accomplice testified that he had paid a bribe to defendant by giving to him a check on a certain bank, payable to cash or bearer, which had afterwards been returned by such bank to witness, it was competent for the state, in corroboration, to show by the books and business memoranda of this same bank, a credit to defendant for a like amount deposited by check two days after the alleged bribery.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1131; Dec. Dig. ⇐510½; Witnesses, Cent. Dig. § 1287; Dec. Dig. ⇐414.]

Before Townsend, J., at Richland, October Term, 1877.

This was an indictment for bribery, committed by defendant, as a state senator, in December, 1872. True bill was found by the grand jury at October Term, 1877, of the Court of General Sessions for Richland county. The indictment contained five counts. The first count charged that the defendant did, on December 18th, 1872, "corruptly accept from Josephus Woodruff a gift and gratuity and a promise to make a gift and do an act beneficial to him," a state senator, "under an agreement and with an understanding that the vote, opinion and judgment" of defendant should be given in favor of a joint resolution appropriating money for public printing—"a question which was and might be by law brought before" said defendant, as a state senator. The second count varied from the first in the charge that the defend-

ant did "corruptly accept from J. W. a promise to make a gift and to do an act beneficial to him, the said Robert Smalls, to wit, a promise to give him, the said R. S., a large sum of money, to wit, the sum of five thousand dollars, under an agreement," &c. The third count varied from the second only in the use of the words "with an understanding," instead of "under an agreement." The fourth count changed the phraseology to "corruptly did accept a promise from J. W., to make a gift of five thousand dollars to him, the said Robert Smalls, with an understanding," &c.; and the joint resolution was charged to have been "then introduced and pending in the general assembly of the said state, and was to be brought before him, the said R. S., in his official capacity," &c. The fifth count was for corruptly accepting a gratuity in payment for a vote already given, and is laid at common law. The first four counts are brought under act of 1869, Section 2. 14 Stat. 308; Gen. Stat.

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*725, § 10. In the first four counts the joint resolution is set out only by its title, to wit: "Joint resolution to make appropriation for expenses of printing ordered by the general assembly during the regular sessions of 1870–1, and 1871–2." In December, 1872, Robert Smalls was senator from Beaufort county, and chairman of committee on printing. Josephus Woodruff was clerk of the senate, and a member of the Republican printing company, by whom the public printing was done.

The case being called for trial on November 7th, 1877, defendant submitted the following petition:

To the Honorable the Court of General Sessions for the County of Richland, in the said State:

The defendant in this cause, Robert Smalls, humbly petitioning, shows unto your honorable court that he has been indicted by the grand jury of this county, and is now held under bail to answer in this court to indictment for the alleged crime of receiving a bribe in his official capacity, to influence his acts in the office of state senator of South Carolina, on or about the eighteenth day of December, in the year of our Lord eighteen hundred and seventy-two, as is more fully set forth in the said indictment; that of all and each of said crimes and offenses set forth in said indictment, this defendant, upon his oath, solemnly declares he is not guilty, and is only desirous to have the trial thereof before an unprejudiced, fair and impartial court and jury that this defendant is a person of color, and was formerly a slave and was afterwards a captain and pilot in the service of the United States; that the offence charged in the said indictment, relating to his action as such state senator, has been the subject of much comment, both in private conversation among the citizens of the county and in several of the public newspapers published and largely circulated in the said county, from the residents of which the jury have been summoned for this trial; that by the laws of the United States of America, as well as the constitution and laws of the State of South Carolina, he is entitled by right to trial by a fair and impartial jury, who shall pass upon the offense charged between him and the state without bias or prejudice; that he is informed and believes that great prejudice

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*exists against him on account of his race, color and previous condition of servitude, so that he cannot have a fair and impartial trial in this honorable court, by reason of political excitement, and by reason of the prejudice excited against him by articles published in the newspapers; that at the general election held in this state, on the seventh day of November, eighteen hundred and seventy-six, this defendant was elected a representative of the fifth district of the State of South Carolina in the house of representatives of the United States, to hold his seat as such in the forty-fifth congress of the United States, and that he has been admitted to said seat by the said house of representatives of the said congress, but a contest for his said seat is being prosecuted, and now exists, by one George D. Tillman, who claims to have been elected representative of the United States from said district to said congress. And your petitioner verily believes that the said prosecution on the indictment above set forth is incited against him by a conspiracy to prevent him, by intimidation, from holding an office under the United States, and from discharging the duties thereof; and, by the same, to injure him in his property, and to molest, interrupt, hinder and impede him in the discharge of his official duties; and that said indictment is prosecuted with intention to deprive him of his rights, privileges and immunities secured by the constitution and laws of the United States, to which, as a citizen of the United States, he is entitled. And, further, your petitioner verily believes that by reason of the said contest for his said seat as a representative as aforesaid, there is an intense prejudice against this defendant in the minds of a large number of the residents of the said county, who differ in political associations with this defendant.

And your petitioner further shows that he verily believes that he cannot have a fair and impartial trial of the said cause before the Honorable C. P. Townsend, Circuit judge, now presiding in the said court; that he believes that the mind of the said judge is prejudiced against him by reason of his race, color and previous condition of servitude; that his belief is founded in the rulings and charge of the said judge, in a certain cause

wherein F. L. Cardoza, a person of the same

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race and color of this de*fendant, was tried on indictment for a conspiracy to cheat the State of South Carolina, at this term of the said court.

And your petitioner further shows that for the reasons above stated, and for other reasons more at large, to be shown in proper court, he is denied and cannot enforce in the judicial tribunals of the part of the state where the said prosecution is pending, the rights secured to him by the laws providing for the equal civil rights, as citizens of the United States, of all persons within the jurisdiction of the United States; that the said cause on indictment aforesaid against this defendant has not been tried or finally heard by this court.

Wherefore, the said defendant, Robert Smalls, files this petition in this honorable court, before the trial or final hearing of the cause, verified by his oath, and prays that the cause here pending be removed to the Circuit Court of the United States for the District of South Carolina for trial, and that all proceedings in this honorable court shall cease, and shall not be resumed unless he, the said Robert Smalls, shall be denied copies of said process against him, and all depositions, indictment, pleadings and other testimony in the case, so that he cannot file them in said court on the first day of the session of the said Circuit Court of the United States, or shall fail to prove the refusal or neglect of said clerk of this court so to furnish said copies, and a certificate of such refusal or neglect, under the seal of said court, shall be given and produced in this honorable court.

And your petitioner, Robert Smalls, doth verify the facts by him stated, by his solemn oath appended hereto, administered by a proper officer for administering oaths for said State of South Carolina. And as in duty bound, your petitioner will ever pray, and so forth.

Robert Smalls.

[Signed and verified.]

The motion was refused, and defendant excepted.

On November 9th the case was again called for trial, when defendant submitted the following affidavit and prayer for discharge:

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*Robert Smalls, the defendant above named, being duly sworn, says—That on the seventh day of November, eighteen hundred and seventy-six, at a general election held in the State of South Carolina, he was elected a representative to hold a seat in the house of representatives of the United States in the forty-fifth congress, from the fifth congressional district of South Carolina; that on the fifteenth day of October, eighteen hundred and seventy-seven, he was admitted to a seat in the said congress and was sworn in as such officer; and but for the proceedings and prosecution in the above-entitled case, would now be in Washington attending to his duties as such officer; and he is of right entitled to all the privileges and immunities given to him by the constitution and laws of the United States as such officer; that shortly before the session of the forty-fifth congress of the United States, which assembled in the city of Washington, D. C., on the fifteenth day of October, eighteen hundred and seventy-seven, he was arrested on the charge of accepting a bribe, which, under the laws of the State of South Carolina, is a misdemeanor other than a breach of the peace; and on the eighth day of October, eighteen hundred and seventy-seven, was required to enter into a recognizance to appear at the present session of this honorable court; that at the present term of this court an indictment has been preferred against this defendant upon the said charge, and he has been compelled, from day to day, to appear before this court, and now is before this court, under its process, in violation of the constitution and laws of the United States, to answer the charge of the said misdemeanor; and by reason of the said proceedings and prosecution, he is compelled to be absent from his seat in the said house of representatives of the United States.

Wherefore he prays that he be hence discharged.

(Signed) Robert Smalls.

Sworn to 9th day of November, 1877.

The court refused to discharge the defendant and he excepted.

The juries were organized for the term, as stated in State v. Cardoza, next preceding case, ante p. 195. Jury No. 2 was called to try the case. The state challenged one

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juror for cause and two per*emptorily. Martin and two others were then drawn from the supernumerary list. The defendant challenged Martin peremptorily. The court ruled that defendant did not have the right to challenge jurors drawn to fill vacancies on the panel; to which ruling defendant excepted. Defendant then challenged a juror of the original panel, and one from the supernumerary list was drawn in his stead.

Attorney-General Conner offered in evidence Journal of the Senate, 1872–3. Mr. Melton, counsel for defendant, objected, and, his objection being overruled, excepted.

Josephus Woodruff, witness for state, testified that in consideration of the vote and influence in the senate of the defendant, in favor of a joint resolution appropriating money to pay for public printing, witness agreed to pay defendant $5000. That in pursuance of such agreement, witness gave to defendant, on January 16th, 1873, a check worded thus:

584, No. 17. Columbia, S. C., Jan'y 19, 1873.

South Carolina Bank and Trust Company, of Columbia, pay to cash or bearer, five thousand dollars.

$5000. J. Woodruff.

That check was dated a few days ahead, and its written date fell on Sunday. It was paid by the bank and returned to witness at the end of the month with his other checks drawn during the month. Witness was allowed to refresh his memory by referring to a memorandum-book, written in phonographic characters; defendant objected, because the book was intelligible only to witness, and excepted. Witness said the senate kept no permanent journal; only the printed journal.

L. M. Zealy, assistant bookkeeper of the South Carolina Bank and Trust Company, was offered as a witness to trace the above check through the bank. Defendant objected to the books of the bank being used against defendant, and his objection being overruled, excepted. Witness said this check was charged to Woodruff January 18th, 1873. Same day $5000 is put to credit of defendant, and was checked out on 8th of February. No other check that day charged to Woodruff or credited to Smalls. Figures 584 on check were put there by witness, and refer to

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page *of ledger. On page 584 of ledger is the entry of this check paid on W.'s account. When deposits were made it was the custom of the bank to require deposit slips. Witness produced the following, found among the papers of the bank:

S. C. Bank & Trust Company,
Columbia, S. C., Jan. 18, 1873.

Deposited by
Hon. Robert Smalls.

Gold	$	
Currency	$	
Check, W.	5000	
Total		

The deposit-slip is in handwriting of F. S. Jacobs, then cashier of the bank, who has been absent from the state since 1873. The letter W is in pencil, also his handwriting, and indicates the person who drew the check. Defendant objected to all the testimony relating to this deposit-slip.

The defendant was found guilty.

A motion for a new trial and in arrest of judgment was made in the Circuit Court, and severally refused. Defendant was then sentenced to be confined in the state penitentiary, at hard labor, for the period of three years.

Defendant appealed upon the following grounds:

The defendant having appealed from the judgment of the court herein, will move before the honorable the Supreme Court of the said state, for an order reversing the decision of his Honor Judge Townsend refusing the motion in arrest of judgment herein; and for an order in arrest of judgment upon the grounds in the said motion specifically stated and set forth—that is to say:

1. That prior to the trial herein, a petition was filed in this court praying that this cause be removed from this court to the next Circuit Court of the United States, to be held in the district where this cause is pending, upon grounds and because of facts therein stated, and that, thereupon, by virtue of the statute of the congress of the United States in such

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case made and pro*vided, all further proceedings in this court should have ceased, and the jurisdiction and authority of this court to try this cause, ceased and determined.

2. That prior to the trial herein, on the ground set forth by affidavit filed in this case, that the defendant is a member of the house of representatives of the congress of the United States, then and now in session, and that therefore the trial herein is in breach of the privileges of the defendant as such member, this court is without jurisdiction and authority to pronounce judgment herein.

3. That the jury rendering the verdict herein was not a legal and competent jury, and was not drawn, summoned, and impaneled according to law; in this, that to fill the deficiency in the number of jurors required by law, the names of five persons were drawn from an apartment of the jury box separate from the apartment containing the legal and proper lists of jurors prepared at the time and in the manner prescribed by statute That the jury commissioners of the said county were not authorized by law to place the names of jurors in such separate apartment and to draw therefrom "the jurors to supply the deficiencies" in the regular panel, and therefore, the jurors so drawn from such separate apartment were not in law competent to act as jurors; and that the defendant was denied his right to peremptorily challenge jurors who had been called to take the place of other jurors removed from the panel by challenge, although the challenges provided for by law in his behalf had not been and were not exhausted.

4. That the first count of the indictment herein is fatally defective for duplicity; in this, that in the statement of the crime therein charged against this defendant, is included several offences separate, distinct, and different each from the other; and for repugnancy, in this, that the "question" is therein set forth in inconsistent terms as "a question which was and might be by law brought before the said defendant," and so forth.

5. That the second count of the indictment is fatally defective for repugnancy; in this, that the "question" is therein set forth in inconsistent terms as a "joint resolution

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which was and might be by law brought before him, the said defendant," and so forth.

6. That the third count of the indictment herein is fatally defective for repugnancy; in this, that the joint resolution is therein set forth as a "joint resolution which was and might be by law brought before him, the said defendant," and so forth.

7. That the fourth count of the indictment is fatally defective; in this, that the description of the joint resolution and the time when introduced and pending, and to be brought before him, the said defendant, and so forth, are not stated with sufficient precision, clearness, and certainty—being without averment of era or year, or of numbers in words as required by law.

8. That the fifth count of the indictment herein is fatally defective; in this, that it does not set forth and charge a crime under the laws of this state.

And failing herein, the defendant will move before the honorable the Supreme Court of this state, upon the grounds stated and specifically set forth in the motion for new trial made before his Honor Judge Townsend for an order reversing the decision of his Honor Judge Townsend refusing the said motion, and for an order setting aside the verdict of the jury, and reversing the judgment of the Circuit Court herein, and granting a new trial, upon the grounds set forth in the motion in arrest of judgment aforesaid, and upon other and further grounds—that is to say:

1. Because the court erred in denying to the defendant the right of peremptory challenge, as to a juror, William T. Martin, who had been drawn and placed upon the panel in the place of a juror removed by peremptory challenge on the part of the state, although the defendant's right of peremptory challenge had not been exhausted.

2. Because the court erred in permitting a witness, Josephus Woodruff, to refresh his memory by reference to a book purporting to be a diary written in phonographic characters, peculiar to the witness and of his own invention; and because the court erred in admitting in evidence the entries said to be contained in the said diary, and allowing them to be translated by the said witness and read to the jury.

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*3. Because the court erred in admitting in evidence the contents of a printed book, purporting to be a copy of the journal of the senate for the session of the general assembly of this state for 1873–'74, and allowing extracts therefrom to be read to the jury as evidence competent to show the proceedings of the senate upon the question in reference to the passage of the joint resolution referred to in the indictment, and competent to prove the averment that the defendant had voted in favor of the passage of the said resolution, and had otherwise used his office and influence in that behalf.

4. Because the court erred in admitting in evidence a printed book, purporting to contain copies of the acts and joint resolutions of the general assembly of this state for the session of 1873–'74, as competent to prove the fact and date of the passage of the joint resolution as averred in the indictment.

5. Because the court erred in admitting in evidence the books of a private corporation, known as "The South Carolina Bank and Trust Company," and permitting entries therein in the handwriting of the assistant bookkeeper, to be read and shown to the jury as evidence competent to prove, as against this defendant, that payments were made by the said bank on account of the said Woodruff, and a deposit made to the credit of the defendant of like amount, and the precise dates of such transactions; although it was in evidence that such transactions were not had with the assistant bookkeeper or within his personal knowledge; and although nothing appeared to connect the transaction had with the said bank by Woodruff with the transaction had with the said bank by this defendant; although the person with whom the transactions are alleged to have occurred is alive, and the person who made the entries is alive, examined as a witness at the trial.

6. Because the court erred in admitting in evidence a slip of paper, said to be in the handwriting of one F. S. Jacobs, an officer of the said bank, containing a date, the name of the defendant, and the figures "5000," written in pencil, as evidence competent to prove that, at such date, this defendant did deposit the sum of $5000 in the said bank by way of check; although it was proved that the said F. S. Jacobs is alive, and nothing

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*was proved to connect this defendant with the said paper, or to refer the said paper to any transaction between this defendant and the said Woodruff.

Several of the points involved in this appeal are identical with questions involved in Cardoza's case, and the argument is the same. Upon other points the two cases differ.

Mr. S. W. Melton, for appellant.

The accused having filed his petition for removal of the cause, the jurisdiction to try the case thereby ceased and determined. Rev. Stat. of U. S., § 641. The rights of the accused are secured by the constitution of the United States, and by Sections 1980, 5510, 5518 of Revised Statutes. The state court could not construe the statute; that belongs to the United States courts. 1 Wheat. 304; 6 Wheat. 264; 6 Wall. 247.

This first count is double. 1 Bish. on Crim. Proc., §§ 432, 441; State v. Howe, 1 Rich. 260.

The second and third counts are bad for repugnancy. 1 Bish. on Crim. Proc., § 572.

The joint resolution is not set forth with sufficient precision and certainty. 1 Bish. on Crim. Proc., §§ 344, 346.

The printed senate journal was improperly received in evidence. 2 Whart. on Ev., §§ 290, 295.

Mr. C. R. Miles, contra.

The defendant does not state, but it is manifest that a removal of the cause is claimed under Section 641 of the Revised Statutes of the United States. This was a part of the legislation intended to apply only to states which failed to guarantee, by legislation, the civil rights conferred by the constitutional amendments and acts of congress. It cannot apply to South Carolina. 16 Wall. 36; 2 Otto 542; 13 Wall. 581. Moreover, he does not state facts which show that he is denied any rights in the state tribunal. Nor could the United States courts try him under this charge if the case was removed.

He claims a privilege as a member of congress. Const. U. S., Art. I., § 6. When arrested he was not in attendance on con-

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*gress, going to it or returning from it. Bright. Dig. 3, note (c). His presence is not required, for the charge is a misdemeanor, and he is under bond. The privilege of members of congress is the same as members of parliament. See 1 Bla. Com. 166; Story on Const., § 865; Cush. L. & P. Leg. As., §§ 559–563.

The indictment is framed under Section 2 of act of 1869, (Gen. Stat. 725) and follows its words. 2 Strob. 474; 1 McM. 472; 3 Strob. 269; 1 Bish. on Crim. Law, § 785; 1 Whart. on Am. Crim. Law, § 295; 1 Bail. 144; 1 McM. 236.

The joint resolution being only a question brought before defendant in his official capacity, it is sufficiently described by its title, certainty to a common intent only being necessary. 2 Bail. 70; 3 Rich. 68; Id. 174.

The printed journals were admissible to prove the vote of the senator and the date and passage of the joint resolution. 1 Greenl. on Ev., § 482; 1 Archb. Crim. Prac. & Pl. [145], note 1; Const. of 1868, Art. XI., § 26; Cooley on Const. Lim. 135; Cush. L. & P. Leg. As., § 428; 4 S. C. 430; 2 S. C. 150.

Acts and joint resolutions require no proof. 1 Archb. Crim. Prac. & Pl. [141]; 1 Greenl. on Ev., § 479.

The evidence objected to was properly admitted in corroboration of Woodruff. 1 Greenl. on Ev., §§ 120, 379, et seq.; 3 Strob. 517; 32 E. C. L. R. 507.

Mr. J. D. Pope, in reply.

The defendant has been convicted and sentenced—(1) before a jury without title to his office; (2) by a jury illegally impaneled; (3) upon evidence that should have been excluded; (4) under an indictment defective in form and substance; and (5) by the uncorroborated testimony of an accomplice, who has confessed his own guilt and proved himself to be steeped in vice and crime.

Could the defendant be convicted upon the uncorroborated testimony of the accomplice, Woodruff? It was so, once. Then, some corroboration was required of the circumstances of the case. Next, it was considered that there should be at least corroboration of the identification of some of the accused to convict others not identified; but the injustice of this was soon recognized by the rulings of the courts. Finally, it was agreed that

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a judge should *charge the jury that the accomplice should be corroborated, as to the material circumstances of the case, as to the personal identity of the accused, and, if more than one, of all—and as to the corpus delicti, the essence of the crime charged. Roscoe's Crim. Ev. 121, 122; Archb. Crim. Prac. 154; Phil. on Ev. (part 2 of notes) 1504-1510.†

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† STATE v. WINGO.

(May Term, 1867.)

[*Criminal Law* ⟸510.]

[Cited in State v. Scott, 15 S. C. 437; State v. Prater, 26 S. C. 207, 2 S. E. 108; State v. Green, 48 S. C. 146, 26 S. E. 234, to the point that defendant was convicted of hog-stealing, on the uncorroborated testimony of an accomplice whose general character was bad. The report of the trial judge did not show his charges to the jury and the character of the defendant as an honest man was sustained by the evidence. *Held*, that a new trial should be granted.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1124; Dec. Dig. ⟸510.]

In 1867, Abel Wingo was convicted of hog-stealing in the Court of General Sessions, Spartanburg county, before Hon. Thomas W. Glover, presiding judge. An appeal was taken upon the ground that the conviction rested upon the uncorroborated evidence of an accomplice.

The opinion of the Court of Appeals was delivered by

DUNKIN, C. J. In Mr. Phillips' Treatise on Evidence, pp. 110–112, the rule is thus stated: after premising that the testimony of an accomplice should be received with great jealousy and caution, because, among other things, they stand contaminated with guilt by their own confession, and are sometimes entitled to a reward upon obtaining a conviction, Mr. Phillips says: "The doctrine of a conviction being legal upon the unsupported evidence of an accomplice has been greatly modified in practice, and it has long been considered as a general rule that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner."

The report of the presiding judge does not state his instructions to the jury, nor was it necessary under the specific grounds of appeal. It cannot, therefore, be affirmed that the verdict was illegal, although unsustained by any evidence except that of an accomplice in the crime, and whose general character would seem to impair his credibility. On the other hand, the character of the defendant, both as an honest man and good neighbor, was sustained by the witnesses. It is true that to judge of all this was the proper province of the jury, upon which this court has neither the

Juries are not judges of the sufficiency of evidence: whether evidence is corroborative at all is a question of law for the court. Can a judge say to a jury, "If the jury believe the evidence of the accomplice, that alone is

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sufficient to authorize a verdict of *guilty?" See 3 Strob. 508; Shars. Stark. Ev. 727; Phil. on Ev., part 2, notes, 1510, and part 1, notes, 16–22; 2 Russ. on Cr. 960–962. Test this instruction by following authorities. 1 Greenl. on Ev. 426; 2 Russ. on Cr. 961, 962; 8 C. & P. 157; 6 C. & P. 595; 6 C. & P. 388; 8 C. & P. 106; 7 C. & P. 272; 8 C. & P. 732.

There was no corroboration of Woodruff. What is corroboration? See 1 Greenl. on Ev. 533, § 381, note; 2 Rich. Eq. 6. The senate journal corroborates only to the extent of identifying defendant with the legislative action, but that is immaterial. Greenl. on Ev., supra. The cabalistic book was not corroboration of its own author, can add nothing to the testimony of the corrupt creature, who thus corruptly refreshed his corrupt mind by corrupt evidence, and did not corroborate the identity of the defendant as connected with the issue. It was not evidence, because a witness may refresh his mind from a written paper only when such paper is intelligible to some other person, and is open to be tested by a cross-examination upon the paper itself. 1 Greenl. on Ev., § 437, note.

In the check to "cash or bearer," there is no corroboration; it might have been handed to any one else just as well. Alderson, B., in 7 C. & P. 272, supra. Nor does the check presented corroborate the accomplice—it was paid on January 18th, a day before the check proved was in existence. But then the accomplice corroborates the check, and the mysterious book corroborates the corroborator.

There is no corroboration in the deposit-slip, for the defendant is not brought into connection with it. It is not signed by defendant or by Jacobs, and should not have been received in evidence. Jacobs living, no other person could testify to the paper. Shars. Stark. Ev. 418, 64, 65; 1 Sm. Lead. Cas. 503; 2 N. & McC. 331; 4 Rich. 52; 7 Rich. 66; Bail. Eq. 482; 2 Hill (N. Y.) 557; Salk. 285, et cet. This is different from entries in shop books. 2 McC. 157.

The entries in bank-book are no corroboration. The witness who made them says he knew nothing personally. Of themselves they prove nothing. 4 Seld. 170; 4 Denio 354.

But every fact proven may be admitted—

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that Woodruff was *clerk of the senate, and one of the Republican printing company; that defendant was a senator; mover of the joint resolution mentioned; that he voted for it; that Woodruff did give defendant a check for $5000, which was paid to defendant at the bank—and still there is no proof of bribery. That charge, the very essence of the offence, is proven by Woodruff alone, uncorroborated by a single person or a single fact.

November 29th, 1879. The opinion of the court was delivered by

WILLARD, C. J. In the case of State v. Cardoza, ante page 195, just decided, we have considered and disposed of all the propositions presented by the third ground of appeal from the decision refusing the motion in arrest, and in the first and second grounds for granting a new trial, and they need not be again considered. The remaining questions will be considered in the order in which they stand in the grounds of appeal.

The defendant was indicted for bribery as a member of the senate of this state. Before the commencement of the trial he presented to the Court of Common Pleas a petition for the removal of the cause to the Circuit Court of the United States. He alleges that he is a person of color, was formerly a slave, and was afterwards a captain and pilot in the service of the United States, and that for that reason great prejudice exists against him in the county of Richland, where the indictment was found. He alleges that prejudice exists against him on account of his race, color and previous condition of servitude, "so that he cannot have a fair, impartial trial in this honorable court, by reason of political excitement, and by reason of the prejudices excited against him by articles published in the newspapers. He further alleges that he had been elected a representative to the United States congress, and was then engaged in a contest of his seat with one claiming to have received such election, and that he believes that the said prosecution on the indictment above set forth is incited against him by a conspiracy to prevent him, by intimidation, from holding an office under the United States, and from discharging the duties thereof, and by the

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same to *injure him in his property, and to molest, interrupt, hinder and impede him in the discharge of his official duties, and that said indictment is presented with intention to deprive him of his rights, privileges and immunities secured by the constitution and laws of the United States, to which, as a citizen, he is entitled." He alleges the existence of great prejudice against him in said county, excited through such contest, and that he cannot enforce, in the judicial tribunals of the part of the state where the said

right nor the disposition to encroach. But in the absence of distinct information as to the charge of the judge, the infirmity of the testimony adduced, and the grave consequences to the defendant of conviction of an infamous offence, the court have determined that neither the rules of law nor the purposes of justice would be impaired by submitting the case to another jury.

The motion for a new trial is granted.

REPORTER.

prosecution is pending, the right secured to him by the laws providing for the equal civil rights, as citizens of the United States, of all persons within the jurisdiction of the United States.

The removal of the cause is claimed under Section 641 (page 114) of the Revised Statutes of the United States. This section provides that "when any civil suit or criminal prosecution is commenced against any person who is denied or cannot enforce, in the judicial tribunal of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States," such suit or prosecution may, upon the petition of such defendant, filed in the state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending. It further directs that "upon the filing of such petition all further proceedings in the state court shall cease, and shall not be resumed except as hereinafter provided." The section in question extends the right of removal to certain other cases not important to be specially considered at this time, as the construction of the section can be ascertained without particular reference to such omitted portions.

This court is charged with the enforcement of the constitution of the United States, and the acts of congress passed in conformity with it, in cases within its jurisdiction, as effectually as if it had been brought into existence under power created by that constitution. We must settle the construction of the constitution and laws of the United States, subject to revision by the Supreme Court of the United States, whenever a similar duty would be imposed, as it regards the constitution and laws of our own

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state. *The section in question must be regarded, so far as it concerns criminal prosecutions commenced in a state court for the redress of wrongs committed against the laws of the state, as, in substance, an interdict of such prosecution whenever, by the law governing the court, some right is denied that is secured to the defendant under the constitution and laws of the United States, where such provision is intended to secure equal civil rights among all citizens and persons residing in the United States, and where the deprivation of such right is material to his defence. In this respect there are but two views to be taken of the intended effect of the act of congress over proceedings in a criminal cause, after arresting its course in the state court; one is that the cause shall proceed to trial and judgment in the United States Circuit Court, and the other that it shall cease altogether, or until by some authority, not very clearly pointed out, jurisdiction to proceed shall be restored to the state court. The first-stated of these views is without reasonable support. It assumes that the Circuit Court of the United States can obtain jurisdiction of crimes committed against the laws of the states, and of the penalties imposed therefor by such laws. It would be singular, indeed, if such an extraordinary power should be found to have laid dormant through a century of our national existence, escaping the attention of the ablest jurist. The difficulty in the way of such a jurisdiction is fundamental. What character would such a criminal prosecution obtain on removal into the United States courts? It certainly would not then be a criminal case in the sense contemplated by the constitution and the acts of congress settling the criminal jurisdiction of the Circuit Court. A criminal case, as usually understood under the common law, is a proceeding by a sovereign of a realm in his own courts against one subjected to his authority for a violation of his laws. The United States is such a sovereign, and proceeds in such manner in the courts of the United States clothed with criminal jurisdiction.

The United States courts, as criminal courts, when proceeding by indictment, act only on such cases as are found by grand juries convened under the laws of the United States, and serving in the United States courts alone. Public officers of the United

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*States conduct and control such proceedings. Beyond doubt, the Circuit Court, as an incident to a civil action properly pending before it, can pronounce a judgment that derives its force wholly under the laws of a state, but that results from a direct grant of such jurisdiction in the constitution of the United States. The constitution confers on the courts of the United States jurisdiction of "controversies" between parties of a certain character. Const. U. S., Art. III. In no just sense can a criminal proceeding in the courts of the state be regarded as a controversy as that term is used in the constitution of the United States. So the court of a foreign state can enforce, as between parties subject to its jurisdiction, rights having their origin and sanction only under the laws of another state. No such attempt has ever been made to transplant criminal jurisdiction, and it is inconsistent with the nature of such proceedings. In the constitution of the criminal administration of all civilized states, the functions of justice and mercy are inseparably united. While the administration of justice is committed to one source of public authority, the power of pardon is usually placed in the hands of another. A subordinate authority to control and supersede such prosecutions is placed in some authority, either executive or judicial.

Will it be contended that the administration is carried to the courts of the United States, leaving the functions of ameliorating its severity in the hands of the state authorities, or that these attributes are carried over into the same jurisdiction, to be exercised in some manner never pointed out by any constitution, law or precedent? The acts of congress do not attempt to solve the numerous difficulties in the way of such a jurisdiction and we shall not attempt it. It is evident that if it had been the intention of congress to change radically the rules, forms and substantial incidents of the proceedings of the criminal courts of the United States, some evidence of such an intention would have appeared in the acts in question; whereas, nothing of that kind appears. We cannot presume such an intent. It must be concluded that a criminal proceeding, removed into the United States court, if it can proceed at all in those courts, must do so as a civil cause. Such a proposition carries absurdity on its face, and need not be considered. We are compelled, then, to conclude that

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the object *of the act was to terminate certain criminal proceedings, having their origin under the laws of a state and in the courts of a state, by removing them to a court having no authority to proceed in them. Although this conclusion leaves the relations of the courts of the states and of the United States in an anomalous and unfortunate condition, and may give rise to the inquiry whether any constitutional authority exists in the congress of the United States to interdict proceedings in state courts on grounds involving the integrity of state administration alone, especially when full authority has been granted for the correction of any errors that these courts may commit, on failures to give full force to the constitution and laws of the United States in a court having appellate jurisdiction over the state courts for that purpose, yet we are forced to conclude, by the terms of the act itself, that such was the intention of the body from which it emanated.

Under the view we take of the case, it will not become necessary to examine the authority of congress to reach such a result, as we do not regard the case in hand as coming within the act in question. Considering, then, that the object of the act of congress was to stop proceedings of a criminal character pending in a state court under certain circumstances, it becomes evident that it was only intended that such authority should be exercised when the law of the forum thus invaded does not admit of a defence that involves some ground of right, arising or secured under provisions of the constitution and laws of the United States intended to secure equal civil rights. Assuming, for the purposes of the argument, that congress possesses such powers in any degree, and a reasonable case for its exercise might be imagined when such courts had not the legal measure of power to enforce some right arising under or secured by the constitution and laws of the United States, provided there was no other or better remedy. Such a case might arise when one indicted in a state court, having full right of citizenship under the constitution and laws of the United States, is, by the law of a state, deprived of a standing in the court allowed to citizens at large. If the right of trial by jury, of being confronted by witnesses, or to any of the incidents of a regular and usual arraignment, trial, verdict and judgment allowed to other

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citizens, be denied such a person, *it may well be said that a tribunal, thus destitute of the means of administering justice in the case, is not entitled to be regarded, under the constitution and laws of the United States, as possessing any competency to act upon the rights of such persons. But even in this case a question would remain whether an adequate remedy is not afforded by the appellate jurisdiction of the Supreme Court of the United States, acting on the proceedings of the court of last resort in the state upon such case, inasmuch as in such an appeal the defendant could well say that he had been denied a right claimed under the constitution and laws of the United States; but that need not be considered. It may be observed that no such defect of authority is alleged or exists in the present case.

On what principle could legislation by congress be carried beyond the point? If such a power exists, it need not be confined to the cases enumerated in the act in question, but may extend to any case when either the prosecution or defence set up in a state court involves any right or modification of right originating under or secured by the constitution and laws of the United States. When, then, it is considered to what extent the laws of the United States enter in some degree into contracts and rights of action and defence, and how extensively they might be made to influence them through the various powers committed to congress by the constitution—notably, of those relating to excise and imports—some conception may be formed of the possible extent of such a jurisdiction. It may be said that it cannot be presumed that congress will stretch a prerogative to its utmost limit, and, therefore, in considering the nature of such a jurisdiction, we ought to have in mind only that idea of it which appears to be reasonable and consistent with the general objects of the constitution. This view, reasonable enough when applied only to the ordinary motives of a legislative body, has no application to cases involving the equilibrium between the different parts of a complex government established by fundamental laws. The constitution of the United States placed the security

of the states against federal encroachment on no such low ground. Its principle is to circumscribe and limit the powers that may be detrimental to the rights of the states, and

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to trust *as little as possible to the assumed principle that rival governments, acting in the same realm or sphere, will be controlled by moderation towards each other. Those who framed that instrument were too well versed in the history of government to entertain such an optimistic idea. If, then, the constitution impresses the important truth that, in maintaining the equilibrium of this complex government, reliance must be had solely in limitations of public authority, the interpretation of that constitution, and of the law passed under it, must be largely influenced by it. If it be conceded that power exists under the act of congress, even to the limited extent already considered, there is still a jurisdiction of incalculable limits, and of sufficient potency to work out material changes in the structure of the government and the equilibrium of its parts. But if the plenary powers contended for by the defendant exist, the equilibrium between the states and the national government, sought so carefully by the constitution, is practically destroyed.

The appellant contends that prejudice, based on his being a person of color, and formerly a slave, in his political opinions and associations, and on the ground of services rendered during the late war to the United States, exist in the country where the indictment was found. Is this a case within the act of congress, assuming the facts to be as stated by him? If so, then the existence of local prejudice likely to affect the rights of a party prosecuting or defending in a state court is ground for inhibiting such court from exercising its jurisdiction, under the authority of an act of congress, where such prosecution or defense involves any direct or incidental right arising or secured under the constitution or laws of the United States. If the rights of equal citizenship are entitled to this protection, then all other rights of the same origin or sanction are entitled to equal protection. The fourteenth and fifteenth amendments of the constitution, intended to secure equal civil rights in this respect, do not place such cases on higher ground than other rights secured under the constitution. Congress is authorized to enforce such provisions by "appropriate" legislation. By appropriate legislation is clearly meant such legislation as that sanctioned by the instrument at large. Unless, then, such legislation

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as we have under consideration *would be appropriate in the case of other rights secured under the constitution, it would not be embraced within the intention of those amendments. We are at liberty, therefore, to consider the subject, on general principles, applicable to the constitution at large.

There is no clause in the constitution of the United States that guarantees a just administration of the laws of the states within their proper sphere as affecting rights enjoyed under that constitution, except as that is implied in certain provisions conferring jurisdiction on the federal courts, both original and appellate. The power in question will not be claimed to arise under that claim of jurisdiction; from what source, then, can it arise? There is nothing in the constitution as originally framed, or in the amendments, that can by any process of reasoning be perverted into such a guaranty. The idea of stopping the administration of justice because it is imperfect, has no place among the principles of the law nor the practice of governments. You might as well arrest the action of the heart because the blood is impure. To stop it on the ground that the community surrounding the court, and possibly affecting the purity of its administration, is in a temper unfavorable to a litigant, without any provision for transferring the trial to another part of the same jurisdiction where circumstances of a more favorable character exist, is to acknowledge exhaustion of the capacity and means of government. The application of the views here presented to the case made by the appellant's petition, is so obvious that it needs no particular discussion.

This court held in Barker v. Bowen, 8 S. C. 400, that in order to remove a cause from the state court to the United States Circuit Court, it was necessary that sufficient cause for such removal should appear on the face of such petition. It is not necessary for the purposes of the present case to say whether the facts alleged are traversable in the state court; for the defect is one of law appearing on the face of the petition in the present case. The general statement of the petition that the defendant "is denied and cannot enforce in the judicial tribunals of the part of the state, where the said prosecution is pending, the rights secured to him by the laws

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providing for equal civil rights as *citizens of the United States of all persons within the jurisdiction of the United States," is insufficient in itself, independent of the ground of fact laid for such a statement. It assumes rather the character of an indictment or impeachment of the tribunal before which one is laboring under a charge of crime, proceeding from the alleged criminal against his sovereign sitting in judgment upon his conduct, than an exception to the right of the court to proceed in the case. If such an anomalous proceeding is to be tolerated as consistent with the practice of civilized communities, the indictment, at the least, ought to be specific and lay a foundation of fact within the act of congress. But where we look into the facts alleged they amount to nothing more than a charge of prejudice existing in the community. If a question of removing the cause for

trial to another county had been raised, the court could have looked into the truth of the facts alleged, but this was not the defendant's demand. He selected his own forum, and he must stand by that selection. The prayer of the petition was properly denied.

The privilege of a member of congress was not available and was properly refused. An indictment for bribery is not arrested by such privilege.

There was no duplicity in charging in the indictment that the defendant corruptly accepted a gift and gratuity, and a promise to make a gift. The promise must be regarded as relating to a gift additional to that alleged to have been given and accepted. There is no inconsistency in taking a certain sum and the promise of a further sum, and the indictment must be read in that sense. The charge is not in any sense in the alternative, and is only cumulative as it regards the consideration of the bribe, a single act of corrupt taking being alleged.

The statement that the question of legislation to which the bribe related, "was and might be by law brought before," etc., is without fault. It was merely equivalent to saying that it was brought before him to act upon as a senator in conformity with law. It cannot be referred for explanation to a somewhat similar phrase in the statute constituting the crime, for the latter is in the disjunctive and intended to treat cumulatively the cases to which the crime should ap-

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ply, while the indictment *alleged only a single case, and uses that language solely to characterize that case.

The joint resolution in regard to which the bribe was alleged to have been offered and received was sufficiently set forth by its title, that being the due and ordinary mode of designating the particular action of the legislature in a given case. The terms of the resolution did not in the least enter into the constitution of the offence. The essence of the crime was the acceptance of a gratuity, or the promise of one "under an agreement" that his vote should be given in a particular manner as to some "question, cause, or proceeding which is or may be by law brought before him in his official capacity." The identity of the "question" is complete with the statement of the title of the measure of legislation that was thus contemplated. The terms of that resolution, as it was finally passed, are immaterial, as they were subject to change after the agreement, for the bribe was complete without changing the identity of the "question" that was the subject of the agreement. This objection to the fourth count is disposed of by what has just been said.

The jury were charged that the fifth count was defective, and therefore the objections to that count need not be considered.

The ground urged for a new trial will next be considered. There was no error in admitting into evidence the printed records of the proceedings of the senate in proof of such proceedings. Article II., Section 26, of the constitution, requires each house to keep and publish a journal of its proceedings. The journals so published are competent evidence to show what matters were pending before the legislative bodies at any particular time, and as that was a matter at issue, it was proper to introduce the journals as the highest legal proof of the fact.

It is not necessary to consider the competency of such proof to establish the fact of an act done by the defendant, as an individual member of the senate, that constituted a material part of the crime charged, for no such question is raised. The evidence being competent for any purpose was properly admitted.

Nor was there error in admitting proof from the books and memoranda of the bank. The state sought to corroborate the testimony of an accomplice by a line of proof that

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embraced *certain facts, of which one was that a credit had been given to the defendant by the bank in which he kept his account, as upon a deposit of the check paid to him for the purpose of the bribe as alleged by such accomplice. It was competent to prove the fact of such credit being given by the books of the bank. The memorandum alleged to have been made in the ordinary course of business by the officer who received the deposit, and which was intended to show the nature and amount of the deposit, must be regarded as representing the original note or memorandum from which the books were made up, and as such was competent to explain the books. There was accordingly no error in its reception in evidence. As no exception brings before us the legal force of these proofs, that subject need not be considered.

The court having overruled all the exceptions the appeal must be dismissed.

McIVER, and HASKELL, A. J.'s, concurred.

Separate Opinion of McIVER, A. J. In this case I concur fully in all the conclusions reached by the CHIEF JUSTICE. I desire, however, simply to indicate the reasons why I think there was no error on the part of the Circuit judge in refusing to allow the defendant the right to challenge peremptorily the juror, William T. Martin. I have already presented these reasons in an opinion just filed in the case of State v. F. L. Cardoza, Ante page 195, and it is unnecessary to repeat them here, but only to refer to them as influencing my judgment in this case. The only difference between the two cases is that, in the case against Cardoza, the defendant, after having been refused the

right to challenge peremptorily two of the jurors, who had been drawn after the twelve originally presented, actually did exercise the right of peremptory challenge to the full extent allowed by law, by challenging five of the original twelve, while, in the case now under consideration, the defendant did not offer to challenge peremptorily but two of the jurors presented, Stanley and Martin, one of which was allowed and the other disallowed. The peremptory challenge of Stanley was properly allowed, because he was one of the

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*twelve originally drawn and presented, while that of Martin was properly disallowed, inasmuch as he was drawn after the original twelve, and, until they had been disposed of, either by acceptance or rejection, the defendant could not reach Martin. Until they were sworn, they could not be regarded as accepted; and, certainly, in this case, it could not be said that they had been accepted by the defendant, for, as the record shows, after his challenge of Martin had been disallowed, he then peremptorily challenged Stanley, one of the original twelve, thereby demonstrating that he had not accepted all that remained of the original twelve. It is very clear, therefore, that at the time the defendant offered to challenge Martin, who had been subsequently drawn, he had no right to do so; and it does not appear that he attempted to exercise this right after those who had been originally drawn were disposed of.

HASKELL, A. J. I concur in the result. My reasons are stated in a separate opinion filed in the case of State v. F. L. Cardoza.

Appeal dismissed.

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11 S. C. 288

(Case No. 662.)

THE STATE, ex rel. ALICE BURTON, v. ALFRED WILLIAMS, Intendant, and JAMES COHEN, Marshall of the Town of Beaufort.

THE STATE, ex rel. JOHN H. PAGE, v. THE SAME.

(April Term, 1878.)

[1. *Municipal Corporations* ⟸594.]

An ordinance to prevent the keeping of a bawdy-house is clearly within the scope of the powers conferred upon a municipal corporation, whose charter authorizes "by-laws, rules and regulations * * * for preserving peace, order and good government."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1327; Dec. Dig. ⟸594.]

[2. *Criminal Law* ⟸90.]

The intendant of a town, "vested with all the power and jurisdiction given to trial justices of this state," and authorized to "hold court for the trial of violations of town ordinances," and "to punish by fine or imprisonment, in his discretion, or both," has power to

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try all violations of the town *ordinances, although such violation may involve a common law offence. And it seems he may summon and impanel a jury, when demanded.

[Ed. Note.—Cited in Town of Lexington v. Wise, 24 S. C. 164; Town Council of McCormick v. Calhoun, 32 S. C. 292, 10 S. E. 1009.

For other cases, see Criminal Law, Cent. Dig. § 132; Dec. Dig. ⟸90.]

[3. *Criminal Law* ⟸90.]

Such trial by the intendant being "provided for by law," is not the trial of a case within the exclusive jurisdiction of the Court of General Sessions, under Article IV., Section 18, of the constitution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 129–136; Dec. Dig. ⟸90.]

[4. *Municipal Corporations* ⟸120.]

Every ordinance passed by a municipal corporation under the powers conferred by its charter, and within the limits prescribed, derives its authority from the legislative power of the state, and has the force and effect of a legislative act within the municipality. Semble.

[Ed. Note.—Cited in City Council of Anderson v. O'Donnell, 29 S. C. 366, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728; State ex rel. Columbia Club v. McMaster, 35 S. C. 14, 14 S. E. 290, 28 Am. St. Rep. 826.

For other cases, see Municipal Corporations, Cent. Dig. § 274; Dec. Dig. ⟸120.]

[5. *Criminal Law* ⟸ 200.]

When the same act violates two statutes, it involves two offences, for which two punishments may be inflicted. Semble. Cases referred to, and the authority of Schroder v. City Council, 3 Brev. 533, questioned.

[Ed. Note.—Cited in Town Council of Beaufort v. Ohlandt, 24 S. C. 159; City Council of Anderson v. O'Donnell, 29 S. C. 358, 369, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728; City of Florence v. Brown, 49 S. C. 338, 26 S. E. 880, 27 S. E. 273; City of Greenville v. Kemmis, 58 S. C. 434, 36 S. E. 727, 50 L. R. A. 725; City Council of Abbeville v. Leopard, 61 S. C. 106, 39 S. E. 248; State v. Sanders, 68 S. C. 195, 47 S. E. 55.

For other cases, see Criminal Law, Cent. Dig. § 386; Dec. Dig. ⟸200.]

[This case is also cited and affirmed in Town Council of Beaufort v. Ohlandt, 24 S. C. 158.]

Before Wiggin, J., at Beaufort, July, 1877.

The opinion of the court states all matters necessary to a full understanding of the case. The writ of prohibition was refused by the Circuit judge, and the relators appealed.

Mr. W. J. Verdin and Mr. Thomas G. White, for appellants.

Mr. William Elliott, for respondents.

November 30th, 1878. The opinion of the court was delivered by

McIVER, A. J. The case first above stated was an application for a writ of prohibition, restraining the respondents "from any further proceedings" in a prosecution against the appellant for keeping a bawdy-house within the corporate limits of the town of Beaufort. It appears that the appellant was

tried before the intendant of said town, upon a charge of keeping a bawdy-house, in violation of one of the ordinances of the town, and, upon conviction, was sentenced "to imprisonment for thirty days in the guard-house, or to pay a fine of twenty-five dollars and costs, or to work thirty days for the town, and that said relator thereupon paid said fine, subject to appeal to council." Whether any steps towards such appeal were taken does not appear; but the relator applied for a writ of prohibition, upon the ground that the intendant had no jurisdiction to try such a case; and this is the only question which we are called upon to consider.

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*To determine this question it is only necessary to inquire whether the charter of the town conferred the authority to pass the ordinance under which the appellant was tried, whether the ordinance was passed by the town council, and whether the charter, or any other act of the legislature, conferred upon the intendant the right to try and punish persons who might violate such ordinance; for nothing can be plainer than that the legislature has the right to confer legislative power upon the various municipal corporations which have been or may be established for the purpose of enabling them to carry into effect the objects for which they are created. Heisembrittle ads. City Council, 2 McM. 233; City Council v. Ahrens, 4 Strob. 241; Heise v. Town Council, 6 Rich. 404.

It is very manifest that all these inquiries must be answered in the affirmative. The original charter of the town of Beaufort, granted in 1803, (8 Stat. 218,) expressly confers upon the town council the power "to make and establish such by-laws, rules and regulations * * * that shall appear to them requisite and necessary for the security, welfare and convenience of the said town, or for preserving peace, order and good government within the same." The act of 1872, (15 Stat. 136,) amending the charter of said town, confers the same powers, in much the same language, the limitation being that such by-laws and ordinances shall not be inconsistent with or repugnant to the laws of the state, and shall at all times be subject to revisal or repeal by the general assembly of the state.

Certainly every one will admit that an ordinance to prevent the keeping of a bawdy-house within the limits of the town is an ordinance tending to the preservation of "peace, order and good government" in said town, and, therefore, clearly within the scope of the powers conferred by the charter.

Finally, the act of 1874 (15 Stat. 647) declares in Section 2, "That the intendant or acting intendant of said town is hereby vested with all the power and jurisdiction given to trial justices of this state, and may hold court for the trial of violations of town ordinances, and may punish by fine or imprisonment, in his discretion, or both."

From this review of the acts of the legis-

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lature, it is very *clear that the legislature had conferred upon the town council the power to pass such an ordinance as the one under which the relator was tried and convicted, and that power had been vested in the intendant to try this, as well as all other violations of the ordinances of said town; and the fact that such ordinance was duly passed by the town council is not disputed, the same being set out in full in the "case."

It is argued, however, that as the offence of keeping a bawdy-house is indictable at common law, it cannot be indictable before a trial justice, but that the Court of General Sessions has exclusive jurisdiction under Article IV., Section 18, of the constitution. So much of that section as relates to this matter reads as follows: "The Court of General Sessions shall have exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law." Hence, in order to bring any case within the exclusive jurisdiction of the Court of Sessions, it will be necessary to show that the trial of such case has not been "otherwise provided for by law." But, as we have seen, the trial of the case under consideration has been "otherwise provided for by law," and hence it is not within the exclusive jurisdiction of the Court of Sessions.

Again, it is argued that if the town authorities can take jurisdiction of a common law offence simply because they have adopted an ordinance prohibiting such offence under a specific penalty, then one of the two results must follow: either the municipal authorities have the power to change the common law, or a party may be subjected to being twice tried and punished for the same act. For if the trial and conviction under the ordinance operates as a bar to the trial under the common law, then the ordinance operates a change in the common law, by mere municipal authority; but if it does not operate as a bar, then the offender is liable to be twice punished for the same act—and either of these results, it is contended, is too monstrous to be for a moment contemplated. In reference to this argument it is only necessary to say that the case as presented here does not necessarily involve the consideration of any such questions. It may be as well, however, to say that if it should be held that the ordinance operated a change in the

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common law, such change *would not be effected by mere municipal authority; for every ordinance passed by a municipal corporation, under the powers conferred by its charter, derives its authority from the legislative power of the state, and not merely from the municipal authority passing it: and hence, unless it is passed in pursuance of authority granted by the law-making power of

the state, it has no force or effect whatever; but when so passed, it does have the force and effect of a legislative act, within the limits prescribed for it. And of the other result—that of subjecting an offender to two punishments for the same act, not the same offence—it may be said that it is not so monstrous as might at first be supposed, inasmuch as we find that our own courts have decided that for the same act a man may be twice punished, because, by the one act, he has violated two distinct statutes of the state, committed two distinct offences, and is therefore liable to two distinct punishments. State v. Sonnerkalb, 2 N. & McC. 280; State v. Glasgow, Dud. 40; State v. Taylor, 2 Bail. 49. It is true that in the case of Schroder v. City Council, 3 Brev. 533, Nott, J., did say that an ordinance of the city council of Charleston, imposing a penalty for selling spirituous liquors without a license, could not stand, because the legislature had imposed a different penalty for the same offence. The question, however, does not seem to have been discussed in that case, and was not essential to the case made. This case does not seem to have been subsequently followed, and, on the contrary, the cases of Heisembrittle ads. City Council, and City Council v. Ahrens, supra, necessarily imply that such an objection to the ordinance would not then have been sustained. In Heise v. Town Council, supra, O'Neall, in his Circuit decision, uses this language: "That the by-laws of a corporation must be subordinate to, and not in conflict with, the statute law cannot be denied. I confess I don't perceive how an ordinance, imposing a fine for doing an act within the corporate limits, which the legislature have declared to be unlawful, can be said to conflict with such law. Both can very well stand together, and both may be enforced—one as against a corporator, and the other against him as a citizen. My great respect for any decision made by Judge Nott has made me hesitate much on this point. Un-

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questionably the case of Schro*der v. City Council, 3 Brev. 533, did rule that an ordinance imposing a fine for an offence which had been, by the legislature, subjected also to a fine, could not stand. On looking to that case, however, it appears that only three out of six judges heard the case, and two gave the judgment—the third dissenting. Under such circumstances, as my judgment is clear against the decision, I am not bound to follow it." As Heise's Case turned upon another point—the want of power in the town council to adjudge a forfeiture—the question with which we are concerned was not considered by the Court of Appeals. But as that court went beyond the case, and declared that the imposition by the town council of five fines for selling spirituous liquors contrary to one of the ordinances of the town, amounting in the aggregate to a sum beyond their jurisdiction, though each fine was within the amount of their jurisdiction, was not irregular simply because the fines were imposed at one sitting of the council, we must conclude that the court agreed with Judge O'Neall on the question we are considering. Otherwise, they would have declared the imposition of the fines void upon the ground taken by Judge Nott, especially as one of the grounds of appeal taken by the relator raised that very question. By reference to the following cases it will be seen that this question has been decided elsewhere in conformity with the view presented by Judge O'Neall in Heise's Case. McLaughlin v. Stephens, 2 Cranch C. C. R. 148 [Fed. Cas. No. 8,874]; United States v. Holly, 3 Cranch C. C. R. 656 [Fed. Cas. No. 15,381]; Hamilton v. State (Texas), 6 Reporter, 476. See also Cooley on Const. Lim. 198–9.

Again, it is urged that the relator was entitled to a trial by a jury, and that this she could not get on her trial before the intendant. It may be observed that there is no evidence whatever before us that the relator demanded a jury. But if she had made such demand there would have been no difficulty in obtaining a jury. The intendant, as we have seen, is invested with all the powers of a trial justice for the trial of violations of town ordinances, and as one of the powers of a trial justice is to summon a jury when demanded, and the mode of proceeding by which a jury may be obtained, is pointed out in Section 31 of Chapter XXV., General

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Statutes, p. 200, it is difficult to see *how this objection can avail the appellant. It may be that the intendant erred in imposing the sentence, by requiring, as one of the alternatives, that the relator should "work thirty days for the town," but as the right of appeal from the sentence is expressly reserved to the defendant by Chapter XXV., Section 34, General Statutes, p. 201, such error, if any it be, might have been corrected in that way, and would not constitute ground for prohibition. Indeed, no such ground is taken in this case, and the matter is only adverted to for the purpose of showing that it would not have availed the relator even had it been properly taken.

The case of State, ex rel. John H. Page, v. Alfred Williams, Intendant, and James Cohen, Marshal of the town of Beaufort, 11 S. C. 288, depends upon the same facts and must be governed by the same legal principles.

The judgment of the Circuit judge, in both of the cases, is affirmed.

Appeal dismissed.

WILLARD, C. J., and HASKELL, A. J., concurred.

11 S. C. 294

(Case No. 674.)

JOHN R. RENWICK and JAMES E. RENWICK v. G. D. SMITH, Administrator of W. W. Renwick, J. W. N. BEARD, Administrator of C. S. Beard, and R. B. LYONS, Administrator of James Rogers.

(November Term, 1877.)

[1. *Executors and Administrators* ⟸470.]

An administrator filed a sworn return, intended to be a full and final account, but produced no vouchers, and no decree was passed by the Ordinary, and no notice of such filing was had by the distributees; *held*, that there was not such an abandonment of his trust, as would give currency to the statute of limitations. Cases reviewed.

[Ed. Note.—Cited in Mason v. Johnson, 13 S. C. 24; Dickerson v. Smith, 17 S. C. 305; Fricks v. Lewis, 26 S. C. 239, 1 S. E. 884; Ariail v. Ariail, 29 S. C. 93, 7 S. E. 35.

For other cases, see Executors and Administrators, Cent. Dig. § 2014; Dec. Dig. ⟸470.]

[2. *Wills* ⟸610.]

A bequest to "my daughter R. and her children" of certain negroes, "lately appraised at three thousand dollars, she accounting for interest from January 1st, 1842, till my death, and at that time she is to receive an equal part, with her other sisters of" certain other

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personalty; R. *having no children at death of testator, *held*, that she took an absolute estate in all the property given to her by this clause of the will.

[Ed. Note.—Cited in Vaughan v. Bridges, 61 S. C. 162, 39 S. E. 347.

For other cases, see Wills, Cent. Dig. § 1380; Dec. Dig. ⟸610.]

[3. *Wills* ⟸593.]

Where a testator in the last clause of his will, (not having previously disposed of his entire estate,) bequeathed all the "rest and residue" of his "other property," to his four children, and directed that if any of his daughters should die without leaving children, "their property hereby given" was to go over—the word hereby referred to the "other property" mentioned in this clause, and not to the dispositions of the entire will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1307; Dec. Dig. ⟸593.]

[4. *Husband and Wife* ⟸11.]

Where a husband administered on an estate, in which his wife had an interest, and wasted the assets before her death in 1850, his marital rights attached upon his wife's share of the assets so wasted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 53; Dec. Dig. ⟸11.]

[This case is also cited in Mason v. Johnson, 13 S. C. 21, and distinguished therefrom.]

Before Northrop, J., at Union, June Term, 1876.

The plaintiffs are the only children of Rosannah P. Renwick, who was the wife of W. W. Renwick, and daughter of John Rogers—all of Union county. John Rogers died January 27th, 1847, leaving of force a last will and testament, bearing date March, 1842; and he left surviving him one son and three daughters. The son, James Rogers, was nominated executor, but he renounced the executorship, and also released all of his interest in the estate in favor of his sisters. Letters of administration cum testamento annexo, were granted March 20th, 1847, to W. W. Renwick and Clough S. Beard, jointly, both of whom had married daughters of testator, and James Rogers signed their administration bond as a surety. W. W. Renwick attended to almost all of the duties of the office.

Mrs. Renwick had no children at the date of her father's will and none at his death. Her first child was still-born between those dates. Her second was the plaintiff, John R., born November 2d, 1847, and her third and last, James E., was born December, 1849. She was married in 1841, and died January, 1850.

In August, 1851, W. W. Renwick, as administrator, filed his return in the Court of Ordinary, sworn to as stated in the opinion of the court, wherein he charged himself with all of his receipts on account of the estate, and credited himself with all of his payments, and with "net balance for distribution, $10.574.88;" next follows an account, wherein he credits himself with "distribution of above net balance, as per will," that is—

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*To Jane E. Beard and R. P. Renwick, to make their advancements equal to S. M. Lyons'.....	$1504 50
To Jane E. Beard and husband....	3023 46
To R. P. Renwick and husband.....	3023 46

Then follows credit of $431.92 to each of four children of Mrs. Lyons (a daughter of testator, then deceased,) with no total added up. Next follows under head of "Dr." the very same items, together with $431.92 to each of the remaining three of Mrs. Lyons' children, and a total of $10,574.88. The return has no dates whatever to the items.

The personal property was sold March, 1847, on a credit of one year; the land was sold (under a power given in the will) in November, 1847, for $3700, on a credit of one and two years, and was purchased by W. W. Renwick. These two sale bills, together with cash on hand at testator's death, made up the entire estate, with the addition of only $96.37, collected by W. W. R. before 1850. The personal estate sold for $5966.72, of which Renwick purchased $2570.37, Beard $829.35, other parties $2567.

C. S. Beard died in 1871, W. W. Renwick in 1872, and James Rogers in 1873; and the defendants, J. W. N. Beard, G. D. Smith and R. B. Lyons, respectively, administered on their estates.

The action was commenced January 27th, 1875.

The complaint claimed that Rosannah P. Renwick was entitled only to a life estate in the property willed to her; that the plaintiffs, her sons and only children, were entitled to an absolute estate in remainder therein; that no part of the share of the

said Rosannah P. had ever been delivered to her in her lifetime, or to the plaintiffs since her death; that there was due the plaintiffs the sum of $4527.96, with interest from January 31st, 1850, as appeared from returns of the said administrators of John Rogers, and that the administrators had wasted the assets of the estate.

And the complaint prayed judgment for the sum of $4527.96, with interest from January 31st, 1850, for an account for costs and for general relief.

The defendants answered, denied that the plaintiffs had such an estate as they claimed,

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and insisted that the said Rosannah *took an estate in fee simple absolute under the will. They also insisted that the estate of Rosannah went into the possession of her husband, and that his marital rights attached thereto. And they further claimed the protection of the statute of limitations, because the cause of action did not accrue to either of the plaintiffs within four years before the commencement of their action.

The clauses of the will construed by the court are as follows:

3. I give, devise and bequeath to my daughter, Rosannah P. Renwick, and her children, the following negroes: Rosy, Lucy, Jim, Elijah and Rosetta, her children, and Jesse and Ned, lately appraised, as aforesaid, at three thousand dollars, she accounting for interest from the first day of January, eighteen hundred and forty-two, till my death, and at that time she is to receive an equal part, with her other sisters, of my land and negroes above stated, including the Hagar family of negroes.

5. I reserve a life estate in all my other property, and at my death I wish my other negroes fairly appraised and given off to my children in families, as they can best agree among themselves; if not, sold and divided as above stated; the rest and residue of my other property to be sold and divided in four equal parts among my aforesaid children, and if any of my daughters should die without leaving children, their property hereby given to be divided in four equal parts, one part to be retained by their husbands, and the other three parts to come back to my other children.

* * * * * * * *

By the fourth clause of the will, the only land of which testator died seized was directed to be sold; and counsel agreed that it was thereby converted into personalty.

The Circuit judge decided that John R. Renwick was barred by the statute of limitations; that James E. Renwick was not so barred; that, under the will, Rosannah P. Renwick took a life estate, with remainder in fee to her sons, the plaintiffs; that the marital rights of W. W. Renwick did not attach to her share. And the decree referred it to the clerk to take an account in conformity with such rulings.

From this decree John R. Renwick appealed, upon the ground that he is not barred by the statute. And all the defendants

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ap*pealed, upon the grounds that the statute of limitations barred James E. Renwick; that the said Rosannah P. took an absolute, indefeasible estate under the will; and that the marital rights of her husband, the said W. W. Renwick, attached to her share.

Mr. J. F. J. Caldwell, for plaintiffs.

An administrator or other fiduciary, and the sureties on his bond, cannot claim the benefit of the statute of limitations against the cestuis que trust. Aug. on Lim., § 166, et seq.; 2 Desaus. 54; 4 Strob. Eq. 207. The only qualification allowed of this rule is where some act is done by the fiduciary purporting to be a termination or disavowal of the trust. 4 Rich. Eq. 60; 4 Strob. Eq. 189; Bail. Eq. 195; 1 Strob. Eq. 79; 2 Strob. Eq. 334; 3 Strob. Eq. 39; 3 Rich. L. 438; 14 Rich. Eq. 176. But this case is like none of these. He states the balance due, but does not profess to have paid them. If the statute did bar, it would only bar an accounting, not a demand of balance admitted to be on hand.

II. The second question is whether Rosannah P. Renwick took a life estate under John Rogers' will, the remainder being in his sons, the plaintiffs, or whether she took an absolute estate.

It is indisputable—since Lampley v. Blower, 3 Atk. 396; Henry v. Archer, Bail. Eq. 535; Nix v. Ray, 5 Rich. L. 423—that a devise or bequest to one and his or her children or issue, with a limitation over, in case of the death of the first taker without having issue, operates to create a purchase, and not an inheritance, on the part of such children or issue, and thereby creates a life estate in the first taker and an estate in remainder in the children, after the death of the first taker. On the other hand, it is conceded that a bare bequest or devise to one, with a limitation over in case of that one dying without issue, will create a fee simple in the first taker, subject only to the condition of children being born to him or her, and that upon the happening of that event, the estate of the first taker becomes absolute.

The question here is, which of such two provisions did John Rogers really make? If the fifth clause of the will is taken by itself, it is not unreasonable to say that the later provision is intended. If the will is taken as a whole, it is submitted that the

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*former case is provided; for, by combining the third and the fifth clauses, we make devises and bequests to Rosannah Renwick and her children, and if she should die without leaving children, then over to her hus-

band and her brothers and sisters, in equal shares. It is conceded that a simple conveyance or devise, without further description, confers an estate in fee simple absolute; that dubious provisions of a will shall be construed in favor of the heir-at-law; and that an absolute and certain gift of property shall not be thwarted by mere conjecture as to the grantor's intention. But the paramount rules in the construction of wills are, that the intention of the testator, unless in direct contravention of the established principles, shall be consulted and carried out; and that the whole will shall be construed together.

The following authorities declare the necessity of reading the whole will together, in order to arrive at the intention of the testator, and also to show that it is the intention of the testator that is to govern the case. 2 Ves., Jr., 329; 10 Bac. Ab. 533; 2 Paige 122; Bail. Eq. 517; 10 Bac. Ab. 534; 6 Ves., Jr., 129; 7 Ves. 403; 10 Ves. 595.

Words may be supplied in a will to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context. 10 Bac. Abr. 534; 6 East 486. As to supplying words in a will, see 1 Jarman on Wills 428, et seq.; Amb. 122; 13 Ves. 476; 1 Kee. 486; 2 Dowl. & R. 398; 2 Moo. & R. 490. And where words of description of an estate devised are postponed to the end of a clause, it has been held that they might apply to a devise in an earlier portion of it, although gifts are separately made to the devisee. 5 East 87; 10 Rich. Eq. 341; 1 Desaus. 354; 3 Barb. Ch. 488; 6 Gratt. 456; 4 McC. 418; 1 Jarman on Wills 500.

III. If her estate had been absolute, plaintiffs would still be entitled to two-thirds of it, for W. W. Renwick never reduced his wife's share into possession. The facts show that he did not. Spann v. Stewart, 1 Hill Ch. 326, does not apply, for in that case both husband and wife administered. Nor does Wallace v. Boozer, 1 Hill Ch. 393. See 2 Kent 138; Ex parte Elms, 3 Desaus. 155; Id. 135; note, 2 Hill Ch. 644; 1 Spears Eq. 142; Dud. Ch. 238; 4 Strob. L. 463; 2 N. & McC. 147; 12 Ves. 497; 2 Hill 644.

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*Mr. R. W. Shand, for defendant, Lyons.

I. J. R. Renwick's claim is barred by statute of limitations.

The rule is to be found in Ang. on Lim., § 174, in Colburn v. Holland, 14 Rich. Eq. 234, and cases cited. A case like this may be found in 4 Rich. Eq. 92. Here the administrator stated his indebtedness and immediately below credited himself with the payment of it all, except to three persons, probably minors.

II. James E. Renwick is likewise barred. He is not entitled to nine months on account of the administrator's death. See argument of Chancellor Wardlaw in 7 Rich. Eq. 40. The limitations prescribed in the Code of Procedure do not apply, (Code, § 96,) because his right of action accrued before the code was passed; when he was still a baby. 3 Rich. 438.

III. Under the will of John Rogers, Mrs. Renwick took an absolute, indefeasible interest in all of the property thereby bequeathed to her.

(1.) It is admitted that this whole estate is personalty. Ad. Eq. *135 and notes; Fletcher v. Ashburton, 1 Lead. Cas. in Eq. 563; 8 Rich. Eq. 291.

(2.) Under the first sentence of Section 3 of this will, the property given to Mrs. R. and her children, she having no children at the time, became an estate tail. Wild's case, 6 Co. 17; 6 Rich. Eq. 91. The property bequeathed in the fifth section became a fee conditional. 1 McC. Ch. *60; 9 Rich. Eq. 58. But words which, as to lands, would create a fee conditional, as to personalty give an absolute estate. 6 Term R. 307; 4 Rich. Eq. 378. And fees tail in South Carolina are construed to be fees conditional, and, therefore, as to personalty, fees tail and fees conditional are regarded as absolute estates. Bail Eq. *351.

(3.) These positions are conceded, but it is contended in reply that she, where it last occurs in Section 3, means she and her children; and that the third and fifth clauses must be construed together, and then governed by principle of Read v. Snell and Henry v. Archer.

a. The case in first Desaus. 355, relied on, is a good illustration of true rule as to first point: it must be a "palpable mistake." But see 4 McC. 418; 6 Munf. 114; 1 Brev. 414; 1 Jarman on Wills 432; Id. 745, Rule 19.

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*b. The mistake on the second point arises from looking for his actual intent, whereas we can only ascertain his legal intent. O'Hara on Wills, ch. II., § 5.

(4.) All property is acquired by descent (which is by operation of law) or by purchase (which is by act of the parties.) Where they coincide, descent prevails. Where property is taken by descent, the heir takes only that which is left by the first taker.

A devisee takes by direct devise, or by implication, (and implications are necessary or not,) and in the construction of a will the legal intent must govern. Bail. Eq. 517.

(5.) But intention is ascertain by certain fixed rules. 2 Jarman on Wills 739; 2 McC. Ch. 70, et seq.; Doug. 78; 3 T. R. 85; 5 Id. 323; 2 M. & S. 455; 5 B. & Ad. 129; O'Hara on Wills 29, ch. II., p. 29; 1 Brev. 414.

(6.) What are these certain rules?

Rule 3, in Sm. on R. & P. Prop. 776, reads: "An express disposition, though probably involving an oversight or mistake by the testator, cannot be controlled by inference which is not necessary or indubitable." In 2 Jar-

man on Wills 740 are twenty-four rules of construction, of which—

"XI. That, in general, implication is admissible only in the absence of, and not to control an express disposition."

"V. That the heir is not to be disinherited without an express devise or necessary implication: such implication importing not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed." 5 Pick. 536; 18 How. 385.

See, to same effect, 11 Rich. Eq. 198. The following authorities fully sustain and explain these rules: Right v. Sidebotham, Doug. 730; 8 T. R. 64; 14 Ves. 364; 1 Jarman on Wills 465, 477. These principles have been repeatedly recognized in the courts of South Carolina. 4 McC. 60; Bail. Eq. 298; 3 Rich. Eq. 559; 9 Rich. Eq. 58; Bail. Eq. 351; 2 McM. 472; 9 East 267. For definition of necessary implication, see 4 Bro. C. C. 534; Mer. 219.

(7.) Another rule of construction is, that every part of the will must stand by itself, if possible. Rule 15, in Sm. on R. & P. Prop. 776. Rule 22, 2 Jarman on Wills 745, and 2 Williams on Ex'rs 929. For authorities, see

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4 B. & C. 667; 1 Salk. 239; *9 East. 272; 2 Ves., Sr., 216; 8 Rich. Eq. 259. The cases cited on the other side (5 East 87; 4 McC. 418; 10 Rich. Eq. 341; Bail. Eq. 40; 5 Rich. 423; 2 B. & C. 680,) do not militate against these positions.

(8.) Other rules may be referred to, particularly those in 2 Jarman on Wills 740, which are numbered 12 (sustained by 4 B. & C. 667, and 9 East 272), 16 (sustained by 3 Pick. 363), and 18 (sustained by 3 Myl. & Cr. 584.) A will almost exactly like John Rogers' will has been lately construed by the Supreme Court of Virginia, and our construction sustained. See Barksdale v. White, 3 L. & E. Rep. 444, No. 14, April 4th, 1877; and see Id. 190.

(9.) Apply these rules to the construction of John Rogers' will, and we will find a fee tail and an absolute estate in Section 3, and a fee conditional in Section 5; all of which, the property being personal, the law regards as absolute and indefeasible.

IV. W. W. Renwick's marital rights attached to his wife's share in her father's estate before her death in January, 1850.

In all of the cases relied upon to sustain the contrary, (16 Ves. 416; 3 Desaus. *155; Bail. Eq. 204; 2 Hill Ch. *644; Dud. Eq. 238; 1 N. & McC. *147; Spears Eq. *143; 4 Strob. L. 463;) the property was unreduced choses in action, unpartitioned chattels, or the husband had no right to receive the money, as in 2 Hill Ch. *644.

The decision in Baker v. Hall, 12 Ves. 497, evidently referred to that which remained after the part had been disposed of, and did not include the money realized from the sale of that part. This is the conclusion of Judge O'Neall. 1 Hill Ch. *333; and see 1 Williams on Ex'rs *734.

Chancellor Kent, in the sentence cited, (2 Kent. *138,) is speaking of "her property in action," as the context shows. But as to money received, the marital rights do attach to the extent of the wife's share. 1 Hill Ch. *333. In Wardlaw v. Gray, 2 Hill Ch. *653, the case of Spann v. Stewart, is approved, when the assets are wasted. What is wasting the assets? 2 Williams on Ex'rs *1765, and Ram on Assets *495.

The complaint charges a wasting of assets. The purchases by Renwick were paid at ma-

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turity. 6 S. C. 490; Dud. Eq. 30; *17 E. C. L. R. 343; 2 Williams on Ex'rs *1124, *1128. The presumption is that all the notes were paid at maturity, (2 Hill Ch. *146,) and paid to W. W. Renwick. 3 Rich. Eq. 341. The purchases by Renwick exceeded his wife's share.

January 27th, 1879. The opinion of the court was delivered by

WILLARD, C. J. This action is by the personal representatives of a devisee under the will of John Rogers, for an account against the administrators of W. W. Renwick and C. S. Beard, who took out letters of administration cum testamento annexo on the estate of the testator, John Rogers, the executor named in his will having renounced the executorship, and against the administrator of James Rogers.

The first question to be considered is whether the demand is barred by the statute of limitations. The Circuit decree holds that the plaintiff, James E. Renwick, is not barred, but that the plaintiff, J. R. Renwick, was so barred. The plaintiff, J. R., excepts to this decision, and the defendants to that holding that J. E. is not barred. The question is whether there was such a termination of the office and duty of the administrators that the plaintiffs were bound to bring action within the time limited by the statute after such termination. The only evidence of such a fact is the circumstance that an account was presented to the Ordinary, intended, no doubt, as a full and final account, to which is appended the following note:

"Court of Ordinary, 18th August, 1851.

"Personally appeared before me W. W. Renwick, administrator of John Renwick, with the will annexed, who proves their return by his own oath, but produces no vouchers. B. Johnston, O. U. D."

It does not appear that the plaintiffs were cited to an accounting, or that they had notice of the filing of the account, nor that the administrators cum testamento annexo ever filed their vouchers, or that the Ordinary passed upon the accounts or made any decree in the matter. It is clear that this was not a final discharge of the duties incident to administration. It was part of the duty

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*of the administrators to account for the estate of their testator that came to their hands.

Filing an account is not in itself a compliance with the whole of this duty. It is at most furnishing the basis of the accounting, the object of the accounting being to verify or falsify its statements. To make that accounting final, it was necessary that the parties entitled to question the account filed should have an opportunity afforded them, by proper notice, to exercise that right, and that final action should be taken on the account by the Ordinary. This was not done; and the administrators cum testamento annexo, as represented by their administrators, must be considered as not having discharged themselves of the duty of accounting. Under this view, the statute of limitations cannot be regarded as having barred either of the plaintiffs, and the decree is, in that respect, erroneous.

The authorities bearing on the conclusions just presented will now be considered. Riddle v. Riddle, 5 Rich. Eq. 32. In this case, one of the questions was as to the commencement of the statute to run upon an administrator's accounting. Chancellor Dunkin says: "If an ex parte return to the Ordinary, in which an executor or administrator strikes a balance against the estate, should be regarded as a discharge of his trust, from which the statute would run, as against a bill to account, it would be an alarming disclosure, as well to creditors as to legatees and distributees of the deceased." It was held that the trust continuing, the statute was not a bar. Miller v. Alexander, 1 Hill Eq. 25. In this case it was held that even a decree of the Ordinary, taken ex parte, was not binding on the parties as an estoppel; that, to make it binding as an estoppel, it should appear that there was a proceeding either upon citation or the voluntary submission of the parties sought to be bound thereby. The result of this decision is to hold that the duty of accounting was not fully performed, even where there had been an actual accounting, and a decree based upon it, as affecting parties entitled to notice of such accounting, and who had not received such notice, or expressly waived their rights. That duty being still obligatory, administration was still existing, and the statute did not run. Long v. Cason, 4 Rich. Eq. 60. In this case the authority of Miller v. Alexander was recogniz-

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ed, but the question of the *statute of limitations then raised depended on the fact that the guardian had been removed and a new guardian appointed, so that the statute commenced to run in favor of the guardian removed, and against the new guardian at the time of removal. It was held that this was such a termination of the trust that the statute had then commenced to run. Crosby v. Crosby, 1 S. C. 337. The decision in this case is entirely consistent with the foregoing, although the question of the statute of limitations went off on the ground that the administrator, being also guardian of the infant plaintiff, he could not take advantage of the statute, when, in his character of guardian, he was chargeable with whatever delay had occurred.

The currency of the statute does not necessarily depend upon the fact of a full and final discharge of the duty of the administration. It commences to run when it appears that the administration has done some act, brought to the notice of the parties affected by it, equivalent to an abandonment of such office, although such act may be in itself wrongful. But the case before us presents no such state of things. The only question raised is whether the office and duty of the administrator ceased by a full discharge of all its duties at a certain time, and that question has already been disposed of.

The next question is, what estate did Rosannah P. Renwick take under the will of John Rogers? The question, as presented to us, assumes that the entire distributable estate is to be regarded as personalty, and the will will be considered in its bearing on personal property alone. The third paragraph of the will is a gift of personalty and realty to Rosannah P. Renwick "and her children." She had no child born alive prior to the death of the testator. The bequest imports an immediate gift to children, and as there was no child to take as purchaser at the death of the testator, children born after that event could only take by descent, as issue. Hence, as it regards realty, the devise imported a fee conditional. As it regards personalty, the condition attached to the fee, viz., that the estate should descend to the issue of the first taker, per formam doni, was impossible, as the law did not permit such a descent in the case of personalty, and as the condition was a condition subse-

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quent, following the ordinary rule *as to conditions subsequent, the fee, unburdened of the condition, remained absolute. This would give Rosannah P. an absolute estate in the personalty. The foundation of the conclusion just stated is in the first resolution in Wild's case. 6 Coke's R. 17. The doctrine has been uniformly applied in this state. It will only be necessary to cite Shearman v. Angel, Bail. Eq. 351 [23 Am. Dec. 166], and Henry v. Archer, Bailey Eq. 535, with the observation that the exposition of the doctrine of the last-named case that appears in Hay v. Hay, 4 Rich. Eq. 384, is essential to a correct understanding of the true result of that case. Under the third paragraph standing alone there is no limitation over on the failure of issue, and therefore no mode of referring to the intricacies that are found in the cases growing out of

the different views that have been taken of the effect of a limitation over both, upon the character of the first estate and the sense of the terms by which it is created. But it is contended that the last portion of the third paragraph be read as follows: "And at that time," meaning the death of the testator, "she and her children are to receive an equal part," &c. The proposition is that the words "and her children" should be interpolated after the word "she" as the words stand in the will, so as to read in the manner just recited. It is obvious that such an interpolation would not help the sense of that paragraph. The testator must be regarded as using these words immediately prior to his death, and as at that time there was no child of Rosannah in esse, and as he must be regarded as intending an immediate devise at his death to children, such disposition could not take effect except by taking children to mean issue, who could take by descent. It will not be necessary to follow the elaborate argument of counsel upon the grounds for correcting the expressions of a will by the underlying intent gathered from other parts of the will. But it will not be amiss to remark that much of the uncertainty that exists as to the application of the various authorities on the subject arises from overlooking the fact that the rules of interpreting technical words, used in a will, have been applied to phrases and connected expressions as importing some known mode of disposition. Technical words, even when employed in a will, are to be taken in the technical sense as their primary sense, and

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such sense must *be corrected, if at all, by finding the testator's glossary or controlling intention in the context. Certain forms of expression employed by testators have been placed upon the same ground as technical words in this respect, and in their primary sense, considered as formula, must be taken to have the meaning imputed to them by the adjudicated cases, and the correction of the apparent sense must be reached under the rules applicable to technical words already referred to.

It is also contended that certain words employed in the fifth paragraph of the will are to be read as qualifying the gift in the third paragraph, by limiting over the estate there given upon the condition of Rosannah dying without leaving children. The portion of the fifth paragraph in question reads as follows: "The rest and residue of my other property to be sold and divided in four equal parts among my aforesaid children; and if any of my daughters should die without leaving children, their property hereby given to be divided into four equal parts," etc. The will thus disposes of these parts. In the first place this purports to be a residuary clause, and the words "hereby given" must be regarded, in the first instance, as referring to that property which is directly disposed of under the residuary clause. That property is characterized by the word "other," which, when used in a residuary clause, naturally excludes all property the subject of prior express devises in the preceding parts of the will. Grammatical considerations must be of undoubted actual force to undo this sense; if at best they are conjectural, the primary sense of the terms remains. It will not be necessary to consider how the clause may be affected by its grammatical relation to its immediate antecedent as a conclusive argument, for allowing "other" to have its ordinary force is found in the character of the express dispositions. If the devises that precede the residuary clause are carefully examined, it will be found that they leave undisposed of an undivided one-fourth part of the entire estate, real and personal, after deducting specific devises and bequests, and to this undisposed-of interest the residuary clause must be regarded as intended to be applied. This construction finds a necessary office for such a residuary clause as this purports on its face to be, and thus affords the highest ground

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for the construction *already represented. It must be concluded that the limitation over contained in the fifth paragraph is inapplicable to the bequest contained in the third paragraph.

The remaining question arises upon the facts that the husband of Rosannah P. administered with the will annexed on the estate of the testator and converted the estate into cash, and that during his administration and during the life of his wife, he wasted the assets of the estate, and finally that he survived his wife. This fact of wasting the assets is set up in the seventh clause of the complaint, and its force is not destroyed by anything that is presented in the case. The plaintiffs can only claim as the distributees of their mother, as it regards the property of which she took an absolute estate, as already determined. Claiming through their mother, they can only claim what she could have claimed had she survived her husband. She could not have claimed compensation out of her husband's estate at large on the ground that he had wasted assets appertaining to her personal estate, which he had the right to reduce to possession. Spann v. Stewart, 1 Hill Ch. 326; Wardlaw v. Gray, 2 Hill Ch. 644. The cases in this state all hold that the right of a distributee, as against the administrator upon whom the title to the personalty devolves by law, is a mere chose in action, until perfected through the act of the administrator. Spann v. Stewart, supra; Sturgineger v. Hannah, 2 N. & McC. 147. The same rule is applied to a legatee and the executor, the legatee having a mere chose in action until assent to the legacy by the executor. Cannon v. Ulmer, Bail. Eq. 204.

As such, there must be a reduction to possession under the marital rights before such chose passes out of the estate of the wife. Where the husband, as administrator or executor, gets possession of the estate out of which his wife is entitled, as distributee or legatee, there is no reduction to possession as long as that estate remains specifically in the hands of such executor, or administrator, or in some form in which it can be identified as appertaining to the decedent's estate, and neither the payment of debts, nor assent, distribution or partition has been made. But no case holds that after the decedent's estate has gone out of the possession of the executor, either the wife or her representatives can hold the estate of her deceased husband

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*amenable to make good her interest in assets wasted, while the authority of the cases already cited for the purpose is directly to the contrary. It would be manifestly inconsistent to allege at the same time that the husband had not reduced her choses to possession, and that he had appropriated and wasted them.

It is clear that the plaintiffs are not entitled to an account for any portion of the estate derived from their mother, through the third paragraph of the will.

The decree must be reversed and the cause remanded to the Circuit Court for proceedings conformable herewith.

Decree reversed.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. 309

(Case No. 688.)

THE STATE, ex rel. DOUGLAS & JACKSON, v. P. C. GAILLARD, County Treasurer.

(November Term, 1878.)

An act of the legislature, approved December 24th, 1878, (16 Stat. 785), provided a mode by which alone should be determined the right of a taxpayer to discharge taxes due the state in funds, currency or bank-bills not authorized by the tax act to be received in payment of such taxes, and deprived the courts of the right to adjudicate the question under proceedings by mandamus: *Held*—

[1. *Constitutional Law* ⟸55.]

That the deprivation was not in conflict with Article IV, Section 4, of the state constitution; but that the legislature had the power to determine to what cases the judicial power conferred by this section of the constitution should extend. State v. County Treasurer, 4 S. C. 520, followed. McIver, A. J., assenting only because of the former adjudication: Haskell, A. J., concurring in the result, upon the ground that the act in question afforded an adequate remedy.

[Ed. Note.—Cited in Grant v. Grant, 12 S. C. 31, 32 Am. Rep. 506; Lumb v. Pinckney, 21 S. C. 476; Chamblee v. Tribble, 23 S. C. 70, 79; State ex rel. National Bank of Newberry v. Cromer, 35 S. C. 227, 232, 14 S. E. 493; Ware Shoals Mfg. Co. v. Jones, 78 S. C. 214, 58 S. E. 811.

For other cases, see Constitutional Law, Cent. Dig. § 58; Dec. Dig. ⟸55.]

[2. *Constitutional Law* ⟸121.]

That taking away the remedy by mandamus did not impair the obligation of the contract made by the State of South Carolina with holders of the bills of the bank of the State of South Carolina.†

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 310; Dec. Dig. ⟸121.]

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*This was an original application to the Supreme Court, by Douglass & Jackson, for a rule requiring P. C. Gaillard, county treasurer for Charleston county, to show cause why a writ of mandamus should not issue to compel him, as county treasurer, to receive certain bills of the Bank of the State of South Carolina, tendered by them, in payment of their taxes. The respondent then moved to discharge such rule to show cause, for the reason that the right to issue a writ of mandamus in such cases had been taken away from the courts by the provisions of an act of the legislature of this state, approved December 24th, 1878, entitled "An act to facilitate the collection of taxes."

Messrs. Simonton & Barker, for relators.

Messrs. De Saussure & Son, Youmans, Attorney-General, and J. H. Rion, contra.††

March 3d, 1879. The opinion of the court was delivered by

WILLARD, C. J. A rule has been made requiring the respondent to show cause why a writ of mandamus should not issue, compelling him, as county treasurer, to receive the bills of the bank of the state in payment of taxes due the state by the relators. The respondent now moves to discharge the rule to show cause, on the ground that, by a recent statute of this state, the right to resort to such a remedy in such cases has been taken away. The question is, then, whether the respondent shall be held to make return to such rule, or the rule be discharged. The grounds upon which the relator claims that the respondent should make return to the rule are:

1. That this court has a constitutional jurisdiction to issue the writ in all cases in which it was issuable at the adoption of the constitution in 1868, which cannot be taken away by any act of the legislature; and, 2d, that the rule seeks to enforce a contract between the State of South Carolina and the relators, by which the state bound itself to permit the relator to discharge its taxes, chargeable against them, by tender and pay-

†This case was carried up to the Supreme Court of the United States, where the judgment of this court was affirmed by a divided court. The judgment of the Supreme Court of the United States was rendered March 2d, 1880.—Reporter.

††The reporter has not been furnished with the arguments in this cause.

ment in the bills of the bank of the state;
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and, therefore, that the act of legislature *attempting to take away the remedy, by mandamus for enforcing such duty specifically, is invalid, under the constitution of the United States, as tending to impair the obligation of a contract. It must be assumed, for the purposes of this preliminary motion, that the right of the relators rests upon a contract with the state; whether such is the actual fact cannot be determined until the respondent shall make return, and it is the object of this motion to ascertain whether he is bound to make such a return. The act in question (16 Stat. 785) contains the following provision: "And no writ of mandamus shall be granted or issued from any court directing or compelling the receipt for taxes of any funds, currency or bank-bills not authorized to be received for such taxes." It is conceded that the act under which the tax was levied did not authorize bills of the bank of the state to be received in discharge of taxes levied under it. The act containing the foregoing provision refusing the writ of mandamus in such cases, gives a remedy by action applicable to cases where taxes are improperly claimed, very greatly enlarging the common law remedy in such cases. If by law the relators were entitled to discharge the amount of their taxes by the payment of the bills of the bank of the state, then the only remedy they needed to enforce their contract was in their own hands, namely, a tender of such bills. Upon such tender the taxes became satisfied. If, after that, the state should attempt to enforce the same tax as a subsisting right, it would clearly be a case of trespass merely, not involving the contract except incidentally, and the statute remedy would apply to it.

The first question is whether the force and effect of the following language of the constitution, establishing the jurisdiction of the Supreme Court (Article IV., Section 4,) viz.: "The said court shall always have power to issue writs of injunction, mandamus, quo warranto, habeas corpus, and such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in this state," confers on this court power at all times to issue writs of mandamus in all cases in which they had been issued at and before the adoption of such constitutional enactment. If so, it was
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clearly beyond the com*petency of the legislature to take away such authority, and the act in question must be regarded as invalid.

This question has been substantially decided by this court in the case of State v. County Treasurer, 4 S. C. 520. In that case a construction was put upon similar language contained in Section 15 of the same article conferring jurisdiction on the Circuit Court. The legislature had declared that the writ of prohibition should not be issued to stay the collection of taxes, (14 Stat. 367), and it was contended that such enactment was in violation of the constitutional grant of jurisdiction to the Circuit Court, conveyed in these words: "They shall have power to issue writs of mandamus, prohibition, scire facias, and all other writs which may be necessary for carrying their powers fully into effect." This court then held that this was a grant of judicial power merely, and did not remove from the legal legislature the power of determining to what cases that judicial power should extend. It is clear that the language of the constitution, as it regards the jurisdiction of the Supreme Court, does not essentially differ from that conferring jurisdiction on the Circuit Court, as it regards the present question. We see no ground to change this conclusion. It is clear that no such legislative restriction is expressed, nor is it in any proper sense a necessary implication, as the primary object of the clause, namely, a deposit of judicial authority in the Supreme Court adequate to reach to all the cases that may arise under the laws of the nature embraced in it, is accomplished without the aid of any such implication. No implication made out argumentatively on probable ground is authority for diminishing the full measure of authority imported by the gift of plenary legislative power to the general assembly in Article II., Section 1, of the constitution. We must conclude that the statute on which the respondent relies did not encroach on the constitutional powers of the court in the manner here contended.

The next question is, whether such statute tended to violate the obligations of the contract alleged between the State and the relators by taking away the remedy by mandamus. Under the view taken of the present question, it is not necessary to determine whether, under any circumstances, mandamus was to be considered a remedy for en-
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forcing the alleged contract obligations, *on the idea that such contract would, from its nature, be self-executing through the legal effect of tender under it. The question will be discussed upon the assumption that it is to be regarded as such a remedy in the contract. All the authorities agree that mandamus is not a writ of right, but may, in the exercise of a sound discretion, be refused on the ground of public convenience. State, ex rel. Shiver, v. Comptroller-General, 4 S. C. 185. The limits of that discretion do not appear to be well defined; but it is clear that on general principles it is competent for the legislature to define the conditions on which it shall be granted or withheld consistently with the nature of the writ, as resting in sound discretion. As was said in McIver v. State, 2 S. C. 1, it is now regarded as an ordinary remedy for the relator, in the cases where properly issuable, modifying to some extent

the view that was originally taken of it. The question still remains, is it a remedy to which the relators were absolutely entitled at the date of their alleged contract, or as it regards each case that may arise, conditional and dependent on the will of the legislature. If, in general, it belongs to the last-named class, then to make good the relator's position they would have to show, not only that the legislature bound themselves by the alleged contract to allow all existing remedies for its enforcement, according to their recognized nature and characteristics, but that they had actually changed the nature of the writ of mandamus so as, in effect, to make it a writ of right in the relator's special favor. Although mandamus to enforce a public duty in which an individual has an interest is, when allowable, regarded as a remedy permitted to such individual, yet it not only proceeds in the name of the state, but in the right of the state also. The principle on which the common law allowed remedies upon contracts was compensatory alone. Specific remedies on contracts were afforded by the courts of equity, in certain defined cases, on equitable principles alone.

The present remedy cannot be brought under the last-named class. Obligations imposed upon public officers for the benefit of individuals, were subject to the general rule of the common law, as to the nature of the proper remedies. If a public officer does any act of wrong to the damage of an in-

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dividual, the in*jured party has his remedy by an action for damages. If such officer refuses to perform an act, which, by law, he ought to perform, and in which an individual has a special interest, and damage is sustained to such right, an action for such damage lies. In addition to these remedies, the state has an exclusive right to compel specifically the performance of public duties on the part of public officers, or persons exercising public powers, in the interest of good government. Formerly, the king exercised this right through mandamus. Considered as a prerogative writ, at present with us, the state stands in the relation in which the king formerly stood. The state thus having a clear judicial remedy in virtue of its sovereignty, and the individual having at common law a right to a compensating remedy merely, it has been the practice for the state to allow the relator to use its right as a means of more effectually enforcing his individual rights. To say that such practice has grown into an absolute and unqualified right in individuals, standing on the same footing as a writ of right, is to deny the principles on which mandamus is founded, and to contradict the authority of all the cases in which the nature of the writ has been carefully considered. As the individual cannot claim, in his own right, a specific remedy of this nature, and must depend upon a concession of the right to use a remedy that primarily belongs to the state alone, in virtue of its sovereignty, he is to take that remedy in subordination to the will of the state, which may grant or withhold it at pleasure. This result is not only necessary to satisfy the principles on which the remedy by mandamus is administered, but vital to the public welfare. Cases can be readily conceived where allowing the actual exercise of governmental powers to be controverted by an individual might be highly detrimental to the public interest, as, for instance, in times of public danger or disorder. If the specific enforcement of a public act is regarded by the legislature as detrimental to the public interests, there is no sound reason why the state should be compelled to lend its name and right of procedure to an individual in order to give him a better remedy than he is entitled to, on the principles of the common law. There is no authority that compels us to depart so far from the original nature of mandamus

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as to place it among the remedies to *which the relator has a strict right. The results indicated are in harmony with the conclusion of the Supreme Court of the United States, in Tennessee v. Snead, 96 U. S. 69 [24 L. Ed. 610], though the reasonings that lead to that conclusion in that case are derived from a different view of the question.

The rule should be discharged.

HASKELL, A. J. I concur in the opinion that the act of the legislature impairs no obligation, and that it affords an adequate remedy, and think that (apart from the section inhibiting mandamus) good reason why the extraordinary remedy should be refused. I concur in the result.

McIVER, A. J. I concur in the conclusion reached in this case, but desire to state very briefly my reasons. As to the first question discussed by the Chief Justice, viz., whether this court has been deprived of the power to issue a writ of mandamus in a case of this kind, by virtue of the provisions of an act entitled "An act to facilitate the collection of taxes," approved December 24th, 1878, if it were res integra, I should feel compelled to dissent, but as I regard the question settled by the case of State v. County Treasurer, 4 S. C. 520, I am bound to yield my opinion to this express adjudication, which, until it is reversed, is as binding upon me as if I agreed to every proposition which it announced.

As the question, however, is one of the gravest importance, involving the boundary line between two of the departments of the government—the legislative and the judiciary—it may not be amiss for me to state, in a very few words, the grounds of my dissatisfaction with the conclusion which this case compels us to adopt. There is no doubt but

that, under Article I., Section 2, of the constitution, the legislative power of the state is vested in the general assembly, but there is as little doubt that this is not a grant of complete and absolute legislative power, but only of such as is not forbidden by the terms of the constitution of the United States, or of this state, either in express words or by necessary implication. Hence, when the inquiry arises whether any particular act of the gen-

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eral assembly is within the scope of *the powers granted to that body, the only question necessary to be considered is whether such act is forbidden, either in express terms or by necessary implication, by any provision of the constitution of the United States or this state; for if it is not so forbidden, then such act has the full force and effect of law; but if it is so forbidden, then it has no such force and effect, and must be declared to be unconstitutional, and therefore void. It will not be denied that where certain powers are, by the constitution of the state, vested in one of the departments of the government or any officer of such department, the general assembly is as effectually forbidden from taking away such powers from such department or such officer as if the constitution had in express words forbidden their doing so. Now, by Article IV., Section 4, of the constitution, it is provided, amongst other things that the Supreme Court "shall always have power to issue writs of injunction, mandamus," &c. Observe that the language is not, as in some other sections of the constitution, shall have jurisdiction in cases of mandamus, &c., which might imply, as is argued in State v. County Treasurer, supra, that this clause was only designed to give the court jurisdiction in this class of cases when they arise under the laws enacted by the general assembly, but do not perpetuate the writs there mentioned, or the power of the court to issue such writs, but the language is "shall always have power to issue writs of injunction, mandamus," &c. This language, it seems to me, confers special powers upon the court in express words, no one of which can be taken away or abridged by the general assembly any more than any other or all of the powers conferred upon the court. By the same section the Supreme Court is invested with appellate jurisdiction "in cases of chancery," and that expression has been held in Sullivan v. Thomas, 3 S. C. 531, to mean all such cases as were cognizable by the courts of equity of the state existing at the adoption of the constitution. For, as was said in that case, at page 546, "It must be premised that the jurisdiction of this court, so far as it was ascertained and fixed by the constitution, is unaffected by the provisions of the code of procedure or any other statute law. Again, the terms employed to mark out that

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*jurisdiction must be taken in the sense in which they were understood at the time the constitution was adopted."

So it seems to me that when, in this same section, the Supreme Court is invested with the power to issue writs of mandamus, it must mean that it should have power to issue such writ in all such cases as it was the appropriate remedy at the time of the adoption of the constitution; and that the general assembly has no more authority to deny to the court the right to issue such writ in any case in which it was then the appropriate remedy than it would have to deny its right to hear an appeal in any particular case or class of cases in chancery, or to deny its right to exercise any other of the powers granted to it by the constitution. If the general assembly has the power to deprive the court of its right to issue the writ of mandamus in one particular case, no reason can possibly be suggested why it may not do so in any other case, or in all cases; and if so, then the result would be that the court would be entirely stripped of one of the powers expressly granted to it by the constitution. Such a result surely cannot be brought about by an act of the general assembly.

Again, by Article III., Section 2, of the constitution, the governor is invested with the pardoning power. I do not see why, upon the same principle that it is held that the general assembly may take away from the Supreme Court the power to issue the writ of mandamus in one particular case, they may not take away from the governor the power to grant a pardon in some particular case; and if in one case, then in all, and thus defeat this provision of the constitution altogether. In the one case the power to issue the writ of mandamus is expressly granted, just as in the other the power to grant pardons.

If the general assembly can in the one case limit the power granted by confining its exercise to certain particular cases, I am at a loss to perceive any reason why it may not do so in the other.

It must be conceded that, not only at the time of the adoption of the constitution, but also at the time of the commencement of the proceedings in this case, mandamus was the appropriate remedy in the case made by the petition of the relators, and that the Supreme Court then had the power, conferred by the constitution of the state, to enforce by writ

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of mandamus the rights *claimed by the relators, if established according to law. What is there now to prevent the court from exercising such power? Will it do to say that the court is prevented from exercising a power expressly conferred by the constitution by an act of the general assembly forbidding the exercise of such power? If so, then, it must necessarily follow that an act of the

general assembly has the effect of repealing or abrogating a provision of the constitution, a conclusion which no one will accept. For as the court undoubtedly once had the power in question, and had it by virtue of an express grant in the constitution, and as the only thing relied upon as depriving the court of such power is the act of the general assembly of 24th December, 1878, it must follow either that the court still has the power to issue the writ of mandamus, or that this power thus conferred by the constitution has been taken away by the act of the general assembly above mentioned. These views do not by any means involve the idea that the general assembly may not by appropriate legislation regulate the form of the remedy or the practice in administering it. This they may undoubtedly do, as there is nothing in the constitution which can be regarded as prohibiting such an exercise of legislative power. But when it is proposed by a simple act of the general assembly to destroy or abrogate a remedy provided for by the constitution by denying to this court the right to exercise a power expressly granted by the constitution, it is difficult for me to understand how the constitutionality of such legislation can be vindicated. But, as I have said above, I regard this question as concluded by the decision in the case of State v. County Treasurer, and as long as that decision stands unreversed I am compelled to yield my convictions to an absolute decision of the court of last resort. For this reason, and this alone, I concur in the conclusion reached as to the first question discussed in this case. As to the other question, I am quite content to rest the conclusion upon the reasoning employed in the opinion of the CHIEF JUSTICE.

Rule discharged.

[Affirmed, South Carolina v. Gaillard, 101 U. S. 433, 25 L. Ed. 937.]

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11 S. C. *319

*(Case No. 689.)

THE STATE v. JOSEPH STEPHENS.

(November Term, 1878.)

[1. *Criminal Law* ⇐1115.]

Defects in the panel, or in individual jurors, not apparent on the record and requiring proof aliunde, cannot be considered on appeal, unless objection was made and exception taken, before the swearing of the jury.

[Ed. Note.—Cited in State v. Gill, 14 S. C. 411; State v. Faile, 43 S. C. 58, 20 S. E. 798; State v. Edwards, 68 S. C. 322, 47 S. E. 395; State v. Lazarus, 83 S. C. 219, 65 S. E. 270.

For other cases, see Criminal Law, Cent. Dig. § 2927; Dec. Dig. ⇐1115.]

[2. *Criminal Law* ⇐968.]

The same defects not objected to, but apparent upon the record, may be considered on a motion in arrest of judgment; and in the Circuit Court, irregularities in the venire facias, or in the drawing, summoning or impaneling of jurors, by which the party has been prejudiced, may be objected to at any time before the verdict is returned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2441; Dec. Dig. ⇐968.]

[3. *Jury* ⇐70.]

The Circuit Court has no power to issue a venire for talesmen. State v. Williams, 2 Hill 381, approved.

[Ed. Note.—Cited in State v. Hill, 19 S. C. 440.

For other cases, see Jury, Cent. Dig. § 320; Dec. Dig. ⇐70.]

[4. *Criminal Law* ⇐918.]

A Circuit judge has no power to vacate the seat of a juror who has been sworn in a criminal case, on proof of facts occurring beyond the presence of the court.

[Ed. Note.—Cited in State v. Cason, 41 S. C. 533, 19 S. E. 918.

For other cases, see Criminal Law, Cent. Dig. § 2221; Dec. Dig. ⇐918.]

[5. *Criminal Law* ⇐751.]

[Cited in State v. Cason, 41 S. C. 533, 19 S. E. 918, to the point that, where evidence affording sufficient justification for an order for new trial is brought to the notice of the court during a criminal trial, a juror may be withdrawn and the trial proceed de novo.]

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⇐751.]

Before Aldrich, J., at Edgefield, June Term, 1878.

The defendant was indicted for murder. There was a deficiency of twenty jurors, and the "five-mile apartment" being exhausted the deficiency was ordered to be supplied from the "other apartments." From the affidavit of the jury-commissioner, made after the trial, it appeared that the board in drawing from the other apartment did not confine themselves to the names of such persons as lived within five miles of the court-house. The sheriff summoned these jurors by verbal order. No venire was issued. Before the panel was complete, a recess was taken, during which a juror sworn in the case, was heard to say that he was opposed to hanging anybody, because he himself might be hanged some day. When the recess was over, this was reported to the court; and the juror, being interrogated by the judge, repeated what he had said. The juror was not resworn on his voir dire, but was discharged, to which appellant objected, on the ground that it was too late to raise any objection to the juror. The appellant exercised his right of twenty challenges, and made no application for another.

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*After the testimony was closed, the appellant's attorney raised, at the beginning of his argument, the point that the court had no right to pass the order for the twenty additional jurors; and if so, that they should be such as lived within five miles of the court-house, and that no venire was issued for them. These objections were deferred and made afterwards in arrest of judgment, to-

gether with the objection as to discharging the juror; and they were severally overruled.

The defendant was convicted and sentenced to be hanged.

An appeal was taken to this court upon the following grounds:

1. That the court erred in overruling motion to arrest judgment in the said case, when the said motion was made upon the following grounds, to wit: The jury that tried the said case was not drawn, summoned and impaneled according to law in such cases made and provided.

2. That after a juror had been called and not objected to by either the state or the prisoner, and sworn to try the case, he was ordered to stand aside, without being examined upon his voir dire, and the prisoner was, under the circumstances, allowed only twenty challenges.

[For subsequent opinion, see 13 S. C. 285.]

Mr. B. W. Bettis, Jr., for appellant.
Mr. Solicitor Abney, for respondent.

March 3d, 1879. The opinion of the court was delivered by

WILLARD, C. J. The appellant alleges irregularities in the drawing, summoning and impaneling of the petit jury. It does not appear that there was any challenge to the array or to the poll, but the jurors were sworn without objection. So far as the present objection is raised on matters not appearing on the record, and such as could only be brought to the notice of the court by proof beyond the record of the facts alleged, it cannot be considered on appeal, for the want of objection and exception in due time. It is too late to allege such defects, either in the panel or in individual jurors, after the swearing of the jury. State v. Williams, 2 Hill 381; King v. Hunt, 2 B. & Ald. 430; Queen v. Hepbam, 7 Cranch 290 [3 L. Ed. 348]; Amherst v. Hadley, 1 Pick. 39.

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*Where the defect appears upon the record, it may be the subject of a motion in arrest, though not previously objected to, as where there is a fatal defect in the venire, (State v. Dozier, 2 Speers 211; State v. Williams, 1 Rich. 188;) so where a defect in the authority of the court ordering the drawing appears on the record. State v. Jennings, 15 Rich. 42; State v. Pratt, 15 Rich. 47. Relief may, however be granted by the court of original jurisdiction, although such objection was not taken in time, but that relief is in the discretion of the court, and will not be granted unless it appears that the party has been prejudiced by the matters complained of. King v. Hunt, 2 B. & Ald. 430; Hill v. Yates, 12 East 229. In Kennedy v. Williams, 2 N. & McC. 79, a new trial was granted where the objection to a juror could not be taken in due time, as the knowledge of the facts had not come to the party making the objection until after the time had elapsed for making such objection. It will be borne in mind that that court had authority to grant new trials on the grounds that were available in a court of original jurisdiction, whereas this court is limited to the correction of errors of law in such cases, and is clothed with no discretionary power on appeals in such cases. State v. Baily, 1 S. C. 1. But such objection is required (Gen. Stat. 523,) to be taken before the returning of the verdict when it involves irregularity in the venire facias, or in the drawing, returning or impaneling of jurors in order to set aside a verdict, in addition to showing that the party has been prejudiced by such irregularity. So far, then, as the objection of the appellant relates to the proceedings for the drawing, summoning and impaneling of the jury, it cannot be heard, for want of objection and exception in due time.

The appellant objects that the record is defective in not showing that a venire was issued for the summoning of talesmen. In State v. Williams, 2 Hill 381, it was held that a venire could not be issued for talesmen, under the acts of 1731 and 1769. Brev. Dig. 446. The act of 1877 so clearly resembles the portion of the act of 1769 considered by the court, that the decision of the court in State v. Williams may be regarded as equally applicable to the one as to the other of these acts. The conclusion in that case was, that, independent of some statute authority, the

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*court had no power to issue a venire for talesmen, and that the act relied on furnished no such authority. The act of 1877 confers no such authority, directly or indirectly, but only makes mention of drawing, summoning and returning in connection with duties thereby imposed. The preceding practice, therefore, remained unchanged, and State v. Williams is conclusive authority. This objection must be overruled.

It appears by the record that a juror who had been sworn without objection was set aside by the court on its own motion, and another drawn to fill his place. The ground of such action was the oral admission of the juror, in answer to a question put by the court, that he had said, pending the trial, "that he, the juror, was opposed to hanging anybody, because he, the juror, himself might be hanged some day." Improper language by a juror in a criminal case, indicating hostility to a party on trial before him, has been held good ground for a new trial. State v. Hopkins, 1 Bay 372; see, also, Dent v. Hartford, 2 Salk. 645. It cannot admit of reasonable doubt that if proper evidence of such a fact as would justify the court in granting a new trial, should be brought to the notice of the court during the progress of a criminal trial, a juror might be withdrawn and the trial proceed de novo. We know of no au-

thority, however, for vacating the seat of a juror after he has been sworn, and calling another to occupy his place, by the authority of the court acting on proof of facts occurring beyond the presence of the court. No authority for such practice has been brought to our attention, and on principle it appears subversive of sound practice. It might open the door to the exercise of undue authority on the part of courts.

There must be a new trial, on the ground last stated.

New trial granted.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. *323

*(Case No. 690.)

THOMAS W. CLAWSON and C. E. SPENCER, Executors, v. A. E. HUTCHINSON and SUSAN J. HUTCHINSON, His Wife.

(November Term, 1878.)

[1. *Husband and Wife* ⇐18.]

A husband held liable for the debt of his wife, contracted by her dum sola, in an action commenced against them in 1867.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 113; Dec. Dig. ⇐18.]

[2. *Husband and Wife* ⇐55.]

[Cited in Wallace v. Craig, 27 S. C. 519, 4 S. E. 74, to the point that a married woman is with respect to her separate property a feme sole.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 272; Dec. Dig. ⇐55.]

Before Aldrich, J., at York, September Term, 1878.

Susan J. Dunlap executed, in 1860, a sealed note, payable to W. J. Clawson, administrator of J. P. Dunlap, on January 1st, 1862. In 1863 she intermarried with A. E. Hutchinson. Suit was commenced on this note against Hutchinson and wife in February, 1867, by W. J. Clawson. In December, 1877, W. J. Clawson died, and his executors, Thomas W. Clawson and C. E. Spencer, by proper order, became the plaintiffs.

At the trial the defendant, A. E. Hutchinson, requested the court to charge the jury—

That the defendant, A. E. Hutchinson, the husband of the defendant, S. J. Hutchinson, is not liable on the note executed by his wife before her marriage, his liability being removed by the provisions of the act of 1870, relating to the rights of married women.

His Honor refused so to charge, and the defendant, A. E. Hutchinson, excepted.

Verdict for plaintiffs.

A. E. Hutchinson appealed to this court, upon the ground that his Honor erred in refusing to charge the jury as requested.

[For subsequent opinion, see 14 S. C. 517.]

Mr. J. F. Hart, for appellant.

At common law, the husband became liable for the wife's debts, contracted prior to the marriage. Death of husband or wife, or divorce, relieved the husband or his estate. 1 Pars. on Cont. 344.

What was the reason of the law? Because the wife could not be imprisoned for her ante-nuptial debt without her husband.

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*Reev. Dom. R. 144–5. Another reason would seem to be, that the person of the wife, as well as her goods and chattels, was merged in the husband.

The husband's liability for the wife's debt was not in the nature of a contract with her creditor. If so, his estate would have been liable after his death. "The debt is not transferred to him." Id.

If his liability is not by contract, then he became liable merely because the remedy upon her contract could not be applied, except by joint suit against the husband and wife; and, consequently, a joint judgment resulted. In no case could the wife be sued alone. The husband's liability—existing during coverture only—was only an incident to the remedy.

II. If only an incident to the remedy, it is removed by Article XIV., Section 8, of the constitution, and the act of 1870. Gen. Stat. 482; 14 Rich. 134; 7 S. C. 88; which compare with 1 S. C. 352, and see changes wrought by act of 1870.

III. This constitutional provision does not apply only to future debts or marriages. Article I., Section 10, of the Constitution of the United States does not apply, for there is no contract here of the husband; it is only a part of the remedy which may be impaired. Cooley on Const. Lim. 357; Potter's Dwarris on Stat. 471; 13 N. Y. 299; 1 How. 316.

The cases confine the constitutional application to the remedy existing against the contracting party at the time the contract was entered into, and not to such incidental remedies as may afterwards adhere to it. 4 Wheat. 197; 12 Wheat. 213; 2 How. 609; 13 Rich. 129; 2 S. C. 224, 226.

Creditors had no vested rights in such cases to be impaired by act of 1870. The death of either party would have destroyed the remedy against the husband. 15 Wend. 360.

But the legislature may divest vested rights. 8 Pet. 110; 4 S. C. 224.

Mr. C. E. Spencer, for respondents.

1. There has been no change of the common law rule which makes the husband liable by mere implication.

The liability grew out of the practice which

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required the *joinder of the husband in an action for the debt, and not out of the doctrine of the marital rights. 2 Bish. on Mar. Wom., § 312; 5 Duer 186. The constitution and act of 1870, standing alone, make no change. Code, § 137.

2. There has been no change of the law by positive enactment. Section 3 of act of 1870,

is inoperative because not disclosed in the title to the act. Const. Art. II., § 20; Cooley on Const. Lim. 81–2, 149–50. Its incorporation into Revised Statutes does not cure defect, for they are void so far as they contain new matter. Const., Art. V., § 3; Art. II., §§ 20, 21; 14 Stat. 207.

3. The law discharging the husband from liability is only prospective. Such construction will never be given if another is possible. Sedg. 173; 7 Johns. 499; 5 Duer 186, supra; 13 Rich. 277.

4. The law, if intended to be retrospective, is to that extent, null and void. It would violate Article I., Section 14, of our constitution. Cooley 362; 2 Kern. 202; 5 Duer 192, which is in all respects like the case at bar; 15 Wall. 610.

Mr. J. S. R. Thomson, same.

Mr. J. H. Rion, contra.

March 3d, 1879. The opinion of the court was delivered by

WILLARD, C. J. The question is whether the provisions of the constitution and the statutes passed under it, declaring the rights of married women as to their separate property, destroys the husband's liability for the wife's debts dum sola, where the marriage took place and the action was brought prior to the adoption of the constitution. The note in suit was given by the wife of the defendant dum sola in 1862, and this action was commenced in 1867. The constitution declares "that the real and personal property of a woman held at the time of her marriage, or which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried; provided, that no gift or grant from the husband to the wife shall be

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detrimental to the claims *of his creditors." Article XIV., Section 8. Under this provision, standing by itself, the husband would still remain subject to his common law liability for the debts of his wife prior to marriage, which would be manifestly unjust after taking from him that interest in his wife's property that was the ground of such common law liability. Accordingly the act of 1870, (14 Stat. 325,) after having re-enacted the enabling features of this constitutional provision and declared in still more full terms the capacity of a married woman to deal with her separate property, adds the following proviso: "Provided, that the husband shall not be liable for the debts of the wife contracted prior to or after their marriage, except for her necessary support." The provisions of the act of 1870 were re-enacted in the General Statutes, page 482.

It is claimed that these provisions acted retrospectively, so as to divest rights of action already acquired under marriages celebrated before the adoption of the constitution. No intention is expressed, as there are no words signifying an intention to impair rights already accrued; if it exists, it must be made out inferentially on principles of construction. Such an enlargement of the expressed sense must not be allowed unless imperatively demanded by the manifest intent of the act, as when it would fail of full efficacy upon any other construction, in which case it would stand on the high ground of a necessary implication. In the present case the equity of the statute is the key of its intent, because the plain object in view was to equalize the rights and liabilities of the husband, which equality had been disturbed by the constitutional provision. This would exclude the idea of depriving the creditor of his acquired right of action where, at the same time such right of action accrued, the husband possessed full and undiminished marital rights as in the case in hand. In Witsell v. Charleston, 7 S. C. 88, the question was whether the wife's equitable interests passed into her legal separate estate, created as such by the constitution, under the words "real and personal property," and the present question was not touched.

The appeal must be dismissed.

Appeal dismissed.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. *327

*(Case No. 691.)

T. M. JOPLIN v. G. D. CARRIER.

(November Term, 1878.)

[1. *Replevin* ⇐10.]

Where a party obtains property under the pretext of hiring it, but for the real purpose of taking it to another state, there to be subjected to an attachment under legal process for a debt due him, it is a naked trespass ab initio, and he is liable to the owner in an action of replevin.

[Ed. Note.—Cited in State v. Posey, 88 S. C. 318, 70 S. E. 612, 615.

For other cases, see Replevin, Cent. Dig. § 71; Dec. Dig. ⇐10.]

[2. *Replevin* ⇐106.]

In an action commenced in a trial justice's court, judgment may be given for the value of personal property converted, although the demand is only for its recovery and damages for its detention.

[Ed. Note.—Cited in Williams v. Irby, 16 S. C. 371, 374, 375; Richey & Miller v. Du Pre, 20 S. C. 10; Holliday v. Poston & Son, 60 S. C. 111, 38 S. E. 449; Reynolds v. Philips, 72 S. C. 34, 51 S. E. 523.

For other cases, see Replevin, Cent. Dig. § 416; Dec. Dig. ⇐106.]

[3. *Appeal and Error* ⇐1004.]

This court cannot consider the objection that damages are excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. ⇐1004.]

[4. *Appeal and Error* ⟸1071.]
The failure of a Circuit judge to state his conclusions of law and fact separately, the merits not being thereby affected, is not a ground for a reversal of judgment.

[Ed. Note.—Cited in Bouknight v. Brown, 16 S. C. 164; Briggs v. Briggs, 24 S. C. 379; Stepp v. National Life & Maturity Ass'n, 37 S. C. 435, 16 S. E. 134; Aultman v. Utsey, 41 S. C. 309, 19 S. E. 617.

For other cases, see Appeal and Error, Cent. Dig. § 4237; Dec. Dig. ⟸1071.]

[This case is also cited in Williams v. Dobson, 26 S. C. 112, 1 S. E. 421, without specific application.]

Before Kershaw, J., at Spartanburg, March Term, 1878.

In the trial justice's court, a verdict was rendered for plaintiff July 5th, 1877, for "fifty dollars for wagon and harness, or wagon and harness returned to plaintiff, and damages for plaintiff for retention of wagon and harness, twenty dollars." The facts are sufficiently stated in the opinion of the court. Defendant appealed to the Circuit Court, where judgment was given plaintiff for $70, with interest from July 5th, 1877, and costs. Defendant then appealed to this court upon the grounds that his Honor erred—

1. In holding that the defendant was liable for property taken by legal process from the plaintiff.

2. In refusing to hold that the plaintiff had shown no cause of action.

3. In failing to make separate findings of law and fact as required by law.

4. Because the damages found were excessive.

5. In refusing to dismiss the complaint and give judgment against the plaintiff for the costs and disbursements of the action.

Mr. J. S. R. Thomson, for appellant.

Messrs. Bobo & Carlisle, for respondents.

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*March 3d, 1879. The opinion of the court was delivered by

WILLARD, C. J. On appeal to the Circuit Court from the trial justice's court, judgment was rendered against the defendant for damages for the taking and detention of a wagon and harness from plaintiff. Testimony had been offered tending to show that the defendant had obtained from the plaintiff the wagon and harness in question under the pretext of hiring it to go to a point in North Carolina and return; but in reality to remove it into the State of North Carolina and subject it to process for the recovery of a debt originally due from plaintiff to defendant and his partner in business, and assigned to a person in North Carolina, for the purpose of bringing suit upon it and attaching the property in question. It was for the Circuit judge to determine the force of this testimony, and he has done so, finding for the plaintiff, with damages. All that we can determine is whether any error of law was committed by the Circuit judge.

It was entirely competent in the evidence to find that the hiring was pretensive and fraudulent ab initio. The appellant assumes that the relation of bailor and bailee subsisted between the plaintiff and defendant, and advances propositions of law pertinent to cases arising under that law of relation. It is very clear that there was ground for holding that fraud existed on the part of the bailee sufficient to convert the transaction into a naked trespass ab initio. The relation of bailor and bailee, as a contract relation, depends upon mutuality of understanding and intent. If the defendant sought possession of the property with other objects and intents than those disclosed, there could not be that mutuality of understanding essential to the creation of a relation depending on the contract of the parties to bind the bailor. This doctrine is forcibly exemplified in State v. Lindenthall, 5 Rich. 237 [57 Am. Dec. 743] Judge O'Neall says: "The guilt of one accused of larceny depends upon intention. If such an one obtain the possession of goods by consent of the owner for one purpose, such as hiring or carrying, with intent to steal, and consummate that intention partially or entirely by converting the goods to his own use, he is, beyond doubt, guilty of larceny. This is abundantly shown by Gorman's Case,

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2 N. & McC. 90 [10 Am. Dec. 576]; *Thurston's Case, 2 McM. 382." There was no error in rendering judgment for the plaintiff on the facts appearing in evidence.

It is alleged that the judgment is erroneous, as it should have been for the return of the property, and that the value of the property should not have been included in the damages awarded, but assessed separably, so that the value would become part of the damages only in case the property was not returned. The plaintiff had a right to demand either damages for the taking and detention, as in trover for conversion, or the return of the property with damages. The code has not changed the rights of parties in this respect. The provisions of Section 301 of the code apply to a judgment awarding possession of personal property, not to a case where the plaintiff is entitled to general damages. It is for the plaintiff to elect which form of remedy he will pursue. It cannot be objected that the plaintiff's demand in the trial justice's court, being for the recovery of a wagon and harness, and damages for detention thereof, it therefore bound him as an election as to the form of judgment. Whether a complaint in a court of record could have that effect need not be considered, but no such effect can be claimed for informal pleadings in a trial justice's court. The case, then, should proceed to

judgment according to the rights of the parties.

The objection to the damages as excessive cannot be considered in this court, as we have frequently held, nor is there any ground for reversal in the fact that the Circuit judge did not state his conclusions of fact and law separately, it not being made to appear that appellant has been prejudiced thereby as it regards the merits of his case.

The judgment below is affirmed.

Judgment affirmed.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. *330

*(Case No. 693.)

J. MIMS SULLIVAN v. MARY W. WARE.

(November Term, 1878.)

[*Taxation* ⟸746.]

Where lands were sold for delinquent taxes, in June, 1872, under the provisions of the fourth section of the act of March 12th, 1872, (15 Stat. 163,) an auditor's deed to the purchaser, made under the provisions of the third section of the same act, is null and void, and conveys no title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1491; Dec. Dig. ⟸746.]

Before Cooke, J., at Greenville, September Term, 1875.

This was an action by J. Mims Sullivan against Mary W. Ware for partition of a tract of land, the greater part whereof was purchased by the plaintiff as the property of the defendant, at a sale made by the county treasurer on June 5th, 1872, for taxes due for the year 1871. The auditor's deed to him bears date June 7th, 1872, and is as follows:

"Whereas, the county auditor of each and every county in the State of South Carolina, is authorized and required, by an act of the general assembly of the state, entitled 'An act to amend an act, entitled "An act providing for the assessment and taxation of property," passed September 15th, 1868, and all acts amendatory thereto,' approved March 12th, 1872, to execute a 'warranty deed' to the purchaser or purchasers of all property forfeited to the state, under the provisions of the said act providing for the assessment and taxation of property, and said other acts amendatory thereto, and sold by the county treasurer under the provisions of said acts:

"Now, therefore, this indenture witnesseth that I, James M. Runion, county auditor of the county of Greenville, in the state aforesaid, of the first part, in consideration of the sum of two hundred and seventy-nine and eighty-two and one-half one-hundredths dollars, good and lawful money of the United States, to me in hand paid by the said J. Mims Sullivan, of the second part, for and in behalf of the State of South Carolina, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said J. Mims Sullivan

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*all that certain lot, tract or parcel of land, bounded and described as follows, (except ten acres,) to wit:

"Twenty-five hundred acres, situate in the county and state aforesaid, in Oak Lawn township, namely, two hundred acres of arable or plow lands, and twenty-three hundred acres of wood, uncultivated and marsh lands, being that body of land which was sold by the county treasurer of Greenville county, on the fifth day of June, A. D. 1872, as the property of Mrs. Ware, wife of T. Edwin Ware, of said county, for taxes, penalties, costs and charges accrued thereon, and purchased at said sale by J. Mims Sullivan, except ten acres as above stated, which will be allotted and surveyed from this body of land for the use and benefit of the said Mrs. Ware, wife of T. Edwin Ware.

"Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging, or in any wise incident or appurtenant. To have and to hold all and singular the premises before mentioned (except the ten acres before mentioned) unto the said J. Mims Sullivan, his heirs and assigns forever. And I, James M. Runion, county auditor as aforesaid, do hereby bind the State of South Carolina to warrant and forever defend all and singular the said premises (the ten acres excepted) unto the said J. Mims Sullivan, his heirs and assigns, against the said State of South Carolina, and against every person and all persons whomsoever, lawfully claiming or to claim the same or any part thereof."

On September 2d, 1872, the defendant tendered to the county treasurer the amount of the taxes and costs paid by the purchaser, together with fifty per cent. additional, and demanded that she be allowed to redeem said property under the laws of this state.

The jury found for the defendant, and plaintiff appealed.

Mr. W. E. Earle, for appellant.

Messrs. Cothran & Wells, contra.

March 18th, 1879. The opinion of the court was delivered by

McIVER, A. J. According to the view

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which we take of this *case, it will not be necessary to consider the several requests to charge submitted by the plaintiff at the trial; for we do not think they were pertinent to the case as made, and therefore a refusal to charge them does not constitute such error of law as would warrant the setting aside of the judgment below, even though, abstractly considered, they may not have been free from all legal exception, about which, however, we are not to be understood as expressing any opinion. We con-

fess it somewhat difficult to understand precisely what was meant by the charge to which exception was duly taken. Giving to it, however, the construction claimed for it by the appellant, as the one most favorable to the success of his appeal, that it was practically a charge that the jury should find for the defendant, we think it was not subject to any legal exception. The case of the plaintiff rested upon the validity of the deed from the county auditor as sufficient to vest in him title for the proportion of the land claimed, and we think it was wholly insufficient for that purpose, and therefore an explicit direction to the jury to find a verdict for the defendant would have been fully warranted, as the question of the sufficiency of the deed was a question of law only, under the uncontradicted facts appearing in the case. It was not and could not be pretended that the land was sold as "forfeited" land, the only taxes due thereon being the taxes for 1871. It must, therefore, as the plaintiff himself alleges in his complaint, have been sold for delinquent taxes, and there is no allegation or proof that the land had ever been declared forfeited, as indeed it could not very well have been, if the only taxes in arrear thereon were those for the year 1871, as seems from the auditor's certificate to have been the case, the sale having been made in 1872. Hence, the sale must have been by virtue of the provisions of the fourth section of the act of March 12th, 1872, (15 Stat. 163,) and not by virtue of the provisions of the third section of that act. If so, then it follows that the deed from the county auditor, upon which alone the plaintiff based his claim, was wholly ineffectual to convey any title to him. For while the auditor is authorized to "execute a warranty deed to the purchaser" for any lands sold under the provisions of the third section of the act, there is no such au-

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thority conferred upon *him in the case of sales made under the provisions of the fourth section of that act, and his deed, therefore, has no more force and effect than if it had been signed by the sheriff, the coroner or any other county officer.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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11 S. C. 333

(Case No. 694.)

D. P. DUNCAN v. SAMUEL BARNETT.

(November Term, 1878.)

[1. *Exemptions* ⇨3.]

The legislature can exempt from levy and sale only such articles of personal property as are embraced within the enumeration contained in Article II, Section 32, of the constitution. A more extended exemption is unconstitutional and void.

[Ed. Note.—Cited in Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 594, 40 Am. Rep. 705; Oliver v. White, 18 S. C. 239; Norton v. Bradham, 21 S. C. 380, 384; Ketchin v. McCarley, 26 S. C. 14, 11 S. E. 1099, 4 Am. St. Rep. 674; Utsey v. Charleston, S. & N. R. Co., 38 S. C. 407, 17 S. E. 141.

For other cases, see Exemptions, Cent. Dig. § 3; Dec. Dig. ⇨3.]

2. A question suggested in Homestead B. & L. Association v. Enslow, 7 S. C. 1, explained.

[This case is also cited in Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 581, 40 Am. Rep. 705; Ketchin v. McCarley, 26 S. C. 2, 11 S. E. 1099, 4 Am. St. Rep. 674, and distinguished therefrom.]

Before Northrop, J., at Union, June Term, 1876.

The sheriff of Union county, in November, 1875, levied the execution in this case upon two bales of cotton and some seed cotton and corn, of value more than sufficient to satisfy the execution, as the property of the defendant in the execution, such defendant, being an agricultural laborer, owning no lands, and having less than $500 worth of personal property, including the property levied upon. The sheriff returned the property to the defendant as exempted property. The cause of action arose January 1st, 1873.

The sheriff was ruled by the assignee of the plaintiff to show cause why he had failed to make the money; and this appeal is taken from order discharging the rule.

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*Mr. R. W. Shand, for appellant, cited the following authorities: Cates v. Knight, 3 T. R. 442; Smelt. Lead Co. v. Richardson, 3 Burr. 1344; C. & A. R. R. Co. v. People, 67 Ill. 11; Test Oath Cases, 2 Hill 1, and Mr. Grimke's argument at p. 17; Smith on Const. Law, § 508; Cooley on Const. Lim. 64, 94, note 1, 195, note 3, and 599.

March 5th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The Circuit Court discharged a rule against the sheriff for failure to enforce an execution against personal property, consisting of cotton in bales, seed cotton and corn, the defendant claiming that they are exempt from levy under the provisions of the act of March 13th, 1872, (15 Stat. 229, § 9,) he being an "agricultural laborer." It is stated in appellant's argument, that the contract upon which the judgment was obtained bore date prior to the passage of the act in question, contending that such exemption could not be claimed as against an antecedent contract; but that fact does not appear in the brief, and, therefore, is not available to the appellant. The question to be considered is, whether the legislature could create new subjects of exemption in addition

to those enumerated in the constitution. The provisions of the constitution relating to the exemption of personal property from execution, are contained in Article II., Section 32. After providing for a homestead exemption on the land of a debtor, the constitution goes on to say: "To secure the full enjoyment of said homestead exemption to the person entitled thereto, or the head of any family, the personal property of such person of the following character, to wit, household furniture, beds and bedding, family library, arms, carts, wagons, farming implements, tools, neat cattle, work animals, swine, goats and sheep, not to exceed in value, in the aggregate, the sum of five hundred dollars, shall be subject to like exemption as said homestead; and there shall be exempt in addition thereto all necessary wearing apparel." The question is, whether the subsequent attempt to add to the list of articles exempted "one third of the annual products of agricultural laborers" by the act of 1873 was consistent with the provisions of the constitutional enactment, or tended to deny the proper force due to the

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same; *and if the latter conclusion is reached, such conflicting provisions must be held unconstitutional and void.

This involves a question of intention to be made out constructively on the provisions of the constitution. It is contended that the enumeration of kinds of property intended for exemption is exclusive, and general rules of interpretation are urged as leading to that conclusion. It will not be necessary to resort to such general rules, or to place the decision on any technical rule or reasoning, as the nature of the subject with which the constitution deals, points very distinctly to the solution of the question at issue.

The question of allowing the legislative exemption to debtors is, in its nature, fundamental, as involving an inquiry into the principles of government. Until within a few years it has not been regarded as a legitimate exercise of legislative power to place the property of the debtor beyond the reach of his creditor, except to an inconsiderable extent. Not that the competency of the legislature to make such exemptions independently of constitutional restrictions, was doubted, but because the spirit of the laws was supposed to oppose such exercise of legislative power. It may well be considered that in solving the question of the legitimacy of such legislation, the constitution had in view a limit that should be imposed to its unrestricted exercise. When it is treating of subjects that have been constantly dealt with by legislative bodies, with the sanction of the courts and the community, such an inference does not necessarily arise.

In such cases some special ground would have to appear by inferring, in the absence of an express declaration to that effect, that the constitution, in prescribing the mode in which a power of that class should be exercised, intended to exclude its exercise in any other mode. But in the present case, where the constitution was dealing with a principle fundamental to the policy of our jurisprudence, and which, by its abuse might unsettle the very corner-stone on which that jurisprudence rests, it is obvious that in imposing limits to such power of exemption regard was had to the general question, to what extent government should go in relaxing the laws for the enforcement of obligations. There can be no doubt that the object of the sec-

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tion in question was to *limit the legislature. If the constitution had been silent altogether on the subject, the legislature would have, doubtless, been competent, as affecting future contracts, to create such exemptions, and to give them any measure of extent that might appear desirable.

Again, Article I., Section 20, confers express powers on the legislature to grant homestead exemptions to a reasonable extent, leaving the determination of what is to be regarded as reasonable to the legislature, so far as unfettered by subsequent clauses of that instrument. If that section had stood alone it would leave no doubt as to the power of the legislature being unrestricted. But the constitution was not content with establishing this as a principle, and in Article II., Section 32, assumes to give a more accurate definition of the kind of legislation contemplated in the twentieth section of Article I., enumerating the subjects to which it should extend and the limitations that should be established as affecting these subjects. Such a definition as applied to a kind of legislation not sanctioned at the time of the adoption of the constitution, but introduced by that instrument, must be regarded as intending limitation of the legislative authority. True, it is not the case of a power entirely new and not before capable of being exercised, given upon conditions and subjected to limitations, in which case such conditions and limitations must be regarded as limitations of the right of exercise as well as the mode of exercise; but it is a case within the same principle as calling into exercise a function of general legislation that had lain dormant through the conviction that it was not a legitimate exercise of legislative power consistently with the principles of our jurisprudence. This view leads us to the conclusion that the exemptions allowed by the constitution cannot be extended or restricted by any act of the legislature. This view does not conflict with what was said in Homestead Building and Loan Association v. Enslow, 7 S. C. 20, where, speaking of the degree of authority possessed by the owner of lands in which a homestead might be claimed, to encumber his land, it is said, "whether the legislature had not the right to extend the measures of relief afforded to

the heads of families by the section above cited, under a more general grant of legisla-

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tive authority set forth in Article *I., Section 20, of the constitution, need not be considered, for no such exercise of authority beyond the limits of Article II., Section 32, has been attempted." This is a question suggested, with no answer to it given; but it was not directed to the question whether the legislature could afford relief beyond the limits imposed by the constitution, but a more full relief within those limits. We must conclude that the provisions of the act of 1873, so far as they attempt to extend the exemption to a class of personal property not embraced in Article II., Section 32, are unconstitutional and void. The discharge of the rule must be set aside, and the cause remanded for proceedings conformable herewith.

Motion granted.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. 337

(Case No. 697.)

M. H. BRYCE v. W. F. PARKER.

(November Term, 1878.)

[1. *Set-Off and Counterclaim* ⟸22.]

A tort arising out of contract may be waived, and the same cause of action treated as a contract, and set up as such, under the second subdivision of Section 173 of the code of procedure, by way of counter claim to an action arising on another contract.

[Ed. Note.—Cited in Tindall v. McCarthy, 44 S. C. 490, 22 S. E. 734; Lenhardt v. French, 57 S. C. 496, 35 S. E. 761; V. P. Randolph & Co. v. Walker, 78 S. C. 163, 59 S. E. 856.

For other cases, see Set-Off and Counterclaim, Cent. Dig. § 33; Dec. Dig. ⟸22.]

[2. *Sales* ⟸261.]

Assurances made by the owner at the time of sale, that a chattel had not been subjected to certain conditions which rendered it peculiarly liable to disease, and without which assurances it would not have been bought, constitute a warranty.

[Ed. Note.—Cited in Walker, Evans & Cogswell v. Ayer, 80 S. C. 297, 61 S. E. 557; Iler v. Jennings, 87 S. C. 91, 68 S. E. 1041, 1042.

For other cases, see Sales, Cent. Dig. § 732; Dec. Dig. ⟸261.]

[3. *Set-Off and Counterclaim* ⟸35.]

Unascertained damages arising ex contractu are admissible as a counter claim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 62; Dec. Dig. ⟸35.]

Before Mackey, J., at Oconee, March Term, 1878.

The trial was brought in a trial justice's court, and a verdict having been rendered for plaintiff, defendant appealed to the Circuit Court. By consent, it was then referred to a special referee, who reported in favor of

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plaintiff, and disallowed defend*ant's counter claim, although reporting, as a conclusion of fact, that "defendant was damaged by the misrepresentations of the plaintiff in the sum of twenty-five dollars." Both parties excepted. The presiding judge overruled all of the exceptions and gave judgment for the plaintiff. Defendant appealed, upon the ground that he was "entitled to set up his counter claim for damages sustained by reason of the breach of plaintiff's warranty," and that it should have been allowed.

The facts are sufficiently stated in the opinion of the court.

Mr. S. P. Dendy and Mr. J. J. Norton, for appellant.

Keith & Verner, for respondents.

March 5th, 1879. The opinion of the court was delivered by

McIVER, A. J. In this case the plaintiff brought his action upon an account, to which the defendant pleaded a counter claim, based upon the allegation that he had paid to plaintiff $25 for an ox, which the plaintiff warranted as fit for the purpose for which it was bought, which warranty was alleged to have been broken. For this breach of warranty the defendant claimed damages as a counter claim, and the only question raised here is whether the defendant could set up such a counter claim to the plaintiff's action. There is no pretence that the cause of action upon which the counter claim was based arose "out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim," nor is there any pretence that it was connected with the subject of the action.

If, therefore, it is sustainable at all, it must be under the second subdivision of Section 173 of the code of procedure, as being a cause of action arising on contract. It seems that there was evidence tending to show that the defendant had bought the ox in the summer of 1873, from the plaintiff, upon his representation that the ox had not been brought from the mountains that season, and that but for such representation he would not have bought; whereas, in fact, as the referee found, the ox "had been brought from the mountains during the summer of 1873, and, by reason of having been so brought, it died

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of distemper *in the early fall of that year, and was of no value to defendant," and he therefore found "that the defendant was damaged by the misrepresentations of the plaintiff in regard to the above-mentioned ox in the sum of $25." The counter claim was, however, disallowed—exactly upon what ground does not appear in the case as submitted; but from the argument we infer it was upon the ground that the defendant's

claim for damages was not based upon a cause of action arising on a contract, but that defendant's only cause of action was for the deceit in making false representations in regard to the ox, which is a tort. It seems to us, however, that there is no just ground for saying that the defendant's claim for damages was not based upon a contract, or was not a cause of action arising on a contract. It may be that if the defendant had brought his action against the plaintiff in the nature of an action on the case for deceit, that he would have had a good cause of action for such deceit. But while deceit is a tort, it is one arising out of a contract, and a party may, as in this case, waive the tort and sue upon the contract. This was conceded in Schweizer v. Weiber, 6 Rich. 159, and, as is said in 1 Chitty on Plead. *139, "formerly case was the usual remedy for a false warranty or other misrepresentation on the sale of goods, but of late it is more usual to declare in assumpsit." See also Stuart v. Williams, Doug. 19. It does seem that this was at one time doubted in this state, inasmuch as Nott, J., in Read v. Duncan, 2 McC. 167, declined to express any opinion upon the point. But, as Frost, J., says, in Wood v. Ashe, 3 Strob. 72, Brevard's Reports had not been published at the time the case of Read v. Duncan was decided, and therefore the case of Houston v. Gilbert, 3 Brev. 63 [5 Am. Dec. 542], probably escaped attention. For in that case, which was an action of assumpsit to recover the price paid for a slave, on the ground that the plaintiff had been deceived by the representations made by the defendant while negotiating the contract of sale, it was held that it was settled law that in an action of assumpsit the plaintiff may recover on an express and also on an implied warranty where there has been fraud in the contract, and the proposition that to authorize a recovery on the ground of fraud or deception it would be necessary to bring an action of trespass on the case, declaring specially

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*in tort, and that an action of assumpsit in such case could not be maintained, was expressly repudiated. See also the case of Fowler v. Williams, 2 Brev. 306 [4 Am. Dec. 579]. What is said in Lightner ads. Martin, 2 McC., at page 216, apparently in contradiction of this view, was clearly a mere dictum, as no such question arose in that case. In Pomeroy on Rem., p. 820, § 801, it is said: "It may be regarded as a doctrine established by the overwhelming weight of authority that, whenever by the principles of law, independent of the new procedure, a cause of action may be treated as arising either from tort or on contract, and the party holding the right may elect between the two kinds of remedial proceeding, and does in fact elect to one on contract, the demand thus determined to be upon contract may be counter claimed against a plaintiff's cause of action arising on another contract."

In this case, as we have seen, the defendant might, upon "the principles of law independent of the new procedure," treat the cause of action upon which his counter claim is based either as a tort, by bringing an action on it, in the nature of an action on the case for a deceit, or he might waive the tort and sue upon the contract; and it is very obvious, from the form in which the counter claim is pleaded, that he has done the latter, and has elected to sue for the breach of warranty. Hence, according to the proposition laid down by Pomeroy, which he says is established by the overwhelming weight of authority, the defendant was legally entitled to set up the counter claim pleaded by him in this case.

It is argued, however, that there was no warranty, nothing but a mere representation, and, therefore, the defendant's counter claim could not be said to be a cause of action arising on a contract. In 1 Pars. on Cont. *580, it is said "any distinct assertion or affirmation of quality made by the owner during a negotiation for the sale of a chattel, which it may be supposed was intended to cause the sale, and was operative in causing it, will be regarded either as implying or constituting a warranty." And again: "It is certain that the word warrant need not be used, nor any other of precisely the same meaning. It is enough if the words actually used import an undertaking on the part of the owner that the chattel is what it is represented to

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be, or *an equivalent to such undertaking." In this case it is impossible to escape the conclusions that in the course of the negotiation the defendant was assured by the plaintiff that the ox had not been brought from the mountains, and was, therefore, not liable to disease, to which, it would seem, mountain cattle were peculiarly liable when first brought to the level country, and that upon this assurance the defendant bought, and without it he would not have bought. This certainly brings the case within the rule stated by Parsons, supra. This rule is fully sustained by the case of Hawkins v. Pemberton, 51 N. Y. 198; 10 Amer. R. 595, in which the authorities are collected and reviewed, and by the recent case of Van Wick v. Allen, 69 N. Y. 61; 25 Amer. R. 136. We are, therefore, of opinion that it was error to exclude the counter claim upon the ground that the cause of action upon which it was based did not arise out of contract.

It was also insisted that the counter claim could not be admitted, because it was based upon a claim for "unascertained damages," and this view would seem to be sustained by certain language used in Gibbes v. Mitchell, 2 Bay 351. But that case has, in this respect, been modified by the recent case of

Haynes v. Prothro, 10 Rich. 318, in which it was expressly held that unascertained damages arising ex contractu are admissible as a set-off, and it is there said that so much of the case of Gibbes v. Mitchell as announced a contrary doctrine was a mere dictum, and was of no authority. So that even prior to the adoption of the code of procedure this objection could scarcely be sustained. Since the code, however, we do not see how there can be a question upon the subject, for if the counter claim is based upon a cause of action arising on a contract, by the express terms of that statute it may be pleaded to an action on a contract, whether the damages be liquidated or unliquidated, ascertained or unascertained. Accordingly in Pomeroy on Rem., § 798, p. 817, it is said: "It may be stated as the universal rule that, in an action on contract to recover debt or unliquidated damages, the defendant may counter claim debt or damages arising on another contract, whether such damages are unliquidated or ascertained."

The judgment of the Circuit Court is set aside and a new trial ordered.

New trial granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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11 S. C. *342

*(Case No. 698.)

THE STATE v. ALEXANDER BRYCE, Jr.

(November Term, 1878.)

[1. *Counties* ⇐43.]

The chairman of a retiring board of county commissioners has no authority to discharge any of the duties of his office after his successors have been duly elected and qualified, although not yet organized into a board by the election of a chairman.

[Ed. Note.—Cited in State ex rel. Gruber v. Knight, 31 S. C. 83, 9 S. E. 692; State v. Lee, 35 S. C. 196, 14 S. E. 395.

For other cases, see Counties, Cent. Dig. § 51; Dec. Dig. ⇐43.]

[2. *Jury* ⇐59.]

A jury list prepared by the jury commissioner and such retiring chairman is illegal.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 269; Dec. Dig. ⇐59.]

Before Cooke, J., at Oconee, March Term, 1877.

At the preparation of a jury list for Oconee county, in January, 1877, only two persons besides the clerk and sheriff were present—the jury commissioner and the chairman of the board of county commissioners who were elected in November, 1874. The county commissioners elected in November, 1876, all qualified during December of that year. The former county auditor resigned his office, and his resignation was accepted December 19th, 1876. His successor had not yet been appointed. The grand and petit jurors present at this term of the Circuit Court were all drawn from said list.

The defendant was indicted for larceny and for receiving stolen goods, knowing them to be stolen, namely, four books belonging to the office of county auditor. Defendant challenged the array of jurors, upon the ground that the list was illegally prepared. The challenge was overruled, and defendant was convicted of receiving stolen goods, knowing them to be stolen.

Defendant submitted a motion in arrest of judgment, upon several grounds, all of which being overruled, and defendant being sentenced, he appealed to this court, upon several grounds, of which it is necessary to state only one:

Because the jury by which the verdict of guilty, &c., was rendered in said action, was not a legal jury, for the reason that there was no legal chairman of the board of county commissioners or county auditor for this county present in preparing the list from which said jury were drawn.

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*Mr. J. W. Harrison and Mr. S. P. Dendy, for appellant.

The whole board of three must be present and act from the very terms of the statute, both in preparing the list and drawing the jury. See ch. CXI., §§ 1, 3, 4, 5, 15; 1 Bay 354; Potter's Dwarris on Stat. 767; Black. Rules of Con. 151; 31 How. Pr. 51; L. & Eq. Rep., Vol. IV., pp. 328–330.

The third section of the act of 1874 (15 Stat. 638), is unconstitutional and void. See Art. II, § 20, Const. S. C.; Potter's Dwarris on Stat., ½ p. 64, 103, 105–6, and note 5.

If the act of 1874 above referred to, be held constitutional, then the whole board of jury commissioners should have a legal existence in the county before a majority can act. See Potter's Dwarris on Stat., ½ p. 223, note 29, and 228, note 30, and cases cited; 2 Cranch 127.

Under the constitution and statutes of this state, county commissioners are elected for two years, and hold until their successors are elected and qualified. Art. IV., § 19, Const. S. C.; Rev. Stat., ch. XIX., § 35, p. 155.

Election or appointment, and taking prescribed oath of office, and filing approved bond, is the only qualification within the meaning of the statutes of this state, and confers the office. Rev. Stat., ch. XIX., § 3, p. 146; State v. Lyles, 1 McC. 239.

March 8th, 1879. The opinion of the court was delivered by

HASKELL, A. J. There are several grounds of appeal presented by the defendant, but the first disposes of the question and is the only one which requires consideration. The objection is to the jury; that the jury list was not legally prepared. The law on that subject, and at that time, is as follows:

1. There shall be a jury commissioner, "who, with the county auditor and chairman of the board of county commissioners, shall constitute a board of jury commissioners for the county. Rev. Stat., § 1, 518; Id., § 3, 519. "The board of jury commissioners of each county shall, once in each year, during the month of January, prepare a list," &c.

From that "list" the grand and petit jurors are drawn. The board is thus composed of three public officers designated. It is

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*submitted by the appellant that all should be present at the preparation of the jury list, but that only two were present in fact; and, secondly, if it should be decided that a majority constitutes a quorum, he submits that one of the two persons present was not qualified to act, and that, consequently, there was not a majority. On this subject it is said in Sedg. on Stat. and Const. Law 387: "In regard to the number requisite to constitute a quorum of the members of a public body, or the number requisite to do business, it has long been settled that where a statute constitutes a board of commissioners or other officers to decide any matter, as to open books, to receive subscriptions and distribute the stock of a railroad company, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide."

The more general rule laid down in Bouvier's Law Dict., tit. "Quorum," is, that where the act is to be done by a definite number of persons, a majority of that number "is required to constitute a quorum, unless the law expressly directs that another number may make one." It may be unnecessary to decide whether the whole number is requisite, for that question will not properly arise until it has been determined that a majority was present. We presume that it will not for a moment be contended that a minority of the whole number could perform the duties of the board, for such a proposition would be absolutely without foundation. We will proceed, therefore, to examine the real question in the case—was there present at the preparation of the jury list a majority of the board of jury commissioners? The facts are that only two were present. "Morgan H. Bryce, jury commissioner for Oconee county, and James M. Hunnicutt, claiming to be chairman of the board of county commissioners for said county."

It is undisputed that Morgan H. Bryce was jury commissioner. The county commissioner are elected under the constitution for two years. James M. Hunnicutt had held the office as a county commissioner during the period preceding the election in November, 1876. The jury list was prepared January 8th and 9th, 1877. The county commissioners had been regularly elected in November, 1876, and had all executed their official bonds, which had been severally approved and

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were all recorded on the 18th *day of December, 1876. It will thus be seen that the new county commissioners had been duly elected and had been qualified nearly a month prior to the time when the jury list was prepared. We know of no authority on the part of James M. Hunnicutt to perform any of the duties of a county commissioner after his successor had been elected, and had qualified by taking the oath of office and filing proper bonds. Such are the facts of this case. The conclusion is, that on December 18th, 1876, the newly elected county commissioners had become installed in their offices, and that from that time the former county commissioners were no longer in office. James M. Hunnicutt was, therefore, no longer chairman of the board of county commissioners, and was not qualified to act on the board of jury commissioners. His action, therefore, being without authority of law, is null and void. The consequence is that there was present but one member of the board of jury commissioners. He had no authority to prepare the jury list, for that is a duty, not of the jury commissioner, but of the board of which he was but a member. The whole proceeding, therefore, was without authority of law, and the jury drawn from such a list was not a legal jury, and the defendant did not have a proper trial. It makes no difference that the new county commissioners had not met together and elected their chairman before the 8th of January. They could have been compelled to perform that duty, and that was the legal remedy. Whether their failure arose from neglect, accident or mistake, is immaterial. Neither of those nor any other cause would sanction the interference of a person unauthorized by law to assume the powers delegated to others. The remaining questions bear upon matters of evidence and of fact, which could not properly (and, indeed, need not to) be considered by this court. The animus, the cause, and the official or de facto position of the defendant, were matters for the jury, with proper legal instruction from the judge, and there seem to have been no exceptions to his charge on any of the points.

The judgment is reversed. Motion granted. New trial granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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11 S. C. *346

*(Case No. 699.)

GEORGE W. HILL v. MARGARET S. THOMAS et al., His Children, and CHARLES BOLT et al., His Creditors.

(November Term, 1878.)

[*Wills* ⇦614.]

A devise as follows: "I give and bequeath to my son G. * * * the land whereon I now

live. * * * Now the condition of the above gift is that the property * * * both real and personal is to remain the said G. and his child or children, and in case the said G. should die, and not leave any living child or children, why then the said property is to go" over. G. having one child at death of testator, *held*, a life estate in G. with remainder to his children as purchasers. Sisson v. Seabury, 1 Sumn. 235 [Fed. Cas. No. 12,913]; Hannan v. Osborne, 4 Paige Ch. 336.

[Ed. Note.—Cited in Robert v. Ellis, 59 S. C. 161, 37 S. E. 250; Folk v. Hughes, 100 S. C. 225, 84 S. E. 714.

For other cases, see Wills, Cent. Dig. § 1394; Dec. Dig. ⟸614.]

Before Hudson, J., at Union, June Term, 1878.

The facts of this case, and the clause of the will construed by the court, are sufficiently set forth in the decree of Judge Hudson, which reads as follows:

James Hill, the father of the plaintiff, made his last will and testament on the 24th day of October, 1854. A few days afterwards he died, and his will was duly proved before the Ordinary of Union county on the 10th day of November, 1854. The devisees and legatees under the will were testator's widow, Susannah, and his sons, George W. Hill, the plaintiff, and John T. Hill, and his grandsons, James H. Scaife and M. G. B. Scaife, children of a predeceased daughter. The widow, Susannah, died a short time after the testator.

By the first section of the will, the testator directs his debts to be paid from moneys due him and from proceeds of his crops, or cotton then on hand; and if this should be insufficient for the purpose, that the deficiency should be made up as follows: one-third by George W. Hill, one-third by John T. Hill, and one-third by James H. Scaife and M. G. B. Scaife.

By the second section he gives to his wife his dwelling-house and furniture for her life, and $3000 in money, to be made up to her as follows: if there should not be enough

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*left from the fund set apart to pay debts, then J. T. Hill and G. W. Hill shall each make up one-third part, and J. H. Scaife and M. G. B. Scaife one-third part. After her death the dwelling-house to go to George W. Hill.

By the third section he gives to his grandsons, James H. Scaife and M. G. B. Scaife, negroes and other personal property, with a limitation over; on default of children, to John T. Hill and George W. Hill; or, if they be dead, to their children.

Section four is as follows: "I give and bequeath to my son, G. W. Hill, the following negroes, * * * and the land whereon I now live, excepting for my wife the dwelling-house during her life; * * * and I also give and bequeath to him one-third of my stock, * * * and at the decease of my wife, one-third * * *; and after payment of my debts, should there not be funds enough to make the three thousand dollars for my wife, why then G. W. Hill shall make up one-third of the amount out of his share. Now the condition of the above gift is, that the property, including that given off before, both real and personal, is to remain the said G. W. Hill and his child or children; and in case the said G. W. Hill should die and not leave any living child or children, why then the said property is to go to J. T. Hill, James H. and M. G. B. Scaife, or the child or children of them, the child or children representing parents; and the said G. W. Hill is to pay to J. T. Hill one thousand dollars, and James H. and M. G. B. Scaife each five hundred dollars."

In section five testator gives certain property to his son, J. T. Hill, and, after a conditional limitation, the section proceeds: "Then the said property to descend to G. W. Hill and his child or children, and James H. and M. G. B. Scaife and their children; that is, G. W. Hill one-half, and the Scaife or Scaifes the other half."

The action is brought by George W. Hill. The defendants are his children, hereinafter named, his judgment creditors, and the sheriff of Union county. The complaint alleges, that under the devises of the will of his father, the plaintiff is seized and possessed in joint tenancy and in fee, together with his children, the defendants, Margaret S. Thom-

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as, Sarah A. Willard, Martha *E. Hill, Robert G. Hill, Roland Hill, Ruth W. Hill, and Daisey Hill, of the land devised by the fourth clause of the will. That the judgment creditors, defendants, have levied their executions upon the interest of the plaintiff in said lands, and that the sheriff, defendant, is proceeding to sell under said levies plaintiff's interest therein; that plaintiff is desirous of having a homestead laid off to his family out of his interest in said lands, but is unable to have the same set apart until his interest or portion in severalty in said lands is ascertained. The complaint prays judgment that a writ of partition issue to set off to the plaintiff his interest in severalty and in fee; that an injunction issue to restrain the judgment creditors and the sheriff from selling plaintiff's interest in said land until the same is set off to him in severalty; and that after such partition, that the sheriff be required to lay off to the plaintiff his family homestead.

The judgment creditors deny that the plaintiff is a joint tenant with his children, but insist that he is entitled to an estate for his life in the whole of said lands. Certain of the creditors allege that their judgments are founded upon contracts entered into prior to April, 1868, and deny that the plaintiff is entitled to any homestead exemption whatever in said land.

The children are all infants under the age of twenty-one years, except Mrs. Thomas, who is of full age. At the time of making the will and at the death of the testator, George

W. Hill had but one child, now Mrs. Thomas. All the others have been born since. For the children, it is claimed that the plaintiff is entitled to only a joint interest with them for the life of the plaintiff in the land, and that they are entitled to the remainder in fee.

A temporary injunction was granted by Judge Wallace, with leave to move to set it aside. The cause came on to be heard before me at June Term, 1878, upon the merits.

The question in the case is, what interest does the plaintiff take, and what interest do his children take, in the land under the will? The devise to them is contained in the fourth clause of the will. Under the devise the children take concurrently with their father, George W. Hill, or they take successively by way of remainder. The will took effect at

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the death of the *testator, and the interest of George W. Hill vested in possession at once. As it regards his interest, no further period of distribution was fixed or contemplated. And if the children are to take concurrently with him, then only those in existence at the time of vesting in possession can take. The others could not take; they were not in esse; and none could take but those in existence at the period of distribution. Wessenger v. Hunt, 9 Rich. Eq. 464; Myers v. Myers, 2 McC. Ch. 256 [16 Am. Dec. 648]; 2 Jarman on Wills [74], [75], [76]; O'Hara on Wills, ch. XXIII., § 1, ch. VI. This construction would give the entire estate to the plaintiff and the one child living at the death of the testator. But it is conceded by all parties, plaintiff and defendants, that this was not the intention. And it is clear that it was not. But if the children take in succession by way of remainder, all can take; otherwise, they cannot. See authorities, supra. The will shows a manifest intention to give a different estate to the father and to the children, and that the children should all take. And they can all take only in succession. Therefore they must take by way of remainder.

It is adjudged that the plaintiff, G. W. Hill, under the devise of his father's will, is not seized of the land in question in fee and jointly with his child or children, nor is he seized jointly with them—he for life and they in fee. The devise is to him for life, the remainder to his children. Whether the remainder be vested subject to be divested by predeceasing the life tenant, or a vested transmissible interest, it is not necessary in this contest to decide. It will be time enough at the death of the parent for the surviving children and the children of such as predecease the life tenant, if any, to settle the question.

2. Therefore, the partition craved cannot be granted. But the plaintiff is entitled to have his homestead admeasured out of the life estate, provided he be entitled to a homestead at all as against the creditors enjoined. This will depend upon the dates of the causes of action upon which the judgments respectively are based, which must be ascertained upon a reference. Any homestead admeasured to the plaintiff from the life estate can only be co-extensive with the same, and must terminate with his natural life. It cannot, therefore, be admeasured under the provi-

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sions *and terms of the act of the legislature in such case, but must be admeasured under the special directions of the court under the broad grant of the constitution.

3. That as it is possible that the homestead exemption may prevail against some of the judgment creditors and not against others, all equities which may arise between these creditors as against each other, and the claimant of the homestead, in determining how much and what part of said land shall be sold, and which part first, and for whose benefit, be reserved for the further consideration of the court after the coming in of the referee's report.

4. That the existing injunction be continued until the further order of the court.

5. The terms of this judgment having been verbally announced, and an intention to appeal therefrom having been declared, and a request made, that, pending the appeal, further proceedings by the judgment creditors to enforce their executions be stayed in case the appeal be taken, the stay will be granted, subject to terminate by the 1st day of November next, should the taxes on said land for the present fiscal year be not paid by that day by the plaintiff; this, however, not to interfere with the existing injunction.

It is further ordered that Joseph F. Gist, Esquire, be appointed referee herein, to take proof of the amounts and priorities of the judgments against the plaintiff, together with the dates of the causes of action upon which said judgments are founded, and that he report the same to the court, together with his conclusions.

(Signed) J. H. Hudson,
June 25th, 1878. Presiding Judge.

The defendants, the children of G. W. Hill, filed the following exceptions, to wit:

1. For that his Honor adjudged that the plaintiff, G. W. Hill, under the devise of his father's will, is not seized of the land in question in fee and jointly with his child or children, nor is he seized jointly with them, he for life and they in fee. The devise is to him for life, remainder to his children.

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*2. For that his Honor did not adjudge that the defendants, as the children of the plaintiff, G. W. Hill, now living, are entitled to the land mentioned in the fourth item of the will of the testator jointly with their said father during his life, one of said children having been born and alive at the time of the devise.

3. For that his Honor did not adjudge that the defendant, Margaret S. Thomas, is entitled to the land mentioned in the fourth item of James Hill's will, jointly with her

father, G. W. Hill, during his life, as a child of the said George W. Hill, living at the time of the devise.

And gave the following notice of appeal, to wit:

"Take notice that the defendants * * * appeal to the Supreme Court from so much of the decree of his Honor Judge Hudson, entered herein on the 25th day of June, 1878, as adjudges that the said defendants had no interest in the tract of land described in the complaint during the lifetime of their father, George W. Hill, and from all the other parts of said decree which ignore the rights of said defendants."

Mr. J. H. Rion, for appellant.

I. G. W. Hill, having a child living at the time of the devise, under the second resolution in Wild's case, the father, G. W. Hill, and his children take as joint tenants; and G. W. Hill is entitled to the one-fourth or one-fifth of the estate devised, as there are three or four children. The children take as purchasers. 2 Atk. 220. "Children," in its natural sense, is a word of purchase. 4 Paige Ch. 297. And see 3 Atk. 397, as to distinction between "children" and "issue."

To A and his children, A having children at time of making will, he takes a joint estate with his children. 4 Paige 297; 2 Strange 1172; 2 Vern. 545. All the cases recognize that under the second resolution in Wild's case, the children take jointly and immediately with parent. 1 Doug. 324. Opinion of Lord Mansfield, "immediate" he says.

Under act of 1824, all take fees where it is not inconsistent with the intention of the testator. But it is clear that Mr. Hill's interest is regarded as not extending beyond his own life; while as to the children, they must have died before their father, to let

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*in the remaindermen; hence they take a fee defeasible, if they predecease their father.

Again, the will provides for remaindermen only if there be no children of Mr. Hill living at his death; hence, the children, if living, take by implication, otherwise there is a void in the devise, if Mr. Hill should die, leaving children living at his death.

The scheme of the will is manifest. G. W. Hill, as the paterfamilias, is to have the management and control of the whole estate for his life, but the condition of this control is, that while he is to provide certain sums for other purposes of the will, the whole property is to remain the property of himself and his child or children, and after his death that child or children are to take the property. His interest is joint with them for life, and for life only; their interest is from time of devise until their death, or a fee if they survive their parent.

The resolution in Wild's case has a peculiar appropriateness in this devise. G. W. Hill had a child at time of devise, and testator seems particularly to have had this child in his mind. The devise is to this child or children. The remainder, after devise to J. T. Hill, is to G. W. Hill and child or children. The devise to J. T. Hill is to him, and not to him and child or children. The bequest to the Scaifes is to them only, and again with remainder to G. W. Hill and child or children.

The fact that the charge is in G. W. Hill, and not in G. W. Hill and his children, does not indicate an intention contrary to our view; for he, as paterfamilias, (or trustee,) has in charge and control the whole of the property, land and slaves, out of which the amount required may be easily produced as income.

II. The limitation over, if he die without children living at the time of his death, restricts G. W. Hill to a life estate, and vests in the children a fee defeasible in the whole estate, subject to be defeated if they do not survive G. W. Hill, and subject to the life estate carved out for G. W. Hill, their father.

The intention is plain that G. W. Hill's interest is limited to his life, for upon his death, the whole estate passes by implication to such children as may then be living;

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and if no children, *then to the remaindermen. No objection that their estates have not same termination. 2 Bl. Com. [181.]

Observe Reeder v. Spearman, 6 Rich. Eq. 88, as to Johnson v. Johnson, McM. Eq. 337.

If the devise were to Mr. Hill, and in case he die without children, over—or, to Mr. Hill for life, and in case he die without issue or children living at the time of his death, over—Mr. Hill would take a fee conditional, under our authorities, ending with Addison v. Addison, 9 Rich. Eq. 58; and the same might be the construction if the devise were to Mr. Hill and his children; and if he die without children living at the time of his death, over, if he had no children living at the time of the devise; but, he having a child living at the time of the devise, it, under Wild's case, takes as purchaser, and there is no estate of inheritance in the father contemplated, implied, or necessary to carry out the intention of testator, and although they are joint tenants with their father while he lives, yet, subject to this life estate, they take (even independently of our act of 1824, and a fortiori under that act,) an estate in fee defeasible, if all die before their father.

The same would be the result if the devise were to G. W. Hill and his children after him; or, G. W. Hill and then his children; or, G. W. Hill, as a place of inheritance for him and his children.

In the case of Hannan v. Osborne, 4 Paige 336, where the devise was to a daughter and her children forever, with a void remainder over (which is the same as no remainder,) there it was held that the children took only by way of remainder, though in this case the

parent was restricted to a life estate. But in South Carolina the courts would have held (as shown above) in conformity to Wild's case, that the children took an immediate present interest as purchasers. The provision in our case is, however, in very different words from that in Hannan v. Osborne. In that case, the devise was "to Mary Ann * * * all the remainder of my estate, both real and personal, to have and to hold the same to her and her children forever; but in case my said sister shall die and all her children die, leaving no children," over.

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*The Chancellor says, (p. 341,) that under common law, there being children in existence at time of devise, they would take "jointly with parent," unless the intention of testator appeared in the will that the children were only to take by way of remainder. And the Chancellor further says in this case, (p. 342,) that "the devise is not to the mother and her children, but to her, to have and to hold the same to her and her children forever." Besides, he says that the devise being to children, when there was in esse only a child, showed that testator had in view that the children were to take by way of remainder.

The language of the case is, "Held under the Revised Statute," etc.

I respectfully submit that the error of the Circuit judge arises from not considering the distinction between the word child (of purchase) and issue (of limitation,) and not recognizing the second resolution in Wild's case.

III. Now, what children take?

The children take as joint tenants with their father.

The rule laid down in many of our cases, that those only who are in esse and capable of taking at the time fixed of a division, applies only when a time for division is fixed. But in our case the estate is to "remain G. W. Hill's and his child or children," and there is no division or change until the death of G. W. Hill, when the time for division is really fixed. Children who have died before that period are dropped out, and their issue cannot take unless the court makes the word "children" include grandchildren. 2 Ves. 336, where a limitation over is the ground; 2 Strange 1172; 4 Strobh. Eq. 15, 16; 2 Vern. 545; 2 Strange 1172. Children can come in at different times, and the Chief Justice gives authorities: 2 Bl. Com. [182], note as to Sugden's remarks; Carson v. Kennedy, 8 Rich. Eq. 268.

Mr. William Munro, for respondents.

Under the will of his father, the plaintiff, George W. Hill, takes a life estate in the lands devised in the fourth item of the will, with remainder to his children.

Two rules are relied on by the respondents:

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1st. Intention *must prevail, if consistent with law. 2d. Effect must be given to all the words of the will, if possible.

If the devise were to "George W. Hill and his child or children," without other words, the rule in Wild's case, 6 Co. 17, would apply, and this would be a case of joint tenancy between George W. Hill and his eldest child. 6 Rich. Eq. 88; O'Hara on Wills, ch. XXIII., § 4.

But if effect be given to the words of limitation over, George will take a life estate, with remainder to his children. Bail Eq. 552; 2 Hill L. 330; McM. 347; 2 Strob. Eq. 63; 2 Ves., Jr., 536, note 1.

But, it is said, these are cases of personalty, and that the rule is different in respect of realty.

The only difference is in this, that in the case of personalty, the limitation over converts the issue or heirs of the body, mentioned in the words of the direct gift, into purchasers in remainder; whereas, in a devise of lands, the words of limitation over are ineffectual to convert the issue or heirs of the body, mentioned in the direct devise, into purchasers. This is because of the different nature and qualities of the two species of property. 1 Rich. Eq. 411; 3 Rich. Eq. 390–393; S. C., 4 Rich. Eq. 380–384.

Now, in a case like this, where it is conceded that the devisees do take as purchasers, the words of the limitation over must have their obvious meaning. Bail Eq. 552.

Second. Under the devise the children of George W. Hill take as purchasers, and must take concurrently with the parent, or successively by way of remainder.

All the children cannot take, if they take concurrently with the parent. All the children were not in esse at the death of the testator. Those only who were in existence at the death of the testator can take concurrently with the parent. 2 Jarman on Wills, *74, *75, *76; O'Hara on Wills, ch. XXIII.; 9 Rich. Eq. 464; 2 McC. Ch. 256; 2 McC. Ch. 445.

But if the children take successively to the parent, all can take. See authorities supra.

Now, did the testator mean that all should take? So it is claimed by all.

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*The appellants claim that the period of distribution, or which is the same thing, the vesting in possession, was at the death of testator, and at same time insist that the children born after that period, as well as the one born before, should take. This is opposed to all the authorities.

The respondents, on the contrary, claim that the period of distribution is deferred until the death of George W. Hill, the life tenant, and that all the children will take, and thus carry into effect the intention of testator.

The appellants demand partition among George and his children, i. e., those in esse.

If any children are hereafter born, must there not be another partition?

There are other words of the context, showing that George is to take a different estate from his children. He is to pay money to equalize "his share."

The case of Hannan v. Osborne, 4 Paige Ch. 341, 342, is identical with this. No difference can be distinguished.

Particular attention is asked to the words of Chancellor Walworth, on pages 341, 342; they seem to counsel to cover the points of this case.

Another strong point in this case is, that the testator has defined the meaning of his own words.

Ambiguous words in one part of an instrument must receive the same construction as the same words used without ambiguity in another part of the same instrument.

The words whose construction is disputed in the fourth section of this will, are again used in the fifth section, and are there defined: "That is to say, G. W. Hill one-half, and the Scaife or Scaifes the other half." 2 Jarman on Wills *744, Rule XVIII.; 2 Williams on Ex'rs *928.

March 15th, 1879. The opinion of the court was delivered by

HASKELL, A. J. The appeal is from the construction of a will, and the only question is as to what estate in land is devised by the following words, to wit: "I give and bequeath to my son, G. W. Hill, * * * the land whereon I now live. * * * Now, the condition of the above gift is, that the property, including that given off before, * * *

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is to remain *the property of the said G. W. Hill and his child or children; and in case the said G. W. Hill should die and not leave any living child or children, why then the said property" over. The will is set forth in full in the statement of the case.

The Circuit judge decides that the devise is to G. W. Hill for life, with remainder to his children. The appeal is on behalf of the children, several of whom are minors, and they claim to take jointly with their father during his lifetime, with remainder in fee for those who may survive him. The whole appeal rests upon the proposition that this case is governed by the second resolution in Wild's case, which is as follows: "If a man devises lands to A and to his children or issue, and he then has children or issue of his body, then his express intent may take effect according to the rule of the common law; and no certain and manifest intent appears in the will to the contrary." The parent and the children thus take jointly. The other points presented by the appellants are mere deductions based upon the above proposition, which, therefore, should be first considered. The resolution relied on relates only to cases of direct devise to parent and children—as if to A and B, both to take immediately. In this case the gift to G. W. Hill is separate and distinct. The land is first given to him absolutely. A clause is then inserted, called "the condition of the above gift," and containing a provision that the said property previously given to G. W. Hill shall not only remain his, but shall also remain for his "child or children." The gift to the children is of the whole property, just as it had been to G. W. Hill. It is thus given to two persons or classes of persons, to each in entirety, but in this way, i. e., it is given to A, but it is made a condition that it shall "remain" for B. The term child or children is primarily a word of purchase, and not of limitation, and can only be given the latter as its secondary meaning when such construction is rendered necessary by the context. No such necessity appears in this case. On the contrary, the primary meaning is admitted, and it expresses the real intention of the testator. Child or children, then, is the same as a designated person. It is as if the property had been given to A, when if nothing more had been said the gift would have been in fee simple under

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the act *of 1824. Rev. Stat. 443. But the expression is added, as a condition of the above gift, that the property is to "remain to A and B," and "in case the said A should die and not leave B living, then over." The real intention cannot be doubted. The gift of the whole property was already to A, and there is nothing in the context to justify the idea that the testator meant to diminish the amount. In fact, the contrary is shown. The testator's design was to divide his property into three parts, one to G. W. Hill to remain to his children, another to J. T. Hill, and the other to two grandsons, together representing a daughter. G. W. Hill is charged personally with sums payable to the other son and the two grandsons for purposes of equalization. Again, in a limitation over of the property devised to J. T. Hill, to "G. W. Hill and his child or children," and to the two grandsons and their children, the testator explains by saying, "that is, G. W. Hill one-half, and the Scaife or Scaifes the other half." That is to say G. W. Hill was to enjoy the whole property devised to him and his children, but the time of his enjoyment is limited. It was to him and to his children after him. It might be said that such was the language in Johnson v. Johnson, McM. Eq. 347, and the first taker was held to have taken a fee conditional. But the Chancellor says it would have been different in Johnson v. Johnson if there had been a limitation over in the event of the first taker having no children living at her death. "That would show the intention of giving the remainder to the children living at her death, and would restrict the mother to a life estate." That is this case. Nor, to return, is there, on the

other hand, any evidence that the "child or children" shall take less than the whole. The only mode by which both can have the whole property is for them to take it successively. It is given to the father. He is, beyond peradventure, a taker at the beginning. When can the children take? Certainly not at the beginning, for then there was only one. The word "remain," which constitutes the gift to the child or children, perhaps contains the explanation. It has within it the meaning of continuance, and, consequently, when there are several actors, the idea of succession. The property was already in the father by the preceding gift. The condition

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permits it to continue or remain *(in) him, but adds that it shall remain (for) his child or children. It is the same as if he had said it shall go to A, but it must remain for B. There is no difference between that and the common expression, "for A and then for B."

In the case of Sisson v. Seabury, 1 Sumn. 235 [Fed. Cas. No. 12,913], the devise was to "A and his male children, lawfully begotten of his body, and their heirs forever, to be equally divided among them, and their heirs forever." The court, after determining that the "male children" did not mean male issue indefinitely, found no difficulty in fixing the estate in A to be for life only, with the fee simple in remainder to the male children. The fact that the devise was to the male children and their heirs, &c., was of great force in that case, but the difference in words in that respect is not material, for, under the act of 1824, unless the contrary appears, the devise to children is the same as to children and their heirs. The court, per Story, J., says: "Where words of devise are used, giving an estate to A and then to B, no one would doubt that the estate to A was a mere life estate, although not so expressly limited. It results from a general rule of law. If the testator, instead of designating the second devisee by name, uses words which are commonly a mere descriptio personarum, the conclusion is equally natural that the estate to A is for life only. We are at liberty to abandon this conclusion only when there is an apparent intent to use the words as words of limitation and not as words of description—'male children' are not, technically speaking, words of limitation, but of description of persons. The court ought, then, clearly to see that they are used as words of limitation before it abandons their common meaning." The word "then" did not occur in the devise, nor was there "remain" to qualify a preceding absolute gift to a preceding devisee. This case is much stronger than the case of Sisson v. Seabury, which is recognized authority, and supported by a long array of the decisions of the English courts. In that case the point was different, but the line of approach on one side is the same as in this. A had no child at the time; the second resolution in Wild's case, was, therefore, not applicable. But it was contended that he took an estate tail under the first resolution in Wild's case. It was held that he took an

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estate for life, and the *reasoning which leads to that conclusion is equally applicable to that point in the case before us. The fact that there was one child of G. W. Hill in esse at the time of the making of the will, would be of more importance in the view urged by the appellants were it not that, by the addition of the word "children," the testator had shown it to be his intention to include after-born children who could not take immediately. For it is only where the children are to take immediately that the second resolution in Wild's case can be said to govern. With regard to the effect of "children" as a plural, where there is but one child in being at the time, the conclusion is put quite forcibly in Hannan v. Osborne, 4 Paige Ch. 336, cited in the arguments. That case, too, is very much in point throughout. See, also, Sisson v. Seabury, with the authorities there cited by Mr. Justice Story.

The judgment is affirmed. Motion refused. Appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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(Case No. 700.)

THE STATE v. WILLIAM HARDEN.

(November Term, 1878.)

[1. *Criminal Law* ⇦1144.]

The statements of a charge as reported by appellant in his proposed case and not corrected by the Circuit judge on a settlement of the case by him, are assumed to be admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3032; Dec. Dig. ⇦1144.]

[2. *Highways* ⇦164.]

On a trial under indictment for obstructing a highway, the charge of the Circuit judge, in which a neighborhood road was called a public highway, *held* to be erroneous, because of the failure to discriminate between public highways and neighborhood roads. McIver, A. J., dissenting, upon the ground, that the distinction was sufficiently explained in the charge.

[Ed. Note.—Cited in Sanders v. Charleston & W. C. Ry., 93 S. C. 550, 77 S. E. 289.

For other cases, see Highways, Cent. Dig. §§ 447–455; Dec. Dig. ⇦164.]

[3. *Highways* ⇦153.]

The mere obstruction of a public road to the impediment of travel constitutes, of itself, a public nuisance.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 417; Dec. Dig. ⇦153.]

[4. *Highways* ⇦163.]

The Circuit judge refused to charge the jury that defendant should be acquitted of obstructing a public road, if he had opened a new

road, and one equally as convenient, in place of the old road obstructed—*held*, no error.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 444; Dec. Dig. ⟸163.]

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[5. *Highways* ⟸18.]

*Our roads are properly divided into highways and private ways; and the highways are subdivided into two kinds, public highways and neighborhood roads.

[Ed. Note.—Cited in Kirby v. Southern Ry., 63 S. C. 523, 41 S. E. 765; Moragne v. Charleston & W. C. R. Co., 77 S. C. 438, 58 S. E. 150.

For other cases, see Highways, Cent. Dig. § 25; Dec. Dig. ⟸18.]

[6. *Highways* ⟸163; *Indictment and Information* ⟸110.]

[The dissenting opinion in this case is also cited in State v. Wolfe, 61 S. C. 27, 39 S. E. 179, to the point that it is not the mere placing of an obstruction in a public road, but the failure to immediately remove the same, that constitutes a violation of section 365 of the Criminal Code, and in State v. Ameker, 73 S. C. 339, 53 S. E. 484, to the point that an indictment not following the words of the statute relating to the offense can only be sustained by rejecting the words "contra formam statuti," and treating it as for an offense at common law.]

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 444–446; Dec. Dig. ⟸163; Indictment and Information, Cent. Dig. §§ 289–294; Dec. Dig. ⟸110.]

Before Hudson, J., at Spartanburg, June Term, 1878.

This was an indictment against the defendant for obstructing a public road. In the indictment it was called "a highway," "a public highway," "a common highway," and the indictment concluded contra formam statuti. The proof was, that it was a neighborhood road, connecting two public highways. The obstruction consisted in the erection of a fence by defendant across this road, about the time that he opened a new road, of the same length as the old road, but at some distance from it. And this new road was partly over another's land.

In his "proposed case," the appellant makes the following statement:

The defendant made a written request that his Honor the presiding judge, charge the jury—

1. That before finding a verdict of guilty, the jury must believe from the evidence that the obstruction in the road was a public nuisance.

2. That if the jury from the evidence believe that the defendant has opened a new road in place of the old one, and equally as convenient as the old one, then the jury should return a verdict of not guilty.

Said charges his Honor refused to make.

His Honor then charged the jury that the same rules applied in law to the obstruction or change of a private path as to a public highway—both being public roads. That whenever the public had had the use of a road over lands continuous and adverse for twenty years, said road because thereby a public highway. That the obstruction of such a highway or private path constituted of itself a public nuisance. That if the jury, from the evidence, believed that the defendant had obstructed said road, then they must find the defendant guilty—and that no citizen has the right to close up a public highway or private path running through his

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land, although he makes another road *equally as convenient, because said citizen would have the right to close the latter road completely before the right of the public thereto had ripened into prescription, and would thereby deprive the public of any road whatever over the land.

To all of which charges and refusals to charge, the defendant duly excepted.

The respondent not agreeing to the case as proposed, it was submitted to Judge Hudson, who made the following report:

The foregoing case on appeal was submitted to the solicitor of the seventh circuit by the defendant's attorney, to which certain amendments were proposed by the solicitor, and not being accepted by the defendant's attorney, I have been called upon to settle the case.

There was little, if any, conflict of testimony on the main points of the case, to wit: That the "Flatwoods Road," connecting the Mills Gap and Rutherford highways, had been uninterruptedly used by the public in going to mill, to church, and in crossing from one highway to the other, for more than twenty years. It was clearly proved by others, and admitted by the defendant, that he had erected a fence across this road and forced the public to abandon the old road for more than a half mile, and in lieu thereof had substituted a new road running through his new ground field, across which he had erected two gates. The obstruction was placed there in April last, and existed at the time of trial.

At the close of my charge to the jury the defendant's counsel submitted certain propositions of law, and requested that I should accordingly instruct the jury. Two of them I declined. The first of these set forth in the case, I qualified by charging the jury that if the evidence satisfied them that the road in question had been uninterruptedly used by the public for more than twenty years, and kept in repair by the neighborhood, it was a public road, for the obstruction of which an indictment would lie; that the obstruction of such a public highway or private path to the impediment of travel constituted of itself the public nuisance.

The second proposition I declined, saying to the jury that the law does not concede to private individuals the right to obstruct public roads and force the public to pass

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through fields enclosed *with gates; that our public roads would be in a precarious

condition if liable to be changed at the caprice of private individuals. Easements valuable to the public might easily be lost or forfeited if such rights were accorded to private persons.

In explaining to the jury the character of the road in question I endeavored to follow the law as laid down in Sartor's case, 2 Strob. L. 61, and instructed them that if they were satisfied from the evidence that for twenty years or more the public had enjoyed the free and continuous use of this Flatwoods road without molestation, it became a public road or highway, technically called a private path, for the obstruction of which an indictment would lie, and that the nuisance consisted in the obstruction complained of.

With the addition of this statement of facts and instructions, I regard the defendant's case sufficiently settled to bring the errors complained of to the attention of the Supreme Court.

The defendant was convicted and sentenced, and he appealed upon the following grounds:

That his Honor erred—

1. In refusing to charge the jury that before finding a verdict of guilty the jury must believe from the evidence that the obstruction in the road was a public nuisance.

2. In refusing to charge that if the jury from the evidence believe that the defendant has opened a new road in place of the old one, and equally as convenient as the old one, then the jury should return a verdict of not guilty.

3. In charging that the same rules applied in law to the obstruction or change of a private path as to a public highway—both being public roads.

4. In charging that whenever the public had had the continuous and adverse use of a road over lands for twenty years, said road became thereby a public highway.

5. In charging that the obstruction of such a highway or private path constituted of itself a public nuisance.

6. In charging that if the jury from the evidence believed that the defendant had obstructed said road, then they must find the defendant guilty.

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*7. In charging that no citizen has the right to close up a public highway or private path through his land, although he makes another road equally as convenient.

8. And because said verdict is contrary to the law and the evidence.

Mr. J. S. R. Thomson, for appellant.

1. Unless the obstruction in the road was a nuisance to the public, an indictment will not lie. The very essence of this indictment is an alleged injury to the public. Unless, then, the defendant was guilty of a nuisance, and has done something that was an annoyance to the public, he is improperly convicted. What is a nuisance? 3 Bl. Com. 166; Bac. Ab., tit. "Nuisances;" 2 Bouv. Law Dict.

2. The citizen has the right to change the course of a private path over his land, provided the change causes no inconvenience to the public. There are different classes of public ways in this state which may not be ignored. 1 McM. 47; 3 McC. 173; 7 Rich. 392; 2 Strob. 66; Act of 1855, Gen. Stat. 266; 11 Rich. 259. A neighborhood road approaches very near to a private way. 6 Rich. 400. It is customary to substitute one neighborhood road for another, and there can be no objection if the new road is as good as the old. 11 Rich. 485; 1 Russ. on Cr. 317; Broom Leg. Max. 357. The Circuit judge seemed to think that if a new road was substituted, it might afterwards be closed, before use thereof had ripened into prescription, and the public be thus deprived of any road over the land. This could not be, because, (1) the prescription to the old road could not be lost until it was gained in the new; and (2) the dedication of the new road by defendant is irrevocable. 12 Rich. 100; 2 Wait's Act. and Def. 715. The obstruction of the new road by gates is authorized. Gen. Stat. 266; 11 Rich. 259.

3. There was error in charging that if the jury from the evidence believed that the defendant had obstructed said road, then they must find the defendant guilty. Because the evidence did not show that the public had a right over this road through defendant's lands.

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*Mr. Ball, solicitor, and Mr. J. B. Cleveland, for respondent.

1. The obstruction of a public road is a nuisance at common law and the remedy is by indictment. 2 Bay 282; 1 Hill 366; 1 McM. 47; 2 Strob. 60; 6 Rich. 112; 7 Rich. 392; Wool. on Ways 52; Ang. on Highways, § 275; 1 Rich. 58; 1 McC. 405; 2 Hill 387; Co. Lit. 56 (a); Sir Wm. Jones 277; Vaugh. 339; 1 Hawk. P. C., ch. DCCCCLVIIVI., § 92; 2 Wat. on Tres. 23, § 649; 3 Hill 100; Broom Leg. Max. 2; 7 Hill 575. An obstruction is of itself a nuisance—a gate or hedge. Kitch. 34; 1 Hawk. P. C., ch. LVIIV., § 9, ch. LVIIVI., § 48; 2 Roll. Ab. 137. Anything that impedes travel, a fence, a gate easy to open and shut. Cro. Car. 184; 2 Bing. 263; Ang. on Highways, § 223.

2. The character of a road or way, as public or private, does not depend upon the fact that it has been formally laid out or opened and occupied by public officials, or that it has been recognized by the county commissioners as public. Const. of S. C., Art. XIV., § 19, and Art. VI., § 2; 2 Strob. 60; 1 McM. 47; 1 Rich. 58; 2 Hill 387; Evans Road Law 7; 19 Ill. 634; 1 Bens. 299.

3. The character of a road as public is de-

termined by either one of the following incidents: (1.) By being opened or received and worked as such by the proper officials. (2.) By dedication and user for twenty years or more. (3.) By being necessary to the free and perfect use and enjoyment of other public roads or highways. 1 Russ. on Cr. 332, 334; 1 Vent. 189; Wool. on Ways 4, 9; Ang. on Highways, ch. I., §§ 2, 5, 27; Id., §§ 132, 133, 143, 147; 1 Camp. 260; 7 Rich. 392; 2 Vt. 480; 19 Barb. 195; 21 Ill. 439; Wat. on Tres. 19; 26 Penn. 189; 11 East 275; 1 Rich. 58; 2 Strob. 60; 1 McC. 405.

4. That assigning a new way will not justify stopping an old one. Cro. Car. 266; 1 Burr. 465; Vaugh. 346; Ang. on Highways, §§ 224, 234, 275, note 1; Wool. on Ways 14; 3 Salk. 183; 2 Stark. 511; 13 Metc. 10; 1 Russ. on Cr. 339; 16 Pick. 175; 2 Wat. on Tres. 36.

5. That in a case of this kind, where the merits have been fully gone into before a jury, a new trial will not be granted, unless there be great and manifest error. Wool. on Ways 293.

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*March 15th, 1879. The opinion of the court was delivered by

HASKELL, A. J. The indictment is for a nuisance committed by obstructing a "way" contra formam statuti. The statute relating to that subject is in Rev. Stat., ch. XLIV., § 16, p. 267. "If any person shall cause any obstruction to be placed in any part of the said highways or on any bridge or causeway thereof, so as to obstruct or render dangerous or difficult the passage of carriages or other traveling thereon, and shall not immediately remove the same, when required, he shall be deemed guilty of a nuisance, and on conviction thereof, shall be fined in a sum not exceeding $10, nor less than $2, and shall be further liable for the expenses of removing the said nuisance." The preceding section (15) establishes a penalty whenever "any person shall willfully and maliciously destroy, injure or in any manner hurt, damage, impair or obstruct any of the public highways," &c., &c. The indictment cannot be made under Section 15, for it in no sense describes that offence, but it is cited to show that "said highways in Section 16 means public highways," as mentioned in Section 15. No objection was made to the indictment for insufficiency or upon any other ground, and the only question is, whether there was any error in the charge of the judge. To convict under this indictment there must be proof that the road was a public highway, and that the obstruction was committed by the defendant, for the road being properly proved, the obstruction constitutes the nuisance. The only exceptions which need be considered, for the others are without any merit, are those which refer to the ruling of the judge upon the question, what constitutes a public highway. The case comes up on a statement by the appellant, with some additional and explanatory remarks by the judge, who thus settled the case. Whenever, therefore, the statements made by the appellant are not corrected by the judge, we take them to be admitted. One of the exceptions taken is to the charge "that whenever the public had had the continuous and adverse use of a road over lands for twenty years, said road thereby became a public highway." And another is to the charge "that the same rules applied in law to the obstruction or change of a private path as to a public highway, both being public roads." This report of a

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charge is *not contradicted by the judge; he simply makes some additional statements not bearing directly on these exceptions, and says that the law, as laid down in Sartor's case, 2 Strob. 61, was his guide. We are forced, therefore, to conclude that for the purposes of this case no distinction was drawn between a "public highway" and a "neighborhood road or private path used by the public;" consequently, that proof either of a "public highway" or a neighborhood road, as in State v. Sartor, would suffice. We think that this was an error, and will state the reasons for such opinion.

The section of the general statutes under which we infer that this indictment was brought, is taken, with very slight alteration, from the act of 1824, (Stat., Vol. IX., p. 545,) entitled "An act concerning the state roads, and for preserving and protecting the same." The preamble thus sets forth the subject and the purpose of the act: "Whereas, it is necessary that the several roads which have been or which hereafter may be constructed in this state, under the authority and at the expense thereof, should be protected by law from injury and dilapidation, and that provision should be made for keeping the same in good and contract repair; be it therefore," &c. The act then proceeds to make provisions concerning "the said roads." Sections 15 and 16, above cited, are copied from Sections 1 and 2 of the said act, substituting the words "public highways" for the said roads, viz., the roads described in the preamble. It may be argued that republication in the general statutes can work no material change, and that the meaning of "public highways" in the said sections, is limited to the roads described in the original act. It is deemed, however, more proper to consider the question as it comes up, and decide what class of roads is legally comprehended by the term "public highways," as used in this state.

It is a well-recognized fact that we have three classes of roads. Judge Evans, in his "Digest of the Road Law of the State," prepared by him in 1850, at the request of the Agricultural Society, describes them as follows: "It would seem from these views that roads are of three kinds—1. Highways, which are laid out for the use of the public

generally. 2. Private paths, laid out for, used and kept in repair by particular per-
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sons. 3. *Private ways or individual roads. The first two are public and the last entirely private. For an obstruction to a public road the remedy is by indictment. For a private way, by civil action." Page 7, section 4, note 9. While such description is useful for general information, it cannot stand for a legal definition, unless the term "highway" be, by usage or judicial decisions or legislation, perverted from its proper and very extensive signification. "Highways is said to be the genus of all public ways," (Russ. on Cr., Vol. I., p. 332,) and in that sense, all public ways are highways, and all highways are public ways. If this be correct, the first two kinds described by Judge Evans are "highways," though differing in many respects from each other, and it would be arbitrary to distinguish one from the other by calling it a highway, which is the common name of both. Such arbitrary distinction has not been adopted. On the contrary, in Heyward v. Chisolm, 11 Rich. 253, in the opinion delivered by Wardlaw, J., it is said: "Judge Evans, in his 'Digest of the Road Law,' page 7, thinks that our acts of assembly relating to roads seem to make a three-fold division of them into highways, private paths and private ways. But this attempt to systematize confused legislation cannot change the meaning of the words that have acquired a settled technical signification. Highway is a nomen generalissimum, which embraces every kind of way common to all citizens, whether a footway, a horseway, a cartway or a way by water; whether under the charge of commissioners or not, and whether originally laid out for the whole public, or laid out for particular persons and used by the public. Jacob's Law Dict., tit. "Highway;" 6 Mod. 225. Indictments for obstructions of our neighborhood roads (strangely called private paths) call them highways. State v. Sartor.

Our roads are therefore properly divided into highways and private ways, and the highways are subdivided into two kinds. The variety of epithets by which these subdivisions have been indiscriminately called has given rise to some confusion. In State v. Mobley, 1 McM. 44, the classification by Judge Brevard in Ex parte Withers [3 Brev. 85] is adopted: "Public roads are best distinguished into two sorts, namely, highways and private roads or paths. A highway is a
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principal road leading to market, town, *or some place of general resort, and is commonly traveled by all kinds of people. Private roads are neighborhood ways not commonly used by other than the people of the neighborhood where they are, although they may be used by any one who may have occasion to do so." In the leading case on the subject of obstruction of highways, (State v. Sartor, 2 Strob. 60,) is contained, in substance, the classification which was adopted by Judge Evans, and already quoted. In both these cases the question was whether a neighborhood road was a public road or highway, the obstruction of which would constitute a nuisance at the common law. It was particularly decided in State v. Sartor that obstruction of a neighborhood road was the obstruction of a highway, and constituted a nuisance. Beyond that point, which was decided, the classification of roads is of no authority. In State v. Pettis, 7 Rich. 390, neighborhood roads are recognized as highways, and the other class of public roads or ways are referred to as "more public highways." The court, per Munro, J., says: "There appears to have existed in this state, for more than a century, two distinct classes of public ways, the first of which consists of such highways or thoroughfares as lead to market towns, or other places of public resort, are laid out by the public labor, and are in all respects subject to the jurisdiction of the commissioners of roads. Those embraced within the second class are distinguished by the name of the neighborhood roads, or, as they are styled in the early acts of our legislature, private paths. This latter name would seem to import that the ways in question are technically private. They are nevertheless public alike in their origin as in their use. * * * And although they are exempt from the jurisdiction of the commissioners of roads, and are kept in repair by voluntary labor of those for whose immediate use and accommodation they are kept open, the public at large have nevertheless a right to their use, and for their obstruction, like the more public highways in the first-mentioned class, the only remedy is by an indictment for a nuisance. State v. Sartor, 2 Strob. 60." The opinion was delivered in 1854. The legislature shortly thereafter, in 1855, passed an act "To authorize the erection of gates upon all such roads as are not public highways." 12 Stat.
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*408; Rev. Stat. 266, § 8. "In 1858 the case of State v. Jefcoat came up to the Court of Appeals (11 Rich. 529) with the question whether a neighborhood road was within the provisions of the act or within the exception to the act, or, in other words, whether a neighborhood road was a public highway. It was held that although such road was a public way, it was, nevertheless, not a public highway." And such, we think, is the law. The case of Heyward v. Chisolm, already cited, is not inconsistent. The real ground relied on in that case was that a public way was not, of necessity, a highway, and that when a highway or public highway (for both terms are used) is pleaded in justification, that the proof of a neighborhood road could not sustain the plea. The argument was that a "private path" was not a highway. The court really decided upon that point. Be-

sides, it was a civil action, and more liberality is allowed, and if "public highway" has been pleaded, the proof of "highway" would have established a public right, which was the real defence. And the court said that if the plaintiff was not really misled, "the name was unimportant." Such liberality cannot, however, extend to the allegations in an indictment. The state must prove what is charged, viz., the obstruction of a "certain public highway," and by the authorities it is established that a neighborhood road is not a public highway. It was essential to a proper trial that the jury should have been instructed as to the real character of the way alleged in the indictment. The law of Sartor's Case could not be the law of this case, for that case was at the common law, and was for a "highway," while this is under the statute, and is for a "public highway." It may be contended that contra formam statuti is surplusage, and that the indictment is good at common law. Be that so, it makes no difference. The objection is not to the indictment, but to the failure to discriminate between the different kinds of public ways. There is a difference of defence, for what is an obstruction of the one is not always an obstruction of the other. A "public highway" is as distinct from a highway as a public landing is from a public way leading to the landing—at least so far as the present question is concerned. The fact that to obstruct either is a nuisance does not help the variation between the allegation and the proof, nor cure the effect of a charge which

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did not draw the *legal distinction between the two. State v. Graham, 15 Rich. 310. If the way in question had not in fact been obstructed by the fence, but had been restored to its original bed, or only changed, for a short distance, which sometimes and with some public ways the law would not consider an obstruction, and the defendant had put a gate or gates across it, under the act of 1855, then, if it were a "public highway," the remarks of the judge about the gates would be proper, but if the road turn out to be the other class of highway, commonly called "neighborhood road," the remarks would be inapplicable, and would tend to mislead the jury.

The judgment is reversed and a new trial granted.

WILLARD, C. J., concurred.

McIVER, A. J. I am unable to concur in the conclusion reached by the majority of the court in this case, and will proceed to state, very briefly, my reasons.

The only question which we are at liberty to consider is, whether there was any error in the charge of the Circuit judge; for, there being no exception to the sufficiency of the indictment, we are not called upon to determine anything with respect to that. If we take the charge as stated, in what is designated in the "case" as the "judge's report," which, I think, we are bound to do, no error has been discovered, but, on the contrary, the law as there stated, applicable to the case, is unquestionably correct. The errors pointed out are found only in the charge as represented by the appellant, which, according to my view, should not be regarded as a correct representation of the instructions actually given to the jury. For the "case," as presented by the appellant, embracing his representations of what the Circuit judge did charge, was certainly objected to by the respondent, and the Circuit judge was called upon to "settle the case." This he did in what is styled the "judge's report," and as the only real difference between that and the "case," as presented by the appellant, consists in the representations of what was said to the jury by the judge in his charge, I think we should regard the judge's report as the correct representation, and that appellant's representations are incorrect where they differ from

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such report. If, however, *the representation made by the appellant as to what was said in the charge to the jury should be regarded at all, it must be construed in connection with the representation of the charge as made in the judge's report. Construing it in this way, I am unable to perceive any error. I think it is conclusively shown, in the opinion of the majority of the court, that there are two classes of roads in this state, for the obstruction of which an indictment will lie. 1. Public highways. 2. Private paths or neighborhood roads; and that both of these classes are comprehended under the "nomen generalissimum" of highway. It is very obvious that the road, for the obstruction of which this indictment was brought, belongs to the second of these classes, and the only question, therefore, is, did the Circuit judge state the law correctly as applicable to that class of roads? I do not understand that this is questioned. The errors pointed out are, first, that, as represented by the appellant, the judge charged "that whenever the public had had the use of a road over land, continuous and adverse for twenty years, said road became thereby a public highway," the error, as I understand it, consisted in the use of the word "public," as qualifying the word "highway." Now, even assuming this representation of the charge to have been correct, still—while this may have been an error, as an abstract proposition of law, inasmuch as it may not be strictly correct to say that "public highways" derive their origin from prescription—I do not see how it can be regarded as an error affecting or likely to affect the questions made in the case on the Circuit. And as I take the rule to be well established that in order to reverse or set aside a judgment of the Circuit Court it is not sufficient to point out any mere ab-

stract errors of law, but they must be such errors in applying the law to the case as made below, as affected or would be likely to affect the result, I do not think, even conceding this to be an error committed, that it would be sufficient to require that the judgment below should be set aside. It is very clear to my mind that no question was raised in the trial below as to the distinction between these two classes of public roads, for in the indictment, to which no exception was taken, the road in question is indiscriminately designated as a "public highway," a "common highway," a "highway," and as a "com-

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mon public highway," and there *is no request to charge or exception indicating any design to draw a distinction between a "public highway" and a "private path" or "neighborhood road," technically so-called. The only points made in the defence were: 1st. That the mere obstruction of a public road was not of itself sufficient to constitute a nuisance, but that the jury should have been instructed to inquire whether in fact such obstruction was a nuisance to the public. 2d. That the defendant, by opening a new road alleged to be equally as convenient as the old one, relieved himself from liability under this indictment. As to these propositions, it is conceded, as I understand it, that there was no error in the charge. The second error pointed out is in saying to the jury "that the same rules applied in law to the obstruction or change of a private path as to a public highway, both being public roads." This alleged error is to be found only in the charge, as represented by the appellant, and not in the charge as represented by the judge's report. As to this alleged error, while I am not exactly prepared to say that it was an error at all in this particular case as developed below, it is sufficient to say that the same remarks which have been made in reference to the first error alleged will apply. It is true that if the obstruction complained of was the erection of gates across the road, then to determine whether such an erection was an obstruction for which an indictment would lie, it would be important to inquire whether the road was a "public highway" or a "private path," for if it was the former such an obstruction would be indictable, while if the latter, it would not, under the provisions of the act of 1855, (12 Stat. 408,) as construed by the case of the State v. Jefcoat, 11 Rich. 529. In this case, however, the obstruction complained of was not the erection of gates but a fence, and certainly the building of a fence across a "private path" is just as much indictable as if built across a public highway. It seems to me, therefore, that to set aside the judgment upon the ground of the errors mentioned would be to give the appellant the benefit of purely technical objections to abstract propositions of law not applicable to the case as made on the Circuit and not raised in the court below. Again, I do not think that the indictment can be regarded as framed under the statute

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but that the words *"contrary to the form of the statute," should be rejected as surplusage and the indictment be regarded as one at common law, as in Sartor's case. It is a well-established rule of criminal pleading that an indictment for an offence created by statute must follow the words of the statute; and, if it does not, it cannot be sustained except by the rejection of the words contra formam statuti, and treating it as an indictment at common law, which may be done in those cases where the offence existed at common law and has not been abrogated by any statute, as in this case now under consideration. The statute under which it is suggested that this indictment is framed is Section 16 of Chapter XLIV., General Statutes, p. 267, taken from Section 2 of the act of 1824. 9 Stat. 545. But the indictment cannot be regarded as framed under that section, for it omits one of the material ingredients of the offence there described. Under that section the mere placing an obstruction in a public highway does not constitute the offence, but it consists in not immediately removing such obstructions when required. Hence to sustain an indictment under this section it requires not only an allegation that defendant placed an obstruction in the public highway, but also that he failed and refused to "immediately remove the same when required," and this latter allegation is not contained in the indictment in this case. This section was doubtless intended to prevent the temporary obstruction of public highways by the stopping of carts, wagons or other vehicles in such highway, and refusing or neglecting to remove such impediments to travel when required. Nor can the indictment be regarded as framed under the preceding section of the same chapter of the General Statutes, which is taken from Section 1 of the act of 1824, supra, which was no doubt intended to prevent and punish those who might place permanent obstructions in a public highway: for in such case it would be necessary following the words of that section, not only to allege that the defendant did obstruct such public highway, but that he did so "willfully and maliciously," and these material words are not found in this indictment. I think, therefore, that the Circuit judge was entirely correct in following the law as laid down in State v. Sartor, 2 Strob. 61.

New trial granted.

11 S. C. *375

*(Case No. 701.)

NANCY E. CRAIG and ROBERT J. CRAIG v. WILLIAM C. BEATTY, WILLIAM H. McCORKLE, Executors, and Others.

(November Term, 1878.)

[1. *Slaves* ⟸13.]

Testatrix died in 1860, and directed her executors to place a sum of money in the hands of W. W. and W. H. M., "who are earnestly requested and directed to place said sum of money at interest, and to expend said interest as it annually accrues, in providing clothing" and other articles for the comfort of certain negro slaves; and if the executors or said W. W. and W. H. M. are prevented "by any legal action and determination from carrying out" these "provisions and injunctions," or at the death of said negroes, then said sum of money to others (white persons.) *Held*, that testatrix intended to create a trust for the benefit of slaves, and the bequest was therefore void under Section 4, of act of 1841, 11 Stat. 154.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 59; Dec. Dig. ⟸13.]

[2. *Wills* ⟸699.]

A failure for four years after probate of a will in common form to dispute the validity of its provisions cannot be construed into acquiescence in such provisions, nor does it bar the right to have the above-recited directions declared null and void.

[Ed. Note.—Cited in Burkett v. Whittemore, 36 S. C. 433, 15 S. E. 616.

For other cases, see Wills, Cent. Dig. § 1677; Dec. Dig. ⟸699.]

[3. *Wills* ⟸688.]

When a testatrix in her will intended a trust, which could not take effect, the property so intended will pass either to the residuary legatees, or to the distributees under the statute, according to the terms of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1648; Dec. Dig. ⟸688.]

Before Hudson, J., at York, March Term, 1878.

This was an action brought by the plaintiffs against William C. Beatty and William H. McCorkle, executors of the will of Nancy Blair, and certain negroes mentioned in the second section of said will, and certain other persons named in this same section, who were to take the legacy and interest, if the negroes should not be permitted to enjoy the interest. The section of the will construed by the court is set forth in the opinion. The negroes mentioned in the will were slaves of testatrix. Testatrix died in October, 1860, and her will was admitted to Probate in York district in November of the same year. The William Wright and William H. McCorkle referred to in the second section were also appointed executors of the will, but William Wright having died before testatrix, she substituted, by a codicil, William C. Beatty as executor, but not as trustee.

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*The Circuit judge held that the second section of the will was null and void, so far as it regards these negro slaves; and the negroes appealed to this court.†

Mr. James F. Hart, for appellants.

Mr. C. E. Spencer, for respondents.

April 2d, 1879. The opinion of the court was delivered by

HASKELL, A. J. The appellants, Jacob and Isaac Blair and Jane Woody, were slaves, belonging to the testatrix, and claim under the second section of her will, which is as follows: "I will and enjoin that the sum of two thousand dollars be reserved by my executors and placed in the hands of William Wright and William H. McCorkle, who are earnestly requested and directed to place said sum of money at interest, and expend the interest, as it annually accrues, in providing clothing, sugar, coffee, and such other necessaries and articles as they may deem proper for the comfort of the negroes, Isaac, Jacob, Adeline, and such other of my negroes that may be alive at my death, during their natural lives, and at their death, or if my executors or the individuals first named in this section of my will be prevented by any legal action and determination from carrying out the provisions and injunctions of this 'second' section, then, and in that case, the said principal and interest not expended by said legal proceedings, or otherwise, are to be equally divided between Mary, Margaret and John Blair," and others.

The action is brought by these legatees or their legal representatives. The former slaves are made parties, and their right, if they have any, is the question before this court, they being the only parties who appeal. The Circuit judge decided that as regards these appellants, the second section of the will which relates to them is null and void under the fourth section of the act of 1841, which is as follows: "That every devise or bequest to a slave or slaves, or to any person upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void." 11 Stat. 154. It is

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argued in behalf of the *appellants that the gift to Wright and McCorkle is not obnoxious to the said act, because it is neither a bequest to slaves nor a trust secret or expressed for their benefit, but is a provision for the necessary support of the slaves under the act of 1740. That act imposes a duty upon the owner of a slave, and a penalty for its non-observance. It is a mistake to think that the bequest to Wright and McCorkle constituted a gift to the owners of the slaves. It is argued that the slaves were not disposed of by the will, and that the legal title remained in the executors, and that the bequest was to the executors. Such, however, is not the fact. It is true that Wright and

†The Reporter has not been furnished with the brief.

McCorkle were appointed executors, but Wright died in the lifetime of the testatrix, and by a codicil William C. Beatty was made executor in his stead, but was not substituted in his place in the other capacity. Besides, the testatrix herself draws the distinction that in the one character they, as individuals, or in the other, as executors, they may be prevented from executing her wishes. But they are actually different persons, so that argument is without foundation. This fact draws a wide distinction between the present case and that of Ford v. Porter, 11 Rich. Eq. 238, on which the appellants mainly rely. But the extent to which Ford v. Porter goes on that subject is that an absolute gift to the owner of a slave is not impaired by an accompanying but purely precatory recommendation that the gift be applied to the support of certain of his (the donee's) slaves in their old age. "That a gift to enable the legatee to confer a bounty is not a trust, but a beneficial legacy. How (the court asks) can a gift to the master be a legacy or benefit to the slave, except at the master's discretion?" Id. 255. That whole case hung upon the point that the gift of the slaves and the gift of the money to the same legatees were respectively absolute gifts, without any trust, and that the recommendations with regard to the treatment of the slaves and the use of the money were in no sense imperative. But in the case before us the language of the will admits of no such construction. The executors are directed to place the money in the hands of Wright and McCorkle for certain purposes distinctly stated. There is no gift to them personally, with a mere request or recommendation on the part of the testa-

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*trix, submitting its execution wholly to their own discretion. On the contrary, her directions are in the plainest terms imperative and mandatory. The donees are "directed" to invest the money and to apply the interest exclusively for the benefit of others, and in the event that they be "prevented by any legal action and determination from carrying out the provisions and injunctions of this 'second' section, then" she directs them to turn the money over to certain persons whom she names as her legatees. A power in the nature of a trust is thus conferred upon them, and nothing more. It is difficult to find room to doubt the intention of the testatrix not to give anything to Wright and McCorkle for their own benefit, and there is no room to doubt the plain legal meaning of her language.

For the distinction between precatory and mandatory expressions, "the one inclining, the other compelling" the donee "to execute the purpose," we need only refer to the language of Lord Eldon, as cited in Ford v. Porter, supra, and Ford v. Dangerfield, 8 Rich. Eq. 102, and to the authorities collected together upon the whole subject under the case of Harding v. Glyn, 2 Lead. Cas. in Eq., Part II., 1833, (4th ed.) *946, 957. In this case the words are imperative, the subject matter of the wish or direction is certain, the object or persons intended to have the benefit of the directions or wishes expressed are certain, and finally the taker has no discretionary power to withdraw the subject from the object to which it is directed by the testatrix. Those are the usual tests, and when they all exist, as in this case, the intention to create a trust cannot be questioned. Such trust is inhibited by the act of 1841, the cestuis que trust being slaves. The case of Fable v. Brown, 2 Hill Eq. 389, was decided in 1835. It held that a bequest to a slave was not void, and that a trust in his favor might be executed. The fourth section of the act of 1841 reverses such propositions directly, and that case is no longer authority upon the point.

The next ground is, that even if the section of the will under consideration be contrary to the act of 1841, still it is not void but voidable, and that being merely voidable the parties in interest may be estopped by actual acquiescence, or by what must be legally construed to be acquiescence. The case of Ford

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v. Porter, *supra, is cited to show that such gift in trust for the benefit of slaves, is only voidable and not void until so adjudicated. There is no such point in that case. It is, however, held in Vose v. Hannahan, 10 Rich. 465, that a gift of slaves declared by Section 3 of the act of 1841 to be void, is void only for the benefit of the distributees or next of kin of the donor, "but is good as against the donor or administrator." By reference to the case and to the act, it will be seen that the cause which led to such conclusion under Section 3 of the act does not exist with regard to Section 4, and that as to the latter, no such conclusion has ever been reached. Even if such could be the decision here, it would be of no force for the purpose to which the appellants endeavor to apply it. For it cannot be denied that the proper parties to test the voidability of the bequest are before the court. It seems to be admitted. And the appellants rely solely upon the ground that these parties are estopped by acquiescence. The Circuit judge decides that there was no actual acquiescence, and we see no evidence to disturb such finding.

It is contended, however, in behalf of the appellants, that there has been acquiescence by operation of law. That more than four years having elapsed since the probate of the will, and since the parties have all been of age, that they are barred, and they rest upon the case of Kinard v. Riddlehoover, 3 Rich. 258, and the act of 1839. That case and the act mean nothing more than that parties are barred from requiring proof in solemn form after four years' acquiescence in the probate in common form; time running against those who were infants at the time of probate after they come of age. Parties

are only precluded from disputing the testamentary character of the instrument, the execution of the will; but the court before which the will is brought for construction is not precluded, nor are the parties in interest. The testamentary character of the instrument is not in question at all. The parties claim under it. The executors ask instructions as to its legal meaning. Acquiescence in the probate is not acquiescence in all or any of the provisions of the instrument. It may be a will and yet all its provisions may be void. Examination of Kinard v. Riddlehoover, supra, and the subsequent proceedings between the parties, in 1 Hill Eq.

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376, will show clearly *that the principles therein enumerated are not at all applicable to the point named in the present case. We must decide, therefore, that there has been no acquiescence, and the bequest, even if not ab initio void, but only voidable, cannot be sustained in behalf of the appellants. It was, perhaps, unnecessary, to consider the question, but it was urged, and it has received the fullest consideration.

The last ground is, that whatever may have been the law when the will went into effect, it does not now prohibit a bequest to these persons who have been emancipated and are able to take and to hold property. That question has been conclusively determined in Blakely v. Tisdale, 14 Rich. Eq. 95. Nothing is more familiar than that "if the testator meant to create a trust and not to make an absolute gift, but the trust is ineffectually created or is not expressed at all, or fails, the next of kin take." The testatrix in this case evidently was in doubt as to this bequest, and has selected the legatees to whom the money should go in the event that her bequest for the benefit of the slaves should not be sustained. The will was probably drawn before the case of Ford v. Porter was decided, and the testatrix died before the case was reported. The provision she attempted to make was, however, so dubious in its validity that she went on, and in that event disposed of the property. But the bequest was unquestionably void under the act, and that view is fully sustained by the reasoning throughout in Ford v. Porter. The money, therefore, or the right to the money, went at once to the parties entitled under the statute of distributions or the provisions of the will, as the case might be. The constitutionality of the act of 1841 is made a question, but no reason being advanced to support it, and the court perceiving none to sustain such a view, it is deemed unnecessary to further discuss it. The judgment, so far as the appellants are concerned, is affirmed. Motion refused.

Appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

11 S. C. *381

*(Case No. 702.)

MARY E. WHITMIRE, as Administratrix de Bonis Non of William Wesson, Deceased, v. W. H. LANGSTON, as Judge of Probate for Laurens County, et al.

(November Term, 1878.)

[1. *Judges* ⟸7.]

A judge of probate elected by the qualified electors of his county, holds his office for two years only. Const., Art. IV., § 20.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 24–28; Dec. Dig. ⟸7.]

[2. *Judges* ⟸8.]

The governor cannot fill a vacancy in the office of judge of probate where the unexpired term exceeds one year. Const., Art. IV., § 11.

[Ed. Note.—Cited in Smith v. McConnell, 44 S. C. 497, 499, 22 S. E. 721.

For other cases, see Judges, Cent. Dig. §§ 30–39; Dec. Dig. ⟸8.]

[3. *Judges* ⟸37.]

When a judge of probate rightfully receives a bond belonging to his office, which he collects after his term has expired, but while still assuming, during a vacancy, to discharge the duties of the office, and fails to turn over either bond or money to his successor, when elected, such failure to turn over is a devastavit for which his sureties are liable.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 174; Dec. Dig. ⟸37.]

[4. *Judges* ⟸8.]

If Section 2 of act of February 14th, 1870, (14 Stat. 338,) was intended to apply to the office of judge of probate, it is to that extent unconstitutional and void.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 30–39; Dec. Dig. ⟸8.]

[5. *Officers* ⟸130.]

[Cited in State ex rel. Causey v. Causey, 93 S. C. 304, 76 S. E. 707, to the point where there is evidence that at the end of his first term funds are turned over by an officer to his successor, although the person is the same, the sureties on his bond for the first term are thereby released.]

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 230, 235; Dec. Dig. ⟸130.]

Before Kershaw, J., at Laurens, February Term, 1878.

This was an action brought by the plaintiff in the Court of Common Pleas for Laurens county against W. H. Langston and the other defendants, his sureties on his official bond as judge of probate for said county, for certain moneys which said Langston, as judge of probate, collected for said plaintiff and never paid over to said plaintiff or to his successor in office.

Langston was elected judge of probate for said county in June, 1868, and executed a bond, dated July 21st, 1868, of which the condition is as follows:

Whereas, the above-bound W. H. Langston hath been elected to the office of judge of probate for Laurens county—

Now the condition of the above obligation is such that if the above-bound W. H. Langston shall well and truly perform the duties

of the said office, as now or hereafter required by law, during the whole period he may continue in said office, then the above obligation to be void and of no effect, or else to remain in full force and virtue.

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*At the general election in 1870, one Powell was elected judge of probate for said county, but he never qualified or entered upon the duties of the said office, having been killed the day after said election. Langston, without executing a new bond, continued to discharge the duties of said office as judge of probate until the general elections in 1872.

The money sued for in this case was collected by Langston, as judge of probate, in May, 1872, on a bond given to same Langston, as Ordinary for Laurens district, on January 2d, 1860, and made payable to him as Ordinary and his successors in office.

The defence set up was that the judge of probate is elected for the term of two years only, and that the liability of his bondsmen is limited to that time; and the amount in question having been received by Langston after the two years for which he had been elected in 1868, and after the general elections in 1870, that his bond sureties were not liable.

The Circuit judge charged the jury as follows:

The bond is conditioned that the official shall well and truly perform the duties of said office, as now or hereafter required by law, during the whole period he may continue in said office. The constitution declares that the judge of probate shall be elected by the qualified electors of the respective counties for the term of two years.

The act approved February 14th, 1870, passed during the term of office of this officer, Mr. Langston, declares that the then "present county officers shall continue to perform the duties of their respective offices until their successors shall be elected and duly qualified."

The duty of continuing to perform the duties of their respective offices was covered by the condition of the bond. It was a duty imposed after the making of the bond, but the sureties expressly contracted to guarantee the performance of any duties that might thereafter be required by law.

This judge of probate did under the act continue to perform the duties of his office, in the default of a successor, and while so continuing he rightfully received the money claimed in this action and failed to pay it over. There is no controversy as to the facts, and therefore it is my duty to instruct you

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that the *plaintiff is entitled to recover the amount claimed, with interest from the day he is admitted to have received it, less his commissions on the same—two and one-half per cent. for receiving, and two and one-half per cent. for paying out the same.

All the defendants excepted to this charge.

The jury rendered a verdict for the plaintiff, upon which judgment was rendered.

The defendants appealed to the Supreme Court from the decision rendered in this case upon the following grounds:

1. The defendant, Langston, as probate judge for said county, having received the money received from this case in 1872, some eighteen months after the term of office of the said Langston for which the other defendants had signed his official bond as sureties had expired, it is respectfully submitted that his Honor erred in charging the jury that said sureties were liable for said amount under said bond.

2. The defendant sureties being bound by the bond for the acts of the said Langston only for the term of office for which he had been elected, and the said term having expired in November, 1870, and the money in this case having been received by the said Langston in 1872, while he was holding over, it is respectfully submitted that his Honor erred in holding as matter of law that said sureties were responsible for the amount, and so charge the jury.

Messrs. Simpson & Holmes, for appellants.

1. The sureties of Langston cannot be held liable for any defalcation of their principal after the expiration of the term for which he was elected, because their contract was for that period and no longer. They had, and could have had, no conception, at the time they executed the bond, that he would or could hold for a longer time than that for which he was elected. Chitty on Con. 454; 2 Hill 591; 1 McC. 41; Const., Art. IV., § 20; 5 Rich. Eq. 227.

2. Langston had no common law right to hold over after his term of office had expired. 30 Barb. 193; S. C., 8 Abb. 359.

3. The legislature had no power, after his

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election and during *his term of office, to extend it beyond the two years for which he was elected, and thereby extend the liabilities of the sureties to his bond. The act was unconstitutional and void. 1 McC. 250; 46 N. Y. (1 Sick.) 57; 52 N. Y. (7 Sick.) 374; 53 N. Y. (8 Sick.) 648.

4. While the legislature had no power to continue his term beyond the two years, so as to extend the liabilities of the said sureties, yet the said Langston, holding under the said act, and thereby under color of title, could legally turn over the papers of his office to himself, as his own successor de facto. And having thus turned the bond in question over to himself, (though without giving a new bond,) the sureties to his bond under his former term are not liable for any misappropriation of the funds thereafter collected on the bond for the respondent's intestate. 7 S. C. 21; 3 Keyes 447; 19 How. 323; 14 How. 315; 24 Barb. 587; 1 Desaus. 452.

5. The language in the condition of the said bond is, in itself, indefinite, and must

be restrained and limited by the period for which the law authorized his election, i. e., two years. And the legal intent and meaning of it is, that he would faithfully discharge such duties as the law then required, or should at any time during the two years require to be performed within the said two years, or so much of that time as he should continue in said office. 6 East 511; 2 Saund. 412; 1 T. R. 295; 5 B. & P. 175.

6. "Holding over" was not a duty imposed by the condition of the bond. 1st. Because it could not be required to be performed within the two years. 2d. It was not a duty within the scope of the office at all, but a continuation of all the duties of the office beyond the official term. New duties imposed by law during the term, to bind the sureties must be of a "similar nature and character to those already devolving on the incumbent." 36 N. Y. (9 Tiff.) 459; 3 Abb. N. C. 252; 1 Tr. App. 209.

Messrs. Todd & Ferguson, for respondents.

1. The defendant, Langston, is indisputably liable for the moneys mentioned in the brief,

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whether he was probate judge *according to law or not; and, therefore, the appeal must be dismissed as to him.

2. The sureties on Langston's bond are liable for these moneys, received in May, 1872, because he continued to be probate judge down to and after that date, under the provisions of the act of February, 1870, (14 Stat. 338); and because according to their bond, they bound themselves that he should "well and truly perform the duties of said office, as now or hereafter required by law, during the whole period he may continue in said office."

The act of 1870 continued him in office till the election and qualifying of a successor, in 1872. No good objection can be made to that act, because: 1st. It was not in conflict with the constitution of the state, for the constitution does not provide either that a probate judge's exercise of his office shall terminate in two years after his election, or that the holding of an election for a successor shall create a vacancy when the election cannot be made of effect. 2d. Nor is the act in the nature of an ex post facto law, for that description applies only to criminal laws. 8 Peters 110. 3d. Nor is the act objectionable as impairing the obligation of a contract, for these terms are applicable only to laws which attempt to diminish or discharge obligations. If liable to any objection, that law is to be objected to as retrospective in its action, inasmuch as it may be said that it continues the liabilities of sureties beyond the period contemplated at the execution of the bond. But the sureties took the chances of the probate judge continuing in office longer than two years, as the language of the condition states. Besides, retrospective statutes, to be objectionable, are those only which discharge or impair existing obligations, or deny rights of action previously existing, or divest vested rights. Potter's Dwarris on Stat. 162, and note; 1 Kent Com. 455; 2 Peters 380.

3. But conceding that Langston was not de jure probate judge in May, 1872, he certainly was de facto. Being such, and such under color of law, (act of February, 1870,) a stranger was authorized to pay him money due that officer. 1 Rich. Eq. 177.

4. But admitting that Langston's term of office expired in October, 1870, and that he was not thereafter judge of probate, his duty was to turn over the bonds in his office to

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the clerk of *the Court of Common Pleas (there being, as is said, a vacancy in judge of probate's office.) When he failed so to do, there was a breach of his bond, for which his sureties were clearly liable. The case of Black v. Ramey, 4 Strob. L. 79, is full upon this point. And the doctrines enunciated in 1 Rich. Eq. 177, and 5 Rich. Eq. 491, are to the same effect. It is therefore immaterial which horn of the dilemma the appellants take—either that Langston was or was not probate judge in May, 1872.

5. The constitution of the state provides that the probate judge shall hold his office "for the term of two years." The sureties of Langston as judge of probate contracted for his faithful performance of all duties appertaining to his office so long as he (Langston) should continue in office. That he continued to discharge the duties of his office until after May, 1872, is not denied. It may be claimed, however, that after the expiration of two years the bond was voluntary, and therefore not binding on the sureties. A bond is not void merely because it is voluntary; nor is a voluntary bond void because the condition is for the faithful performance of the obligator's duty to the public. 1 Bail. L. 211; 5 Peters 128.

April 2d, 1879. The opinion of the court was delivered by

HASKELL, A. J. The statement is, that this was an action brought by the plaintiff against Langston and the other defendants, his sureties on his official bond as judge of probate, for certain moneys collected by the said Langston, judge of probate, for said plaintiff, but not paid over either to the said plaintiff or to his (Langston's) successor in office. Langston was elected judge of probate in June, 1868, and gave his bond, which is conditioned that he "shall well and truly perform the duties of the said office as now or hereafter required by law, during the whole period he may continue in office." The money was collected on a bond which was in the Court of Probate when Langston took possession as judge of probate in 1868. It was collected in May, 1872, nearly two years after the time when, according to law, the term for which Langston had been elected in

1868 had expired. The defense set up by the sureties was, that the judge of probate is elected for two years only, and that the lia-

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bility of the *bondsmen is limited to that time; and the amount in question having been received by Langston after the two years for which he had been elected in 1868, and after the general elections in 1870, that his bond sureties were not liable. The Circuit judge charged in substance that the condition of the bond obligated Langston and his sureties to the performance of the duties of the office by Langston "as now (then) or hereafter (thereafter) required by law during the whole period he may continue in said office," applied not only to any change in the nature of those duties, but also to an alteration in the duration of the office. And that an alteration in the duration of the office having been effected by the act of February 14th, 1870, by which the judge of probate was continued in office after the expiration of his term and until his successor had been elected and had qualified, and a default having been committed by him while performing the duties of the office during the time intervening between the expiration of his term and the election and qualification of his successor, that his sureties were liable. The appeal is from the judge's charge.

The first question is, whether the judge of probate was continued in office by the act of February 14th, 1870, entitled "An act to provide for a general election of county officers," and of which Section 2 says: "That the present county officers shall continue to perform the duties of their respective offices until their successors shall be elected and duly qualified." If this act was intended to apply to the judges of probate, Section 2 is, to that extent, unconstitutional and void. The constitution, Article IV., Section 20, provides that "a Court of Probate shall be established in each county. * * * The judge of said court shall be elected by the qualified electors of the respective counties for the term of two years." How said office shall be filled when a vacancy occurs is provided for by Section 11 of the same article: "All vacancies in the Supreme Court or other inferior tribunal shall be filled by election as herein prescribed; provided, that if the unexpired term do not exceed one year, such vacancy may be filled by executive appointment." In no event other than that of an unexpired term not exceeding one year, can the office be filled except by an election "by the qualified

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*electors of the respective counties, for the term of two years." For that is the manner "prescribed" in the constitution, Article IV., Sections 11 and 20. It has been said at length, in so many cases, that it is unnecessary here to repeat further than by saying that when the constitution expressly ordains, the subject is to that extent taken away from the legislative body of the government, and can neither be altered nor repealed. Section 20 is imperative: "Shall be elected * * * for the term of two years." Section 11 is equally so: "All vacancies * * * shall be filled by election as herein [Section 20] prescribed." In this case, there was no portion of an unexpired term, and the executive could not have exercised his power of appointment. The vacancy was occasioned by the legal expiration of the term to which the officer had been elected. To fill the office otherwise than by regular election, as prescribed in the constitution, is a palpable attempt to violate the constitution, and cannot be allowed to stand. The Circuit judge instructed the jury thus: "The judge of probate did, under the act, (act of February 14th, 1870,) continue to perform the duties of his office in the default of a successor, and while so continuing he rightfully received the money claimed in this action and failed to pay it over," and that therefore the sureties were liable. We are unable to concur in the view that Langston "rightfully received the money," although if he had rightfully kept it and paid it over to the proper parties when demanded, that question would be of no moment. But, as things are, it is of importance. Langston could not hold his office beyond the period of two years fixed by law, and, whatever the wording of the official bond, his sureties are only liable for default committed by him during the time that he was in office. We think, too, that the words in the condition of the bond refer to the nature of the duties and not to alteration in the duration of the office. But if the latter was the meaning, it has no legal effect, for the duration of office could not be changed except by amendment to the constitution. Langston could not "rightfully receive" the money on the bond unless he received it as judge of probate, for the bond was payable to the Ordinary and his successors in office, and had been turned over to the Court of Probate and become, under the law, payable

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to the judge of probate. *But Langston was not judge of probate at the time he collected the money—May, 1872—his term having expired nearly two years before, and therefore he could not "rightfully receive." If he had been entitled to collect the money in May, 1872, his sureties on the official bond given for the term running from 1868 to 1870, could not be held liable, for he could not lawfully collect the money unless he lawfully held the bond, with a power to collect, which could not be unless he was judge of probate at the time. If he had been judge of probate in May, 1872, the fact that he collected the money on the bond would be conclusive evidence of the fact that the bond had been properly turned over, by the judge of probate holding from 1868 to 1870, to his successor holding from June, 1870, to June, 1872. The

fact that both are the same person makes no difference in this respect, for the terms of the offices are distinct and separate, and if there is evidence that at the expiration of the first term, the funds were properly turned over to the successor, although the person be the same, the sureties on the official bond for the first term are thereby discharged. Vaughan v. Evans, 1 Hill Eq. 414; Field v. Pelot, McM. Eq. 370; Enicks v. Powell, 2 Strob. Eq. 196.

The case of Vaughan v. Evans is questioned by Harper, Ch., (who delivered the opinion in it,) in the subsequent case of Field v. Pelot, but the explanation of Vaughan v. Evans, by Johnson, Ch., in his separate opinion in Field v. Pelot, is very satisfactory, and is clear on this point, that in Vaughan v. Evans it was held "that a surety is discharged if no act of mal-administration was committed during his time; provided he can show that at the expiration of that time the trust fund passed into hands lawfully entitled to the possession of it." Page 400.

The case has always been recognized as authority, and the same doctrine is upheld in Street v. Laurens, 5 Rich. Eq. 227. But the facts, as admitted, show that Langston went out of office in June or July, 1870, and that up to May, 1872, when this money was collected by him, there had been no qualified successor, and that he, Langston, had remained in possession of the bond. It is further admitted that there has, since May, 1872, been a judge of probate in that county, and that Langston has failed to turn over to him ei-

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ther the bond or the money in ques*tion. It is manifest that he could not turn over the bond, for the money had been collected and the bond given up before his successor had been elected. One of the duties of the office for which the sureties are liable is to turn over the property and funds in the office to the successor. Anything not then properly accounted for is a devastavit, and, by legal presumption, it was committed during the term. The view on this point is thus expressed by Harper, Ch., in Field v. Pelot, p. 384: "If a guardianship should be revoked, and so continue, the surety would be liable for everything which the guardian had received up to that time and should afterwards fail to pay over. Nor would it be necessary to show that the guardian had actually wasted the funds, or committed any act of mal-administration before the revocation. But if, after the revocation, the guardian, as an individual, should obtain the unauthorized possession of a part of the infant's estate, the surety would not be held liable for that."

The defence contained in the last sentence cannot be set up in this case, for Langston had received the bond in his official character. These sureties would have had a good defence if Langston had been his own legal successor. That defence, however, is prevented by the facts as admitted, and they, the sureties, are obliged to rest solely upon the ground that the wrong was committed after he, Langston, went out of office. By the law as above expressed, that defence cannot avail, nor should it; for the sureties are bound for whatever comes into the hands of the office while he holds his trust, if it is received by him under the trust. They pledge themselves to a given amount that their principal will not commit a breach, or that if he does they will be responsible, and upon such security the interests of many depend, and demand protection. But the point is decided in Lowndes v. Pinckney, 1 Rich. Eq. 155. In that case the commissioner in equity had not turned over to his successor a bond given to him as commissioner in equity, but had retained it and collected the money on it. The court says: "It [the bond] was not delivered over to his [the commissioner's] successor within the period prescribed by law, nor for six years afterwards. * * * In the judgment of the court, the sureties of Mr.

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*Elliott [the commissioner] are responsible for the sums thus received by him in consequence of this neglect or violation of duty. * * * It may be that Mr. Elliott supposed himself entitled to retain the bond and receive the money, either as receiver or as private agent of the parties, and that he was not bound to deliver it over to his successor under the provisions of the act of 1821. But this error of judgment does not alter the consequences of the act."

That case made a stronger showing for the sureties than this, and there was a difference of opinion among the members of the court; but we follow its decision upon the point in question, and especially are we relieved from any doubt in so doing, for the reason that the principal grounds for the dissenting opinions do not exist at all in this case. Besides, the sureties rest here upon technical defence. It is plain that it was thought that Langston was continued in office by the act of February, 1870, and that the old bond remained as security. For if that had not been thought, a new bond would have been required. If the sureties had any doubt upon that subject, they had their remedies, and could have prevented any waste by Langston. They are held by this decision simply to their original liability, for the safe keeping and proper accounting concerning all that went into Langston's hands as judge of probate during the two years, 1868–1870, and no more. While the Circuit judge may not have expressed the law as it is viewed by this court, his conclusion of law was correct, and we see no reason why a new trial should be granted. As the facts admitted stand, the sureties are legally liable, and if the charge of the judge had been in accordance with these views, the conclusion would have been the same, and could not have changed the result. The at-

tempt on the part of Langston to appeal is without any foundation; the facts show his liability, whatever had been the decision with regard to his sureties.

The judgment is affirmed. Motion refused. Appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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*(Case No. 704.)

THE STATE, ex rel. THOMAS L. COLEMAN, Administrator of J. D. Cresswell, v. HENRY S. CASON et al.

(November Term, 1878.)

[1. *Sheriffs and Constables* ⇐162.]

A suit may be maintained upon a sheriff's official bond, without a previous order of court.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 390; Dec. Dig. ⇐162.]

[2. *Sheriffs and Constables* ⇐162.]

That plaintiff cannot bring an action without the authority of a previous order of court, is an objection that can be taken only before answer.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 388–390; Dec. Dig. ⇐162.]

[3. *Judgment* ⇐614.]

A judgment recovered against a sheriff, after the expiration of his term for moneys received while in office, is no bar to a subsequent action against the sheriff and the sureties on his official bond, jointly executed, alleging breaches generally and setting forth the recovery of this judgment against him, and his failure to pay the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1128; Dec. Dig. ⇐614.]

[4. *Sheriffs and Constables* ⇐158½.]

The allegation of an unsatisfied judgment, which was recovered against a sheriff alone for moneys received by him in his official capacity, and converted, states a cause of action as against him and the sureties on his official bond, and is prima facie evidence against the sureties of a breach of the condition of such bond. Cases cited, and this case distinguished from Smith v. Moore, 7 S. C. 209 [24 Am. Rep. 479].

[Ed. Note.—Cited in State ex rel. Slay v. Williams, 19 S. C. 65.

For other cases, see Sheriffs and Constables, Cent. Dig. § 351; Dec. Dig. ⇐158½.]

[5. *Pleading* ⇐187.]

Objections to the form of a complaint can be taken only by demurrer or answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 400; Dec. Dig. ⇐187.]

[6. *Appeal and Error* ⇐501.]

Objections raised on appeal, but not resting upon exceptions duly taken in the court below, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2300; Dec. Dig. ⇐501.]

[This case is also cited in State ex rel. Slay v. Williams, 19 S. C. 62, and distinguished therefrom.]

Before Northrop, J., at Abbeville, September Term, 1877.

H. S. Cason gave his bond as sheriff of Abbeville county in August, 1868, with Charles W. Cowan and others, his sureties. His term of office expired in November, 1872. In January, 1869, Cason sold a lot of land under execution, and received the payment therefor. J. D. Cresswell, the plaintiff in this execution, moved for a rule against the sheriff requiring him to show cause why he had failed to pay over this money; and the rule was issued and served in June, 1873. In answer the sheriff alleged facts and asked a trial by jury, which was granted by the court. J. D. Cresswell having died, the proceeding was prosecuted by Thomas L. Coleman, his administrator.

The case came to trial April Term, 1875, and a verdict was found for the plaintiff.

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Thomas L. Coleman, as administrator of *J. D. Cresswell, for the sum claimed, with interest from January 12th, 1869, to time of the verdict, and upon this verdict judgment was entered and costs amounting to $117 included. Nothing upon this judgment was realized from the defendant, Cason, and the return of nulla bona was entered upon the execution. This suit was brought October 29th, 1875, on the official bond containing the usual condition, against H. S. Cason and his sureties. At the trial, the court admitted the record of the judgment against Cason alone, as well as parol testimony against the other defendants.

The defendants asked that the following instructions be given to the jury:

1. That no suit can be maintained upon the sheriff's bond, without a previous order of court.

2. That suit cannot be maintained against Henry S. Cason jointly with other defendants; judgment having already been recovered on the same cause of action against H. S. Cason by J. D. Cresswell in his lifetime.

3. That plaintiff cannot recover upon an allegation of judgment recovered against Henry S. Cason alone; that the act of Henry S. Cason should be charged which renders his sureties liable.

4. That the complaint should be dismissed as stating no cause of action against the defendants.

5. That the demand for judgment for the penalty of the bond is irregular, and should have been only for the sum which it is alleged was received by H. S. Cason as sheriff.

6. That a single breach of the bond should have been assigned.

These instructions were refused and defendants excepted. The jury found a verdict for plaintiff for $1144.27, which included the principal, interest and costs in the case against Cason alone.

The defendants appealed from the judgment upon the grounds taken in their request to charge—and in appellant's argument the further position was taken, "that the liability

of the sureties of the sheriff according to the bond is for the performance of his duty. The obligation does not include costs in cases against him alone, nor accumulation of interest by compounding in judgments."

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*Mr. , for appellant.

Mr. J. S. Cothran, for respondents.

April 14th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The action is against the sheriff and his sureties on his official bond, for failure to pay money received on executions. On the trial, which resulted in a verdict for plaintiff, the court refused certain requests to charge, and this refusal is the only ground of exception to the verdict. The first request involved the proposition that no suit can be maintained upon the sheriff's official bond without a previous order of the court. This objection is not well taken. The statute (Gen. Stat. 215, § 11,) provides that "the bond of any public officer in this state may, at all times, be sued on by the public, any corporation or private person aggrieved by any misconduct of any such public officer." The sheriff, in the execution of ordinary process, acts as a public officer, and is thus within the provisions of the statute. The principle that the courts will not permit one acting under their immediate orders and supervision to be sued for such action, independently of a due control over such proceedings, is inapplicable to such a case. If the objection had been valid it could not have been taken by way of charge. The time to raise the question would have been before the defendant had answered, as it involved the question of his obligation to answer. If, however, he submits to answer, the court would presume an order when necessary and not permit that fact to be put in issue in the cause.

It is objected that a recovery having been had against the sheriff for the misconduct alleged, he cannot be joined in the action on the official bond. Even if pleaded properly, which it was not, this is not a defence. The bond is a different cause of action from that on which the judgment was recovered. The bond is alleged as a joint bond, and the sheriff, as one of the joint obligors, was a proper party.

The next proposition is, that the plaintiff cannot recover upon an allegation of judgment recovered against Henry S. Cason alone, and that the act of Henry S. Cason should be charged, which rendered his sureties liable.

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The last part of this propo*sition is contradictory to the complaint, which does allege the fraudulent withholding of money collected under execution. The first part of the proposition was equally objectionable. It appears from the brief that the record of the recovery against Cason, the sheriff, was only admitted on the trial as against him, and that parol testimony was submitted as against the sureties. The record of the recovery against the sheriff was clearly admissible against his sureties without previous proof of notice of the pendency of the suit against the sheriff and an opportunity to defend the same, and was prima facie evidence of a breach of the condition of the bond. Treasurers v. Temples, 2 Speers 48; Treasurers v. Burch, 2 Hill 519; Norton v. Wallace, 1 Rich. 507; S. C., 2 Rich. 460. Cases arising on official bonds stand on a different principle from those that were discussed by this court in Smith v. Moore, 7 S. C. 209 [24 Am. Rep. 479]. In the class of cases there considered, the surety or administrator was to be considered as in some sense interested, directly or indirectly, in the subject matter of the action against the principal or party indemnified, and, as such, should not be bound by such judgment unless an opportunity had been afforded him to protect such interest. Hence the necessity for notice and an opportunity to defend. The contract of the surety on an official bond has reference to the general conduct of the officer within the sphere of his office, and not to his particular conduct in cases and transactions that should arise in the discharge of his official duties, and therefore they have no concern or interest to protect in an action brought against such public officer by one aggrieved by his misconduct. The law presumes that a judgment recovered against the principal rests on sufficient grounds of proof, but allows that presumption to be rebutted by proper evidence. It does not appear that any evidence rebutting such presumption was submitted to the jury in the present case, and therefore it was competent to rest the verdict on such judgment as proof of official misconduct. The objection that the complaint does not state a cause of action, has no foundation.

The fifth and sixth requests to charge relate to matter waived by failure to demur or answer.

An objection was discussed in the argu-

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ment on the ground *that the verdict should not have included costs recovered against the sheriff, but no such exception appears on the record, showing a defect in the charge in that respect, and it cannot be considered.

The appeal must be dismissed.

Appeal dismissed.

McIVER and HASKELL, A. J.'s, concurred.

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(Case No. 705.)

IDA WEBB, BURWELL McBRIDE, SARAH McBRIDE and WILLIAM McBRIDE v. THE GRANITEVILLE MANUFACTURING COMPANY and CHARLES L. PAUL.

(November Term, 1878.)

[*Corporations* ⊂⊃134.]

Certain stock stood upon the books of a corporation in the name of two persons "executors of M." It was then transferred to "P., guardian," and a certificate issued in the same name. P. was in fact guardian of minor children of M. P. endorsed the certificate and put it in hands of D., an attorney-at-law, for safe keeping. Under a petition in P.'s name, setting forth that this stock was the property of P.'s wards under the will of M., D. procured an order from the Circuit judge permitting a sale and re-investment. D. then assigned the certificate to a bank as collateral security for the repayment of money borrowed for his own purposes. Failing to repay, stock was sold, and purchased by the bank by whom it was afterwards transferred to H., president of the bank, who was also president of the corporation, and to G.; transfers being made on the corporation books from "P., guardian," to the bank, and from the bank to H. and G. *Held*, that P. held as trustee, and that the books of the corporation, the certificate of stock and the order of the judge (which alone could give authority to the guardian to sell, and a knowledge of which, therefore, must have been had by the purchaser,) were sufficient to put H. upon inquiry, and so charge him with a knowledge of the trust and conversion; and that his knowledge in this matter was the knowledge of the corporation of which he was the president.

[Ed. Note.—Cited in Salinas v. Pearsall, 24 S. C. 184; Knobelock v. Germania Savings Bank, 50 S. C. 287, 27 S. E. 962.

For other cases, see Corporations, Cent. Dig. 523; Dec. Dig. ⊂⊃134.]

Before Reed, J., at Beaufort, November Term, 1877.

The facts are fully stated in the opinion of the court. The order for the sale of the stock, referred to in the opinion, together with the petition therefor, is as follows:

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*State of South Carolina, Beaufort county. In the Circuit Court.

To the Honorable Judges of the said Court:

The humble petition of Charles L. Paul showeth, that under the appointment of the Court of Probate, he is the guardian of the persons and estates of four infants, children of William McBride, deceased: that under the last will and testament of Burwell McBride, the grandfather of the said infants, (and of your petitioner,) he has in trust for the said infants, besides other property,——— shares of the capital stock of the Graniteville Manufacturing Company; that he is fully persuaded a change of the investment will materially promote the interests of his wards; that in due course of proceeding, he filed approved bonds with the judge of probate for the said county. Wherefore your petitioner, with full appreciation of his responsibility in the premises, prays your Honors' assent that he may, at his own discretion, so re-invest the said stock for the benefit of his said wards. And your petitioner, as in duty bound, will ever pray, etc.

Davant, Solicitors pro pet.

Order.

On hearing the petition of Charles L. Paul, guardian, and on motion of Messrs. Davant—

It is ordered that the said guardian have leave to sell, transfer and re-invest the said stock in his said petition mentioned, whenever and in such manner as, in the exercise of sound judgment and discretion, it shall appear to him advisable for the best interests of his said wards; provided, his guardianship bonds continue to be satisfactory to the judge of probate for the said county, and he, the said guardian, make regular and proper accounting, as by law is required.

December 9th, 1870.

At Chambers. (Signed) Z. Platt, Circuit Judge.

The Circuit degree is as follows:

The material facts in this case, as gathered from the pleadings and evidence, appears to

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be as follows: That the defendant, *Charles L. Paul, was appointed guardian of the plaintiffs by the Probate Court of Beaufort county, on or about the 9th day of June, 1870; that at that time there was standing on the books of the defendant corporation, the Graniteville Manufacturing Company, certain stock in the names of F. W. Fickling and John M. Hill, executors, without naming the person of whom they were executors. But it was proven by the defendant, Paul, that the testator was one Burwell McBride, who was the grandfather of plaintiffs, and who had been long deceased, and that plaintiffs, through another, had an interest in the said stock; that on the 19th day of July, 1870, forty-nine shares of the stock of the defendant company were transferred by F. W. Fickling and John M. Hill, executors, to Charles L. Paul, guardian, to whom the usual certificate was issued, and the number of shares therein named afterwards stood in the stock-ledger of the said company in the name of Charles L. Paul, guardian, as he was described in the certificate.

The names of his wards were not disclosed in the transaction, nor does it appear that plaintiffs are the persons, and that the forty-nine shares of stock were of their estate, otherwise than by the testimony of Paul himself. The fact, however, has not been questioned that on or about the 12th day of December, 1870, the said Charles L. Paul, guardian, transferred and delivered the said certificate of stock to J. C. Davant, by his endorsement on the back of the same, in the presence of two witnesses, and on the 26th day of December, of the same year, the said

John C. Davant, claiming to be the absolute owner thereof, transferred the said certificate of stock, in due form, to the "Savings Bank of Augusta, Georgia." That afterwards, upon the surrender of the said certificate to the defendant company, thus endorsed and assigned, a new one for forty-nine shares of its capital stock was issued to the said "Savings Bank of Augusta, Georgia," and subsequently thereto the bank sold and transferred the said stock, for its full value, to H. H. Hickman and Samuel Giles, to whom, upon the surrender of the scrip held by the bank, a new certificate for forty-nine shares of their capital stock was issued, and they are now, so far as appears, the holders and owners of the same. It is claimed that

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the defendant company were trustees *of plaintiffs, who were the legal owners of the forty-nine shares of stock in question, and sought to make them liable for a breach of trust in permitting the transfer from Paul, guardian, to his assignee, without their knowledge or consent. As a basis to rest this claim upon, it charged that the defendant company had notice that the forty-nine shares of stock standing in the name of Charles L. Paul, guardian, was in fact their estate. The testimony in the case, which was all derived from plaintiffs' witnesses, fails to sustain the charge, and is direct to the point that the defendant company had no knowledge whatever as to the ownership of the stock, other than that it stood on their books in the name of Charles L. Paul, guardian. It appears, from certain informal papers exhibited with the complaint, that a proceeding was instituted in the Common Pleas for Beaufort county, in December, 1870, by John C. Davant, claiming to be attorney for Paul, guardian, to obtain authority for the sale of the forty-nine shares of stock standing in his name. That proceeding even did not disclose the names of his cestui que trust, but an order was nevertheless obtained from a judge, at chambers, authorizing a sale and re-investment. The order was assumed by plaintiffs' counsel as having been made without warrant of law, and as void on several accounts, but was not alluded to in the argument for the defendant company. I do not perceive what value could be attached to it in the cause, unless, through it, notice could have been brought home to the defendant company. That was not done, and, according to the view I take of the case, it is not necessary to pass upon the question raised by that proceeding. The defendant, Charles L. Paul, answering the complaint through plaintiffs' counsel, admits his liability to account, and the single question remaining in the case, therefore, as I understand it, is, did the "Graniteville Manufacturing Company," by permitting the transfer of the forty-nine shares of stock, standing on its books in the name of Charles L. Paul, guardian, to his assignee, make themselves liable under the circumstances as for a breach of trust, for which they should be held to account to plaintiffs?

The case of Bayard v. Farmers' and Mechanics' Bank, of Philadelphia, 52 Penna. St.

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232, and of Magwood v. Rail*road Bank, 5 S. C. 379, was chiefly relied upon to fix their liability, whilst the same cases were quoted as authority for the defendant's company. In the first of these cases, the plaintiff held certain certificates of stock, issued to him in the name of Thomas F. Bayard, trustee of Mary Gilpin, and the stock so stood on the books of the banks. By power of attorney duly executed, he authorized his vendee of one of the certificates to transfer the shares named to himself. This the bank refused to permit until it had been referred to their solicitor to ascertain and report the nature of the trust. Whereupon, a friendly action upon a case stated was instituted to determine whether the bank was liable for damages on account of its refusal to allow the transfer. The court held that inasmuch as the name of the cestui que trust, Mary Gilpin, was disclosed in the certificate, and upon their books, the bank was justified in refusing to permit the transfer without the production of some authority from her besides the certificate. In the opinion delivered the court says: "That although the legal right was in the plaintiff, he was not the owner. The person to be affected by the transaction was not himself, but Mary Gilpin, and hence the bank was justified in refusing to permit the transfer until some authority beyond the certificate was produced." In the course of the opinion, the case of Albert and wife v. City of Baltimore, 2 Md. 159, is cited, in which it was held that "the mere designation of the holder of the stock as trustee, without a specification of the trust, or naming the cestui que trust, is not such notice to the transfer agents as to make it their duty to look beyond the legal title, for it did not point to any source of information. The fiduciary character of the person in whose name the stock stood did not appear;" and in Stockdale v. South Sea Co., Barn. 363, the Lord Chancellor says: "It is certain that these great companies are only to consider the person in whose name the stock stands, unless the trust of the stock is disclosed on their books." After referring to other English and American authorities that have held the same doctrine, the statement of Chancellor Johnson, in delivering the opinion in Albert v. Savings Bank, 1 Md. Ch. Dec. 407, is quoted as follows: "These authorities must be understood as applying to cases

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where the fiduciary character appears, *but there is nothing to indicate the nature of the trust or the beneficiaries," and the court adds, "there is no case in which it has been

ruled that a trustee of stock, whose certificate shows a declared trust for another named, has a right to transfer it without showing a power beyond his certificate." The case of Bayard v. Bank is, therefore, rather an authority as to how far the transfer agent will be justified in refusing to permit a transfer, than as to how far he may proceed in allowing it, without incurring responsibility. It decides that where the cestui que trust is known, the transfer should not be made without his consent; but when unknown, and no clue is given to his identification, as in this case, the transfer may be lawfully made. In Magwood v. Railroad Bank, H. M. Magwood was trustee of the plaintiff, Elizabeth C. Magwood, and held certain certificates of stock for her, which stood on the books of the bank in his name, as trustee of Elizabeth C. Magwood. Without her knowledge or consent, he sold certain of said certificates, and his vendee, under the power given him, was permitted to transfer the stock without question.

The proceeds of the sale were lost to the trust estate, and the action was brought against the bank to recover the value of the stock as improperly transferred. It was held that the bank was liable, "it appearing that the transfer occasioned the loss of the stock." In delivering the opinion the court says: "Inasmuch as the trust, in the present case, was declared on the books and face of the scrip to the extent of naming the cestui que trust, it follows that if the action of the trustee in disposing of the stock was without authority, and tended to defeat the object of the trust, the corporation is liable in equity to the extent of any damage sustained by reason of its co-operation with the trustee to that end." The bank having been held liable because the cestui que trust was known, and the transfer permitted without her authority, it follows that, as in the case of Bayard v. Bank, if the trust had not been declared, and the name of the cestui que trust disclosed, the transfer would have been justified. The case of Simons v. Railroad Bank, 5 Rich. Eq. 270, is to the same effect. In that case, the bank was held to account for stock improperly transferred, but the decree was

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predicated on the fact *that the nature of the trust and the names of the beneficiaries were set out in the certificates and stood upon the books of the bank, what was held to be distinct notice, and as furnishing such indications as, if followed up, must have led to the most complete information on the subject. The inference is, that if these disclosures had not been made, the bank would have been justified in making the transfer. The rule in Morse on Banks and Banking, p. 166, is stated thus: "Any person showing a prima facie right may demand a transfer to himself, and any officer who can properly make the transfer at all, will be protected in making it, without going behind the apparent legality and propriety of the demandant's rights in order to determine whether there is any hidden cause for objecting to it." And in Mount Holly Turnpike Co. v. Ferrer, 11 N. Y. Eq. 117, it is said that "a certificate of stock in a company, accompanied by a power of attorney authorizing the transfer of the stock to any person, is prima facie evidence of equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate." Indeed, the rule as to the transfer of the stocks of incorporated companies by ordinary trustees seems to be settled, that if the name of the cestui que trust and real owner is disclosed, the transfer officer should require the production of some other authority besides the certificate before permitting the transfer; but if the names of the beneficial owners are not known, and there be no indication on the face of the scrip, or the books of the company, to put them on inquiry, they are not only justified, but may be compelled to permit the transfer by the prima facie owner, as evidence by the production of the usual power. But it was suggested by the plaintiffs' counsel that there is a distinction between the authority of an ordinary trustee and a guardian in making a transfer of stock, and that the rule was more stringent as to guardians. Without stopping to inquire into the difference in their powers, if there be any, I refer to the case of Bank of Virginia v. Craig, Guardian, 6 Leigh 339, which seems to have been well considered, and from which it appears that a guardian may transfer with more facility than an ordinary trustee.

In that case it was held that "bank stock standing in the name of F., guardian of C.,

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may be sold and transferred by the *guardian, and the officers of the bank had no right to control or prevent him from transferring it on their transfer books." In delivering the opinion of the court, Tucker, J., says: "To concede to the bank the power of permitting or refusing the exercise of his legal power by a guardian, would indeed be of serious consequences. It would annihilate the admitted powers of the guardian over his ward's estate, it would arrest the discharge of his duties, and vest the inquiry into his conduct in the officers of the corporation instead of the courts of justice, or drive him to his mandamus or other processes against the bank, to compel its assent to a transfer. The bank has nothing to do with these official trusts. If the guardian defrauds his ward, his sureties are responsible; if the purchaser combines in the fraud, he, too, is chargeable, but the bank cannot interfere and arrest the transfer of its stock by the legal holder of the scrip upon such pretences. It would trammel and embarrass such transactions so as to impede materially

that transferable character, which is one of the most valuable attributes of stock." In the case under consideration, the stock which it is sought to make the defendant company responsible for, on account of having unlawfully, as it is said, permitted its transfer from the real owners, was set out in the certificate and stood on their books in the name of Charles L. Paul, guardian; the nature of the trust was not indicated, nor the name of the beneficiaries given. Suppose they had been given, would that have estopped the company from permitting the transfer on presentation of the certificate? It was held otherwise in the Virginia case just referred to. Is the rule different in South Carolina? Has it been so adjudicated as to the office of guardian? If so, I have not been so fortunate as to find the case. The law in this state is so well settled that it is the first duty of a guardian to collect the personal funds and choses in action belonging to his ward, and invest the proceeds in bonds, secured by mortgages of real estate or government securities; that it would be a work of supererogation to cite authorities. Is the stock in a manufacturing company anything more than a chose in action, and if a guardian holding such stock permit it to stand and it is lost by the failure of the company, is there any doubt but he would be held lia-

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ble for it on account of his neg*lecting a plain legal duty? I think not. It being his duty to collect and re-invest, which, in the case of stock, can only be done by a sale and transfer, shall the company that enabled him to do so, by permitting the transfer to his vendee upon the production of his warrant of attorney, be held guilty of a breach of trust? Or, to save themselves, must they require from the cestui que trust some other authority than the certificate and their own records? What authority? Infants cannot execute a power; would the letters of guardianship answer, or must he resort to a suit in equity, with its attendant delays, trouble and expenses?

If he do this, it may happen that before he gets the order the corporation may fail, and both guardian and ward, if his sureties be insufficient, be involved in the same ruin. It is bad policy to encumber these important fiduciary relations with restrictions not clearly deducible from the law, as it is extremely difficult now to get responsible persons to fill them. And it will be found at last that the interests of infants under guardianship will be best protected, and it is their only protection, by the integrity of their guardians, and the strength of their official bonds. I am of opinion, therefore, that upon general principles applicable to the office of guardian, the defendant company, in this case, would not have been guilty of breach of trust, even if the wards had been named and the transfer permitted upon the certificate alone, without it had been shown that they were guilty of some mala fides in connection therewith.

But, however that may be, as the case stands the stock appeared, prima facie at least, to belong to Charles L. Paul, guardian, and was transferred upon his warrant of attorney thus endorsed. It may have as well been Paul, trustee, or receiver, or agent, or prochein ami. Neither of these descriptions would have proved that there was any one behind to whom it applied as they are doubtless often used for a purpose without indicating an office. Nor did the addition of the word "guardian" at the end of his name furnish any sufficient indication to put transfer agent upon inquiry even, and therefore the defendant company committed no legal wrong by their agency in the transaction under consideration. To hold otherwise would,

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in my judgment, be to *rivet fetters upon the commercial and business transactions of the country, that would be highly prejudicial to the public interest.

It is therefore adjudged and decreed that the complaint, as to the Graniteville Manufacturing Company, be dismissed.

J. P. Reed.

January 15th, 1878.

From this decree the plaintiffs appealed to this court.

Messrs. Tracy & Tracy, for appellants.

A certificate of stock is a mere chose in action. 1 Saund. 210, note a; Bail. Eq. 147.

It was not a security of the guardian, but an equitable agreement by the company that in those shares some beneficiaries, not sui juris, had the exclusive usufruct, held in trust for them by a guardian.

The guardian had neither the legal nor equitable interest in the stock, and his endorsement transferred no interest. The legal interest is in the corporation.

In South Carolina the guardian is not possessed of any legal estate in his ward's chattels or choses. 4 Rich. Eq. 70; 9 Rich. Eq. 325; 3 Rich. Eq. 156; 3 S. C. 384; 7 Mass. 5.

Whence has a guardian his authority? By appointment of judge of probate. Gen. Stat. 573; 2 Kent. 226. His authority does not extend to power of transferring stock. 2 Kent 228. Statute does not define powers of guardians appointed by the court. Such powers over personal estate can extend only to its custody, direction and management. If he could sell forty shares of stock in 1870, he could have sold sixty shares in 1860. See 2 Smith (Penna.) 232; 5 S. C. 379.

The word "guardian" showed that infants were the real owners of this stock. The corporation alone can make a transfer; it is its duty to see that the person applying has in himself all the interest of the preceding owner. 2 Smith (Penna.) 232; 3 Am. Law Jour. 111; 14 Md. 299; 1 Md. Ch. Dec. 407; 8 Am. Law Reg. 219; 14 Allen 523.

The names of wards not being disclosed
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may put corporation *to somewhat more trouble, but cannot affect the principle. Besides, they had knowledge how it was derived.

The order for leave to sell was of no efficacy; the petition was not signed by general guardian, no guardian ad litem appointed, infants were not parties, and the order was signed by a judge at chambers. 1 Abb. Forms 51; Code, §§ 138, 139, subd. 1, 2; 1 Hill Ch. 27; 4 Rich. Eq. 62; 9 Rich. Eq. 325; 7 Rich. Eq. 43; 3 S. C. 394; 14 Stat. 77, § 8.

The stocks were the specific chattels of the wards, and the guardian could not authorize the corporation to transfer. 1 Rich. 359; 2 Rich. 3; 12 Rich. 333; 9 Rich. Eq. 325; West. U. Tel. Co. v. Davenport, (Sup. Ct. U. S., Oct., 1878.)

See following as to defendant's liability for an illegal transfer: 2 Bright, 293; 2 P. Wms. 76; 14 Sim. 475; 28 Beav. 287; 2 Eden 299; Tan. C. C. Dec. 310; 4 Allen 277; 123 Mass. 110; 14 Md. 299; 7 N. Y. 274; 49 N. Y. 286; 4 Md. Ch. Dec. 357; 22 Eng. L. & Eq. 452; 7 Hurl. & Nor. 603; 58 N. Y. 322.

Messrs. Buist & Buist, for respondents.

Liability for illegal transfer is admitted, but here there is no knowledge of a trust. In 5 S. C. 379, and in 52 Penna. 223, there was such knowledge. But see 2 Md. 159, 168; 1 Md. Ch. Dec. 407; Perry on Tr., § 242; 6 Leigh 339; 37 Geo. 515; Tan. C. C. Dec. 324; 7 Johns. Ch. 150; Barrett v. Cochran, 11 S. C., ante page 29.

These certificates of stock are negotiable instruments, and the company had no alternative but to make the transfer when demanded by a bona fide holder. 48 How. Pr. 427; 11 Rich. Eq. 344; 11 Wall. 369. The corporation does not make the transfer; it only records the transfer, and gives certificates of the fact. The title becomes perfect in the vendee upon assignment of certificate. Field on Corp., § 110; 46 N. Y. 325.

The crucial question is, did the mere word guardian, added to Paul's name, give the defendants notice of the trust? Such position of the appellants finds no support in the case relied on (Bail. Eq. 147) by them. In 3
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Rich. Eq. 157, and 9 Rich. Eq. *311, relied upon by appellants to sustain position that guardian has no authority over ward's property, the property stood in the name of the wards, not in name of the guardian. In West. U. Tel. Co. v. Davenport the transfer was a forgery, and illegal under statute of Ohio unless by order of the Probate Court.

April 14th, 1879. The opinion of the court was delivered by

WILLARD, C. J. Paul, the guardian of the infant plaintiffs, took from the defendant corporation a certificate of shares of the capital stock of that corporation belonging to his wards in his own name as guardian. He placed it with a blank endorsement in the hands of Davant, his counsel, for purposes connected with his administration as guardian. Davant hypothecated the certificate to the Savings Bank of Augusta for money loaned for his personal use. Hickman, who was president of the bank, and also president of the Graniteville Manufacturing Company, purchased, with Giles, the stock from the bank, and had the stock transferred by the defendant corporation to such purchasers. To show authority on the part of Paul as guardian to sell the stock, an order of the Circuit judge of the second circuit was produced, claimed as authorizing the guardian to sell the stock for the purpose of changing the form of instrument. Objections were made to this order that need not be considered, for no sale of the nature authorized was made under it. As the title of the stock stood in the name of Paul and the beneficial interest in the plaintiffs, his wards, Paul was a trustee for plaintiffs' use. These relations were sufficiently declared by facts appearing on the face of the certificate and the books of the corporation. The stock previous to the transfer to Paul as guardian stood in the name of Fickling and Hill, as executors of Burwell McBride. The plaintiffs are the children of Burwell McBride. The transfer to Paul as guardian was made with full knowledge on the part of the corporation of the source from which information might have been derived as to the persons represented by Paul, and it must be assumed that the defendant corporation either had full knowledge of the persons entitled as beneficiaries under the trust, or improperly neglected to inform themselves on such subject. The company were, therefore, apprised of the
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rights of the parties and *occupy the same position as that of the defendants in Magwood v. Bank, 5 S. C. 379. Hickman could only derive title through the order of the Circuit judge, as he was chargeable with notice of the guardianship from the certificate itself, and, as we have just held, the guardian had no authority to sell the plaintiffs' beneficial interest in stock constituting an investment, independently of an order of the court for that purpose. McDuffie v. McIntyre, Post Case No. 720 [11 S. C. 551, 32 Am. Rep. 500]. The order discloses all that was essential to charge Hickman with full notice of the rights of the plaintiffs, both as wards of Paul and under the trusts with which he was charged. As Hickman's alleged title flows through that order, he is chargeable with notice of its contents. The order did not authorize the guardian to hypothecate the stock for the purpose of borrowing money. Such a transaction is neither within the terms or intention of the order, and cannot be justified under it. It must

be assumed that Hickman saw the order and the proceedings upon which it was made, and from that he would be informed that Davant was the solicitor of Paul. In the absence of evidence showing that Hickman had reason to believe and did believe that Davant was a purchaser from Paul of the stock for a fair consideration, it must be assumed that Hickman dealt with Davant as the solicitor or agent of Paul. To hypothecate the stock was a breach of trust. If Hickman supposed that Davant had authority from Paul to hypothecate the stock, which is the assumption most favorable to Hickman, then his action must be regarded as assisting Paul to commit a breach of trust. As Hickman was president of the defendant corporation, that defendant is chargeable with notice of such breach of trust. It is in that case an instance of knowledge brought home to the agent of a corporation possessing full authority to act and actually acting as such in the matter to which the notice relates—the strongest case for charging a corporation with notice of matter known to its agent. It is unnecessary to consider the questions discussed by the Circuit judge, as they have no real application to the facts of the present case. The plaintiffs have lost their estate through a series of wrongful acts that would have been ineffectual

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for *that purpose but for the transfer of the stock on the books of the defendant corporation, and by the exercise of reasonable prudence and care on their part the loss might have been prevented.

The judgment dismissing the complaint as to the Graniteville Manufacturing Company must be reversed and the cause remanded to the Circuit Court for judgment for the plaintiffs against both defendants.

Decree reversed.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. 409

(Case No. 707.)

BOWDEN & EARLE v. JOHN WINSMITH.

(November Term, 1878.)

[1. *Appeal and Error* ⇨716.]

When the reasons which induced the Circuit judge to refuse a motion for continuance are not brought before this court, such refusal cannot be made a ground for granting a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2966; Dec. Dig. ⇨716.]

[2. *Pleading* ⇨394.]

A note was described in the complaint as note of the defendant, and the note proven was signed by defendant and another; motion for non-suit, upon ground that complaint did not contain a plain and concise statement of facts, was refused; *held*, no error.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1330; Dec. Dig. ⇨394.]

[3. *Interest* ⇨30.]

The act of December 20th, 1877 (16 Stat. 325), does not affect contracts entered into before its passage.

[Ed. Note.—Cited in Hardin v. Trimmier, 27 S. C. 121, 122, 3 S. E. 46.

For other cases, see Interest, Cent. Dig. §§ 61–63; Dec. Dig. ⇨30.]

[4. *Pleading* ⇨367.]

[Cited in Kennerty v. Etiwan Phosphate Co., 17 S. C. 416, 43 Am. Rep. 607; Ruff v. Columbia & G. R. Co., 42 S. C. 119, 20 S. E. 27; Smith v. Smith, 50 S. C. 65, 27 S. E. 545, to the point that a motion to make the complaint more definite and certain should be made before answer.]

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173–1193; Dec. Dig. ⇨367.]

Before Kershaw, J., at Spartanburg, March Term, 1878.

These were two actions upon two promissory notes; each complaint was upon a promissory note in the usual form. They described the note sued on as if given by defendant alone. The notes were dated March 14th, 1877, and bore interest at rate of two per cent. after maturity, one of them being payable November 1st, and the other December 1st, next after their date.

At the trial, the two actions were consolidated. The defendant moved for a continuance, upon the ground of the absence of a material witness, whose attendance could not be secured because of his residence at

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a considerable distance and in another *county. The motion was overruled, and defendant excepted. The notes were produced in court; they were joint and several notes signed by one Dunaway and defendant. Defendant admitted his signature. He moved for a non-suit, upon the ground that the complaint did not contain such a plain and concise statement of facts as was required by the code to constitute a cause of action. The motion was overruled, and defendant excepted.

Verdict for plaintiff for amount demanded in the complaint—judgment accordingly.

Defendant appealed upon the following grounds:

1. That his Honor erred in overruling the motion for a continuance.

2. That his Honor erred in overruling the motion for a non-suit.

3. That his Honor erred in charging the jury that they must find a verdict for plaintiffs for the principal sum stipulated in the notes, and two per cent. interest a month, as demanded in the complaint.

Mr. John Winsmith, for appellant.

Messrs. Duncan & Cleveland, contra.

April 14th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The first ground of appeal is that the Circuit judge refused a mo-

tion for a continuance on the ground of the absence of a material witness. The reasons for the refusal to continue are not stated, and we have no reason to conclude that any error of law was committed. If the Circuit judge concluded that the facts appearing did not warrant the conclusion that the defendant had used due diligence to procure the attendance of the witness, and that the failure to attend was through no fault on the part of the defendant, and that the witness was material to the defence, and that he would be prejudiced in his defence unless the attendance of such witness was compelled, the refusal of the motion to continue is not a proper subject of appeal to this court. This exception must be overruled.

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*The second ground of appeal is the failure of the Circuit Court to grant a non-suit, on the ground that the complaint "did not contain such a plain and concise statement of facts as required by the code to constitute a cause of action." Where the allegations of a pleading are "so indefinite or uncertain that the precise nature of a charge or defence is not apparent, the remedy is by a motion, in due time, for an order requiring the pleading to be made definite and certain by amendment." Code, § 183. If such motion is not made in due time, it is waived. Such an objection should be taken before answer. Section 199 provides that "the court shall in every stage of action disregard any error or defect in the pleadings or proceedings which shall not affect substantial rights of the adverse party, and no judgment should be reversed or affected by reason of such error or defect." This section precluded the Circuit judge from allowing the motion for a non-suit on the ground of informality alone. The only defect in the complaint that could be made available on the motion for a non-suit was that it did not state facts sufficient to constitute a cause of action; all other defects, excepting only want of jurisdiction, were cured by failure to demur or set them up by way of answer. Section 171. But, though the complaint might be defective in the statement of a sufficient cause of action, yet if the plaintiff had, without objection on that ground, supplied requisite proofs to entitle him to a judgment, it would be the duty of the Circuit judge to order immediate amendment without prejudice to the proceeding. It would appear, from the argument of the appellant, that the objection was that the notes in suit were declared upon as the notes of the defendant alone, and the notes produced were signed by the defendant and another person severally liable. No objection appears to the introduction of such notes in proof. The objection is merely to an alleged misdescription of the notes in the complaint. In law the notes were the several obligations of the defendant at the election of the plaintiff, and could be declared on as such. This objection must be overruled.

The third objection is that judgment was given for the amount of the notes, with interest at the rate of two per cent. a month

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*after maturity. That was the contract of the parties, and at the time it was made there was no law to invalidate it.

The subsequent act of 1877 (16 Stat. 325) fixes the rate of interest (Section 1) at seven per cent. on contracts from and after its passage. Section 2 of that act, presenting certain consequences to arise from establishing a greater rate of interest than that fixed by the first section, must be read as restricted to cases falling under the first section.

The appeal must be dismissed and the judgment affirmed.

Appeal dismissed.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. 412

(Case No. 708.)

E. C. WILLIAMS, Treasurer of Stono Phosphate Company, v. WADE H. HARRISON and J. W. HARRISON.

(November Term, 1878.)

[*Infants* ⇐57.]

An infant who signs a note as surety may, after attaining his majority, ratify his contract of suretyship, and thereby become bound by the terms of such contract.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 137; Dec. Dig. ⇐57.]

Before Mackey, J., at Greenville, April Term, 1878.

The only point involved in this appeal is as to the liability of Wade H. Harrison, who affixed his name and seal to a single-bill as surety merely, he being, at the time, an infant. After he attained his majority, and before the single-bill became payable, he wrote a letter to the payee, the plaintiff, which, upon its face, purports to be a promise to pay the sealed note.

The Circuit judge gave the defendant, Wade H. Harrison, a judgment of dismissal, upon the ground that the contract was void, and that no action could be maintained thereon. The plaintiff appealed.

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*Messrs. Blythe & Ansel, for appellants, contended that contract was voidable and not void, and cited 2 H. Bl. 511; Bing. on Inf. (1st Am. ed.) 8; Tyler on Inf. & Cov. 41, 48, 54–58; Pars. on Mer. L. 4, and note; Chitty on Con. (9 Am. ed.) 50; 2 Bail. 114; 4 McC. 221, 241; 9 Rich. 55; Bail. Eq. 223; 1 Com. on Con. 162; 11 Serg. & R. 305; and that respondent could ratify it after attaining his majority. 2 Bail. 114; 4 McC. 241; 9 Rich. 55.

Messrs. Simonton & Barker, on same side, cited the following additional authorities: 1 N. & McC. 33; 11 Mus. & W. 255; 3 Wend. 479; 14 Mass. 457; 1 Am. Lead. Cas. 244–248, et seq.

Messrs. Earle & Wells, for respondent, contended that contracts from which an infant derives no benefit, (as in this case,) are not simply voidable, but are void ab initio. Authorities cited: 4 McC. 242; 2 H. Bl. 515; Tyler on Inf., § 9; 10 Pet. 70; Story on Con., §§ 39, 57; Story's Eq. Jur., § 241; Schouler on Dom. Rel., §§ 532–541; 1 Mason 82; 7 Humph. 121; 13 Mass. 237; 3 Rich. 164; 2 Hill Ch. 540, 541.

April 14th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The main question in this case is, whether a contract of suretyship made during minority, is, in judgment of law, actually void, so that no act of confirmation, after arriving at majority, could add validity to it. It must be conceded that the question is unsettled by judicial authority in this state. It is evident, from the language of the court in Little v. Duncan, 9 Rich. 58 [64 Am. Dec. 760], extending the decision in Cheshire v. Barrett, 4 McC. 241 [17 Am. Dec. 735], to the case of a sealed instrument made by an infant, that the general tendency in the courts to uphold the effect of ratification after arriving at maturity, on contracts made during minority, was participated in by the court that decided that case. In view of this tendency, clearly manifest, and the unsettled state of authority elsewhere, we feel at liberty to place the decision of the present case on grounds of reason.

It is the misfortune of this question that it has become entangled with what, at this day,

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is quite another and distinct *question, namely, that of the authority and duty of the courts to uphold the acts of an infant, on the grounds of their manifest advantage to such infant, and independently of the effect of ratification after attaining majority. The lines of distinction drawn in reference to one of these questions do not accurately apply to the other. Assuming that a person being of full age, and, as such, chargeable with knowledge of his legal rights, deliberately determines that his interest or duty demands that he should recognize and discharge an obligation, imperfect through the fact of its assumption during minority, it would be difficult to find any sound reason why the courts should interfere to deny effect to such an act. If that responsibility rested on the court it might be well to consider the rules that should govern its exercise; but when it is assumed by the immediate party in interest, of competent age, and decided against himself, it does not seem to be a case calling for the interference of a court. The object of the rule that avoids the acts of infants is to protect the infant during a period when he is adjudged unequal to his own protection. If, after arriving at maturity, and no longer needing that protection, he deliberately subject himself to the obligation, the duty of protecting him against himself no longer subsists as binding the court, and he may well be permitted to stand or fall by his own views of interest or duty. Should an infant, immediately after arriving at age, being regarded by equity for certain purposes as in that condition more or less under the influence of his antecedent condition, assume an obligation under circumstances that would raise an implication of mala fides on the part of the obligee, it may well be that he could find relief in the application of equitable principles to his case. Crosby v. Crosby, 1 S. C. 337. But, assuming that in the present case his act is free from any circumstances that could deprive it of the character of a deliberate act, and there can be no reason short of the stern rule of stare decisis, that could warrant the defeat of such act. It is especially objectionable that the court should pronounce a transaction fair and legal on its face absolutely void for the purpose of applying as against an attempt to satisfy the operation of the purely technical rule that that which is void cannot be validated for the want of

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anything to become validated. *What might be the effect, under the authorities, where the transaction bore on its face evidence that the immaturity of the obligor had been imposed upon, so that, as matter of law, the court could say that the transaction was a wrong done to the infant, need not be considered, as it is inapplicable to the present case. The mere fact that the infant assumed to become a surety for another, is not, in itself, ground sufficient to say that such dealing was a wrong to the infant. The most that can be said is, that the court cannot see how the infant could derive benefit from such an act; but that is not sufficient, if he, himself, after arriving at maturity, deliberately has determined the matter for himself. This direct question was decided in Curton v. Patton, 11 Serg. & R. 305. We think that the decision of the Circuit Court was erroneous in holding that the contract was incapable of ratification. The dismissal of the complaint must be regarded as equivalent to a non-suit. In this point of view it presents the question whether the letter of the defendant, proved in evidence, was sufficient to go to the jury on the question of ratification. On its face it purports to be a promise to pay the note in suit, made upon an offer that involved a new consideration, namely, forbearance to sue the other party to the note. If the proffer was accepted and acted upon it would constitute not only proof of confirmation but a new contract, assuming the old one to be incapable

of ratification. It was for the jury to say whether this condition was accepted by the plaintiff.

There must be a new trial.

New trial granted.

McIVER and HASKELL, A. J.'s, concurred.

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11 S. C. *416

*(Case No. 709.)

JOHN H. HAMER and ROBERT M. HAMER, by His Guardian ad Litem, v. EDWIN A. BETHEA, J. F. BETHEA, and D. W. BETHEA.

(November Term, 1878.)

[1. *Executors and Administrators* ⊂⊃40.]

Under proceedings in partition the lands were assigned to A, who was charged with the payment of half their assessed value to the distributees of B, who at his death intestate was a joint tenant with A. *Held*, that a payment of this amount to the administrators of B was not a satisfaction of the decree.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 282; Dec. Dig. ⊂⊃40.]

[2. *Conversion* ⊂⊃21.]

So far as administrators are concerned, the character of property, whether real or personal, is that which it bears at the death of the intestate, and is unaffected by any subsequent conversion.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 56; Dec. Dig. ⊂⊃21.]

[3. *Partition* ⊂⊃111.]

An order for the disposition of the proceeds of land "hereafter directed to be sold," cannot embrace the proceeds of other lands of the same party sold under a previous order of the court, passed in another cause, at the same term.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 401–418; Dec. Dig. ⊂⊃111.]

Before Townsend, J., at Marion, March Term, 1876.

In this case Honorable William H. Wallace, judge of the seventh circuit, sat in the place of Associate Justice McIver, who had been one of the counsel in the cause in the court below.

The Circuit decree very fully states all the facts of the case. The order of Chancellor Dunkin passed February 20th, 1860, in the case of Fladger et ux. v. Hamer et ux., (mentioned in the Circuit decree and also in the opinion of this court,) so far as it affects the present issues, is as follows:

The commissioners to whom a writ of partition was directed in this case, requiring them to make partition of the property named in the pleadings, having made their return to the writ, it is, on motion of Harllee & Graham, complainants' solicitors, ordered that the said return and recommendations be confirmed, except as to vesting the share of Missouri, wife of John H. Hamer, the defendant, in the said Missouri. And it is ordered, in respect to the portion of negroes allotted to the said Missouri, and the proceeds of land,

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hereafter directed to be sold, that it be *referred to the commissioners of this court to inquire and report as to who would be a fit and proper trustee on whom to settle said slaves and proceeds of sales of land to the use of the said Missouri; the terms of such settlement and the amount of bond to be given by said trustee.

The Circuit decree is as follows:

William S. Bethea died intestate on the day of March, 1857, leaving his widow, Sarah A. Bethea, and two children, Missouri Bethea and William H. Bethea, as his only heirs-at-law. Sarah A. Bethea administered upon his personal estate, and subsequently intermarried with C. J. Fladger, who, by reason of the marriage, became administrator with her; Missouri Hamer intermarried with John H. Hamer, after the death of her father, and died intestate on the day of , 1862, leaving an infant son, Robert M. Hamer, and her husband as her only heirs-at-law.

The intestate, William S. Bethea, in his lifetime, was joint owner with John C. Bethea of several tracts of land lying in Marion county, then district. On the 14th day of February, 1859, after the death of W. S. Bethea, a bill of complaint was filed in the Court of Equity, for the partition of said lands, by John C. Bethea, against the heirs-at-law of intestate before named. The cause was heard on the 18th of February, 1859, and the court, after directing certain conveyances to be made to perfect the titles, &c., of the joint tenants, and the payment of a certain sum of money by the administratrix of W. S. Bethea, ordered a writ of partition to issue to divide the said lands between John C. Bethea and the heirs-at-law of W. S. Bethea. In December, 1859, the writ accordingly issued, and the commissioners therein named, and to whom it was directed, made their return to the Court of Equity in February, 1860, in which they valued all the lands at the sum, in the aggregate, of $5,151, and recommended that the lands be set apart to John C. Bethea at that sum, who was to pay to the heirs-at-law of W. S. Bethea the one-half of said amount by the 1st day of January, 1861, with interest from the 1st day of March, 1860. The return was confirmed by an order of the court on the 17th day of Feb-

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ruary, 1860. John C. *Bethea went into possession of the three tracts of land so set apart to him, and continued in possession up to the time of his death in January, 1863. By the terms of his will, of which R. B. Fladger was one of the executors and duly qualified, his son, Edwin A. Bethea, as devisee, went into possession of the said lands, and is now in possession of them, with the

exception of the "Clark" tract, which was conveyed by him to John F. Bethea in 1869, and a portion of which was sold by John F. Bethea to D. W. Bethea.

The complaint in this action alleges that neither J. C. Bethea, in his lifetime, nor his executor, after his death, nor his son and devisee, nor J. F. Bethea or D. W. Bethea, as pretended owners of the "Clark" tract, ever paid to Missouri Hamer or her legal representatives, or to any other person authorized to receive the same, her share of the money assessed and decreed to be paid to her by John C. Bethea.

That at the time of her death, Missouri Hamer was a minor and owed no debts, and there has been no administration upon her personal estate; that there is now due and owing to the plaintiffs, as heirs-at-law of Missouri Hamer, on account of her interest in the said lands, the sum of $1,697.39, with interest from the 26th of May, 1873, being the one-third of the amount, with interest, as assessed to be paid by J. C. Bethea; and they are informed that a statutory mortgage or lien exists upon the lands for the payment of her share, and that the title of Edwin A. Bethea, J. F. Bethea and D. W. Bethea will not vest in the same until the said amount of money is paid to her, even if the other heirs-at-law of J. C. Bethea have been paid.

The prayer of the complaint is for the foreclosure of the statutory mortgage, and for a sale of the said lands for the purpose of subjecting them to the payment of the amount due the plaintiffs.

The defendants, in their answer, after admitting most of the allegations of the complaint, deny the fact stated, that the share of Missouri Hamer was never paid to her or her heirs by them or any of them. For further answer they allege that on the 17th day of December, 1859, C. J. Fladger and wife, administrators of W. S. Bethea, filed their bill against John H. Hamer and wife and others, for partition and account, and that at the

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*February Term of the Court of Equity, in 1860, it was ordered, among other things, "that the said return be confirmed, with its recommendations, except as to the vesting of the share of Missouri Hamer, wife of John H. Hamer, the defendant, in the said Missouri, and it is ordered, in respect to the portion of the negroes allotted to the said Missouri, and the proceeds of the land hereafter directed to be sold, that it be referred to the commissioner of the court to inquire and report as to who would be a fit and proper trustee on whom to settle said slaves and proceeds of sales of land to the use of the said Missouri, the terms of said settlement and the amount of the bond to be given by the trustee. It is further ordered that the share of the negroes and proceeds of sale of land allotted to Missouri, wife of John H. Hamer, remain in the administrator's hands until the further order of this court."

They further allege that the above order was made at the same term of the court, by the same Chancellor, and on the same day that the order referred to and granted in the complaint was made.

They further allege that the money ordered to be paid by J. C. Bethea was a part of W. S. Bethea's estate, and as such was covered by the order of the court settling Missouri's portion upon a trustee.

The defendants further allege that John C. Bethea, in his lifetime, paid the money ordered to be paid to the distributees of W. S. Bethea to C. J. Fladger, the administrator of W. S. Bethea, and that said Fladger, as administrator, has accounted for the same. The defendants insist that said payment was a good payment, and a complete discharge of the statutory lien upon the lands, and plead said payment in bar of the plaintiffs' action for foreclosure. The evidence of the payment of the money by J. C. Bethea to the administrators of W. S. Bethea is a receipt, as follows:

"Received 26th August, 1861, of John C. Bethea, two thousand six hundred and sixteen 75–100 dollars, as above stated, which is in full of the portion of the estate of W. S. Bethea in the lands which were assigned the said John C. Bethea in partition under proceedings in the case above stated had in the Court of Equity for Marion District."

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*The title of the case in which the lands were assigned to J. C. Bethea appears above the receipt. The paper is in the handwriting of C. D. Evans, the then commissioner in equity for Marion district.

At the hearing of the case there was oral and record testimony offered. The records and all the papers in the cases of J. C. Bethea v. Sarah A. Bethea, Adm'x, et al., and H. C. Fladger et ux. v. J. H. Hamer et al., were introduced. The testimony shows that Missouri Hamer was four years of age in 1860,† and died before attaining majority, without ever having had a guardian or trustee. John H. Hamer is now the guardian of the infant plaintiff. Edwin A. Bethea, as devisee, went into possession of the lands sought to be sold, about the close of the late war. At the hearing, a motion was made on the part of the defendants to make the other heirs at law of John C. Bethea besides Edwin A., parties to this proceeding. The reasons urged in support of it were that the amount decreed to be paid by J. C. Bethea is a general debt against his estate, and not a claim against one of his devisees on the lands in his possession, and that it is necessary for all the heirs-at-

† This is twice stated in the decree. The brief does not give her age. It appears from the order of the court passed in February, 1860, that she was then married. She died under age in 1862.—Reporter.

law to be made parties before complete justice can be done. The motion was resisted by the counsel for the plaintiffs.

The record in the case of J. C. Bethea v. Sarah A. Bethea et al., proves the liability of J. C. Bethea to the plaintiffs for the share of Missouri Hamer in the amount decreed to be paid by him. It is incumbent on the defendants to show that this debt or liability has been discharged in some way, either by J. C. Bethea, in his lifetime, or by his executors or heirs since his death, in order to preclude the granting of the relief demanded in the complaint.

The first position assumed by the defendants is, that the order of the court affirming the allotment of the lands to J. C. Bethea, and directing the payment of money by him to the distributees of W. S. Bethea, was a conversion of realty into personalty, and the claim was a mere money demand, secured by the judgment for its payment, which was a

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lien upon and enforcible against all *the property of J. C. Bethea, and hence the administrators of W. S. Bethea had a right to receive the fund and administer it.

The doctrine of equitable conversion is thus laid down by Sir Thomas Sewell, in Fletcher v. Ashburner, found in Lead. Cas. in Eq. I., 777: "That money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid; whether the land is actually conveyed or only agreed to be conveyed." The direction to convert either money into land or land into money must be express and imperative; for if the conversion be optional, the property will be considered as real or personal according to the actual condition in which it is to be found.

In the case of Steele v. Prince, 9 Monk Eq. R. 743, it is held: "That if a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow."

In this state it has been held that proceeds of land ordered to be sold by a will, are treated as personalty. 8 Rich. Eq. 291.

In the case of Arnold v. Dixon, 19 Eq. 113, Vol. IX., Amer. Law Reg., it was decided that in an administration suit wherein partition was asked, a sale was ordered, and after the decree, but before the sale, one of the parties entitled to a share died, that "the real estate had been converted into personal and passed to the personal representative of the deceased beneficiary."

The ground of this doctrine is, as stated in Story's Eq. Jur., § 791, p. 175, that it is to be presumed that the parties, in directing money to be invested in land, or land to be turned into money, intend that the property shall assume the very character of the property into which it is to be converted. The lands owned by John C. Bethea and W. S. Bethea, jointly, were partitioned after the death of the latter. His share descended to his heirs-at-law as real estate. His debts were inconsiderable, and there was no necessity for the sale of any of his lands for their payment; when the lands were allotted to J. C. Bethea, and he was decreed to pay the value of the

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share of W. S. Bethea to his *distributees in money, it was for the purpose of partition, and not for the payment of debts. The money decreed to be paid represented the portion of the lands to which the distributees were entitled. There was no direction of the court for J. C. Bethea to pay to the administrators of W. S. Bethea the amount ordered to be paid for equality of partition. It cannot be successfully contended, then, that the administrators were entitled to receive this fund as the assets of the estate of W. S. Bethea for the payment of debts. If they had a right to receive it, it was only on the ground of a conversion, by the court, of real estate into personalty, to be distributed by them among the parties entitled.

The order of the court directing the payment of money by J. C. Bethea, was express and imperative. The distributees of W. S. Bethea were designated as the parties to whom it was to be paid. There could be no election to take the fund as land or money, for when an estate is directed to be sold and the money divided among several persons, none has a right to say that any part shall not be sold. The authority of the court to direct a conversion is unquestionable. A conversion, if directed by the court, was rightfully made.

But it appears that, at the time the judgment of the court was made, Missouri Hamer, the mother of the infant plaintiff, and wife of John H. Hamer, was but four years of age. The rule seems to be different when the real estate of an infant is sold: "If the real estate of an infant be sold, the proceeds are to be deemed real estate until he arrives at majority, and descend to his heirs as such. But on an infant arriving at majority, and obtaining possession of the proceeds of real estate sold, such proceeds are to be deemed personal property, and on his death thereafter descend to his personal representatives as such." Farmer v. Marcet, 11 N. Y. 544, and other cases cited in Monk Eq. R., Vol. IX., 743.

There can be no difference in the rule as applied to a case, where the real estate of an infant is allotted in a partition to another and money decreed to be paid to him for equality, and when a sale is directed for the

purpose of a partition. It will be seen that, in this case, one of the parties entitled in

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the par*tition to a share of the lands was a minor at the time the decree was made against J. C. Bethea; that the amount to which she was entitled was directed to be paid to her as a distributee; and that there was no necessity (or intention on the part of the court) for selling the lands for the payment of debts. Missouri's share in the lands was her own real estate, and having been allotted to another, the proceeds, or equivalent of same in money, must be considered as real estate until she attained majority—and she never arrived at majority—and her share in the amount due by J. C. Bethea was never converted, and her interest should have descended to her heirs-at-law as real estate.

I am of the opinion that the order of the court did not operate as a conversion of real into personal property, so far as Missouri was concerned, and the administrators were not entitled to receive her share as money, either for the purpose of distributing it, or for the payment of any debts of the intestate. The next position of the defendants is, that if the administrators had no right to receive her share as personal property, they clearly had the power to do so by virtue of the order of Chancellor Dunkin, made on February 20th, 1860.

The order was made in the proceeding for the partition and settlement of the estate of W. S. Bethea. In the first clause it directed, "that in respect to the portion of the negroes allotted to the said Missouri, and the proceeds of the land hereafter directed to be sold, it be referred to the commissioners in equity to inquire and report who would be a fit and proper trustee on whom to settle said slaves and proceeds of sales of land to the use of said Missouri."

In the second clause of the order, the lands mentioned in the return of the commissioners appointed to partition the real estate of W. S. Bethea, are directed to be sold.

The last clause of this order directs, "that the share of the negroes and proceeds of sale of lands allotted to Missouri, wife of J. H. Hamer, remain in the administrator's hands until the further order of the court."

This order was made at the same term of the court, and only two days after that, the

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order was granted allotting the lands to *J. C. Bethea, and directing him to pay so much money to Missouri as one of the distributees of W. S. Bethea.

There can be no question about the power of the administrators, under the order of February 20th, 1860, to receive the proceeds of the sale of the lands therein ordered to be sold to which Missouri was entitled. The Chancellor seems also to sustain the view already presented in the question of conversion, for he directs the proceeds of lands to be held, clearly indicating that it was a direction to secure real estate, and not personalty, by reason of a conversion consequent upon the sale.

Did this order also include the amount ordered to be paid to Missouri by J. C. Bethea?

The terms of the order are general. The administrators are directed to hold the proceeds of sale of land allotted to Missouri. The amount J. C. Bethea was decreed to pay her was proceeds of lands allotted to her. These proceeds were allotted to her by the same Chancellor at the same term of the court, and only two days before. The court was certainly cognizant of this fact, and must have intended that the proceeds as well as all others should be embraced within the terms of the order.

What was the object of this order, in so far as it related to Missouri? Clearly to protect her share in her father's estate from the debts of any future husband. As expressed in the order, the object is to settle her property upon a suitable trustee. If this was the object, why should not her entire property have been thus settled? The court clearly never intended to settle only a part upon a trustee. It does seem that the purpose of the court was to settle all of the property, and if so, then the last clause of the order embraced the amount in controversy. This seems to have been the construction placed upon the order by the then commissioner in equity, for it is in proof that the receipt of the administrators to J. C. Bethea is in his handwriting. J. C. Bethea and the administrators appear to have so understood the order. All parties concerned seem to have acted upon such a construction. The administrators accounted in the settlement of the estate of W. S. Bethea for the fund so received by them.

At the time this order was made no trustee had been appointed for Missouri. This seems to have been the reason for directing

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*the administrators—one of whom was the mother, and the other the stepfather of Missouri—to hold the property. That the infant was protected by the court in same way when this direction was given, is to be presumed from the fact of the direction itself. The extraordinary prudence and caution of the Chancellor granting this order render its propriety and necessity unquestionable.

If this order was intended to embrace the proceeds of the lands allotted to J. C. Bethea, to which Missouri was entitled, the administrators had the power to receive her share from J. C. Bethea, and to hold it until the further order of the court. That they did so receive her share is incontestably established by the receipt. It is now in their hands, and to them the plaintiffs

must look. The fact of the insolvency of the administrators, or their bondsmen, cannot affect the question to be decided in this case. Considering the order of Chancellor Dunkin, and all the peculiar circumstances of this case, it would be a great hardship to require the heirs or devisees of J. C. Bethea to again pay this amount, when it was once paid under what was supposed to be the direction of the court.

It is adjudged, ordered and decreed that the complaint be dismissed.

July 1st, 1876. C. P. Townsend.

From this decree the plaintiffs appealed to this court, upon the ground that the payment to the administrators of W. S. Bethea could not operate as a satisfaction of the amount J. C. Bethea was ordered to pay to Missouri Hamer, one of the distributees of William S. Bethea, under the order of February 17th, 1860.

Messrs. Johnson & Johnson, for appellants.

Upon the position that there was no equitable conversion, they cited 4 Rich. Eq. 152; 2 Hill Ch. 644; 2 Rich. Eq. 56; 1 Bro. C. C. 503; 2 N. & McC. 149; 2 Rich. Eq. 115; 4 Rich. Eq. 503; 2 Hill Ch. 575.

Messrs. C. A. Woods, Townsend & McKerall, contra.

Cited 4 Rich. Eq. 157, 160, 503; Spears Eq. 150; 2 Strob. Eq. 23; Dud. Eq. 56; Bail. Eq. 294; 9 Rich. Eq. 478; Herm. Est., §§ 28, 43, 336.

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*April 14th, 1879. The opinion of the court was delivered by

WALLACE, A. A. J. In 1857 John C. Bethea and his brother, William S. Bethea, were the joint owners of three tracts of land, viz., the Clark land, the Hamilton or Hamner Hays land, and a tract of land lying on Reedy creek. In March, 1857, W. S. Bethea died intestate, leaving as his heirs-at-law his widow, Sarah A., and two minor children—a daughter, Missouri, and a son, W. H. Bethea. The widow administered on the estate of the intestate, and afterwards intermarried with J. C. Fladger. The infant daughter intermarried with John H. Hamer, and died before attaining her majority, leaving one child, Robert M. Hamer. On the 14th of February, 1859, John C. Bethea filed his bill for the partition of the three tracts of land jointly owned by himself and W. S. Bethea. On the 18th of February 1859, it was, amongst other things, ordered that a writ of partition should issue. On the 5th of December, 1859, the writ was issued, and on the 6th of January, 1860, the commissioners made their return, setting apart the three tracts to John C. Bethea, at the valuation of $5151, and recommending that John C. should pay one-half of this sum, viz., $2575.50, with interest from the 1st of March, 1860, to the distributees of W. S. Bethea. This return was confirmed and made the decree of the court on the 17th of February, 1860. John C. Bethea subsequently paid this amount to C. J. Fladger and wife, as administrators of the estate of W. S. Bethea. On the 17th of December, 1859, C. J. Fladger and wife filed their bill against J. H. Hamer and wife and W. H. Bethea for the partition of two tracts of land, of which W. S. Bethea was sole owner in his lifetime, viz., the Home place and the Herring place, which they had in possession, and also of the three tracts in which John C. Bethea had a half interest. On the 17th of February, 1860, the day on which the commissioners in the case instituted by John C. Bethea made their return to the writ in that case, a writ of partition was issued to commissioners to divide the Home place and the Herring place. A return to this writ was made on the 20th of February, 1860, recommending that the Home place and the Herring place be sold on sale-day in December, 1860. On the same day the return was made it was con-

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firmed, except *as to vesting the share of Missouri, wife of John H. Hamer. This action is brought by the representatives of Missouri Hamer, to recover the amount of her share of the $2575.50 ordered by the court to be paid to the heirs of W. S. Bethea by John C. Bethea, and to set up a lien to the extent of Missouri's share of that amount upon the land assigned to John C. Bethea. The defendants set up the payment to C. J. Fladger and wife as a discharge of the debt of John C. Bethea to the heirs of W. S. Bethea, and extinguishment of the statutory lien upon the land. The duty of administrators is to collect and sell, under proper proceedings, the personal estate of their intestates. Primarily they have to do only with the personal estate, and, so far as their powers and duties are concerned, that only is personal estate which has that character impressed upon it at the time of the death of the intestate. Now, when under proceedings in partition the three tracts of land were assigned to John C. Bethea by the court, the title which had vested in the heirs of W. S. Bethea, at his death, was extinguished, and their interest was transferred and attached to the money to be paid. Whether there was any conversion of realty into personalty is a question with which the administrators of W. S. Bethea have no concern. This land was certainly realty at the death of W. S. Bethea, and, as such, they had no authority to administer it. Nor would the order of court, directing the title of the heirs to be extinguished by the payment of money to the heirs, change the relation of the administrators to this part of the estate of

their intestate. The question as to a conversion might arise between the personal representatives and the heirs of Missouri Hamer.

It does not appear that there was any insufficiency of personal assets to pay the debts of the intestate. The administrators, therefore, as such, had no power to discharge John C. Bethea from his obligation to pay Missouri Hamer, by receiving the money themselves. It was certainly competent for the court to direct to whom the money should be paid. Did the court direct that this fund be paid to the administrators? In the case instituted by John C. Bethea the court ordered that the sum to be paid by John C. Bethea should be paid to the heirs of W. S. Bethea. In the case of Fladger and wife, the court orders: 1st.

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*"That in respect to the portion of the negroes allotted to the said Missouri, and the proceeds of the land hereafter directed to be sold, it be referred to the commissioner in equity to inquire and report who would be a fit and proper trustee on whom to settle said slaves and proceeds of sales of land to the use of said Missouri." 2d. "That the lands mentioned in the report of the commissioners be sold." 3d. "That the share of the negroes and proceeds of sales of land allotted to Missouri remain in the administrator's hands until the further order of the court." It will be seen that the first clause of the order directs the commissioner in equity to inquire and report a proper trustee to take charge of the negroes allotted to Missouri, and the proceeds of land hereafter directed to be sold. Now, the land immediately thereafter directed to be sold, in the same order, and the only land thereafter directed to be sold, are the Home place and the Herring place. So it was for Missouri's share of the proceeds of these two tracts that the commissioner was to report a trustee; the share of Missouri in the other lands of her father having been covered by a previous order in another case. There is no language in the last clause of the order under consideration that extends its operation beyond the case in which it was made. Construing the whole order together, the first and second clauses designate the property to be settled to the use of Missouri, and the last clause provides for the custody of that property until the settlement could be made. No part of the order authorizes the administrators to receive from John C. Bethea Missouri's share of the money to be paid by him.

The decree of the Circuit judge dismissing the complaint is reversed, and the cause remanded.

Decree reversed.

WILLARD, C. J., and HASKELL, A. J., concurred.

11 S. C. *429

*(Case No. 710.)

JACOB LYONS v. BELLA HOLMES, JAMES D. TRADEWELL and WILLIAM HOLMES.

(November Term, 1878.)

[1. *Deeds* ⊂⊃53; *Evidence* ⊂⊃374.]

When the witnesses and parties to a deed, signed by an illiterate grantor with her + mark, are dead, proof of the handwriting of the subscribing witnesses, together with other evidence confirmatory of the execution of the deed, are sufficient to require the case to be submitted to the jury upon the question of the execution of the deed, notwithstanding there was no evidence of grantor's signature. Proof of the signature by grantor in such cases is not indispensable.

[Ed. Note.—Cited in Robinson v. Robinson, 20 S. C. 570.

For other cases, see Deeds, Dec. Dig. ⊂⊃53; Evidence, Cent. Dig. § 1584; Dec. Dig. ⊂⊃374.]

2. Cases in our state reviewed and explained, and Russell v. Tunno, 11 Rich. 318, limited.

Before Townsend, J., at Richland, January Term, 1879.

This was an action to recover a lot of land in the city of Columbia, formerly the property of Sarah Hane, a free woman of color. Plaintiff was devisee of Henry Lyons, and in support of his title offered in evidence a deed bearing date June 5th, 1855, conveying the lot to Henry Lyons in consideration of $500. The deed was signed "Sarah X (her mark) Hane," and the names of I. D. Mordecai and C. S. Bedell were signed as witnesses. A probate by Mordecai and a certificate of record by the register of mesne conveyance for Richland county,† both bearing date June 5th, 1855, appeared upon the deed. Henry Lyons died in 1858, and by a codicil to his will, this lot was devised to plaintiff. Subsequently Sarah Hane died intestate, leaving Richard Holmes, her husband, at the date of the deed and since, her sole heir-at-law. Richard Holmes again married and afterwards died in 1870, and by his last will and testament devised this property, one moiety to his wife, Bella Holmes, and the other moiety to James D. Tradewell in trust for William Holmes—the defendants in this action. Defendants denied the execution of the deed.

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*The evidence showed the death of both parties to the deed, and also the death of the witnesses. The signatures of the witnesses were proven. No evidence was offered to prove the mark to be that of Sarah Hane, nor that she was seen to sign it. The other evidence in this case is fully stated in the opinion of the court.

† It does not appear in evidence, but it is a fact that the records of this office were all burnt in February, 1865.—REPORTER.

The Circuit judge ruled that the deed was not sufficiently proven, and on defendant's motion ordered a non-suit.

Plaintiff appealed.

[For subsequent opinion, see 19 S. C. 406.]

Mr. W. A. Clark, for appellant.

The sole question presented for the consideration of this court is, what proof is sufficient to authorize the submission to a jury of a deed executed with the grantor's X mark, when both of the subscribing witnesses are dead. Proof of the handwriting of the subscribing witnesses would seem to be all that could be required.

First. The best evidence which the nature of the case admits is to be produced. Stark, on Ev. 642*; 1 Greenl. on Ev., § 82; 2 McC. 139*; 1 Bail. 543*.

Second. In England the rule would seem to be settled that if the subscribing witnesses be dead, or beyond the jurisdiction of the court, proof of their handwriting would be sufficient, and it would not be necessary to prove the handwriting of the grantor. Stark. on Ev. 519–521*, and cases cited; see review of English cases by Nelson, C. J., 19 Wend. 443.

Third. The courts of the State of New York have certainly recognized the rule as well established. 19 Wend. 437; 1 Johns. Cas. 230; 4 Johns. 461.

Fourth. In our state the rule would seem to be, that in such cases the handwriting of the grantor ought also to be proved, or "something to connect him with the instrument." 2 McC. 138; 11 Rich. 318.

These cases, however, establish no invariable rule. See remarks of Mr. Justice Gantt, in delivering the opinion of the court, in Plunkett v. Bowman.

And in the case of Russell v. Tunno, the testimony was too weak and uncertain. See remarks of Judge Withers.

Fifth. It is impracticable, after the lapse of so long a time, to prove the execution of a

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X mark; and herein arises one of those *circumstances which will dispense with the proof of the execution by the grantor, by testimony other than that of the subscribing witnesses.

Our courts have always recognized another rule where the instrument was executed by the X mark. 2 N. & McC. 374; 1 Rice Dig. 256.

And this rule is said by Judge Withers, in Russell v. Tunno, p. 32, to be recognized by our decisions.

And even when the execution of the instrument is in writing, but by a person not accustomed to write her name, or to transact business, so as to render her signature hardly susceptible of proof, our courts have held that the question should be submitted to the jury as presumptive evidence that such grantor had executed the deed. 2 Bay 157.

Sixth. The grantor was sufficiently connected with the instrument as to bring the case within the rule laid down in Russell v. Tunno.

Mr. J. D. Pope, for respondents.

1. The first proposition, that in the case of the death of the attesting witnesses it is not only necessary to prove their signatures, but that the signature of the grantor must also be proved, will hardly be called in question. Steph. Dig. Ev., Art. LXVI., pp. 121–122; App. 221.

In South Carolina, in such case, if there are two witnesses to the instrument, as in conveyances of real estate, then the signatures of both attesting witnesses must be proved as well as the signature of the grantor. 4 McC. 253; 1 Brev. 245.

In considering the cases in our books, the act of 1802 must not be overlooked as to the execution of bonds or notes, when other testimony is allowed, if the witness to the instrument is absent, unless the defendant shall swear that the signature to the bond or note is not his. Gen. Stat. 514.

2. The second proposition, that when the deed is executed by making a cross (X) mark, and the witnesses are dead, the death of the witnesses being proved and the signatures proved, it is also necessary to prove the identity of the grantor as the real person who was present and made the mark, thus con-

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necting him *personally with the mark so purporting to be made by him, is, we think, equally conclusive.

Why does the rule require that in case of death the signature of the grantor should be proved? It is to identify and connect the grantor with the deed. So, in the case of the marksman, the mere mark cannot do this. Any one may have made the mark. It has no character to distinguish it; and, therefore, the marksman must be identified in person as the one who actually made the mark as his signature. That certainly is the rule in England. 2 Stark., IV., 239; 1 B. & Ald. 19; 1 Exch. 511.

In South Carolina we have to the same point, 1 McM. 305; 2 McC. 138; 2 Brev. 200. And the last case upon the subject, where the English and South Carolina authorities are reviewed by Judge Withers. 11 Rich. 318.

3. In the case in hand, there is nothing going to show the identity of Sarah Hane with the deed in question.

(1.) If the probate before the magistrate could be evidence in the cause, (which it is not,) the witness, Mordecai, does not say that he saw Sarah Hane, to him personally known, sign, seal and deliver.

(2.) The paper signed by R. Holmes does not identify Sarah Hane with this deed, nor does it identify the lot of land described in the deed, for Sarah Hane had several lots of land in Columbia.

(3.) Nor is the paper itself evidence, being an acknowledgment, not of Sarah Hane, nor by any one in the presence of Sarah Hane. This certainly could not affect her nor her property; nor does the testimony of R. D. Senn throw the least light upon the subject.

April 15th, 1879. The opinion of the court was delivered by

McIVER, A. J. The question in this case is whether the testimony offered by the plaintiff to prove the execution of a deed from Sarah Hane to the plaintiff's testator, Henry Lyons, was sufficient to allow the case to go to the jury. The Circuit judge, not regarding the testimony as sufficient, non-suited the plaintiff, and upon that error is assigned. The deed in question purports to have been signed by Sarah Hane with a X mark, in the presence of two subscribing witnesses, both of

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whom were dead at *the time of trial. It bears date June 5th, 1855, and appears to have been duly proved and recorded on the day of its date. The plaintiff proved the handwriting of the two subscribing witnesses and their death, and also proved by Levin, that as agent of the plaintiff, he paid the state and city taxes on the lot in controversy, which said deed purports to convey, from the year 1866, when plaintiff left the city, until the year 1869 or 1870, upon an understanding with Richard Holmes, who was the husband of Sarah Hane, that he would refund the amounts so paid, as he had agreed with the plaintiff to pay the taxes as long as he occupied the premises; and that he continued to pay the taxes until the defendants raised the question as to the ownership of the property. R. D. Senn also proved that the said Richard Holmes, under whom the defendants claim, executed in his presence a paper, of which the following is a copy:

"The sale of the lot, made by my wife Sarah, to the late Henry Lyons, deceased, has my consent, with the verbal conditions this day reduced to writing by J. C. Lyons.

(Signed) "R. Holmes.

"Columbia, March 14th, 1860."

Witnessed by R. D. Senn, who testified that at the execution of this paper there was some talk between Lyons and Holmes about the occupancy by Holmes and wife of the lot of land now in controversy, but he could not say what were the precise terms of the verbal conditions which this paper shows were that day reduced to writing. It seems to us, that even under the most stringent rule which can be deduced from our cases, the testimony offered was amply sufficient to allow the question of the execution of the deed to go to the jury. The deed bore date more than twenty years before it was offered in evidence, and for that length of time it had been spread upon the public records of the country. All the parties to it were dead, including both of the subscribing witnesses. The supposed grantor was not only an illiterate woman, unaccustomed to write, but actually unable to write. All this, taken in connection with the testimony of Levin and Senn, afforded much stronger proof than that which has been held sufficient in some of our cases. In Hopkins v. De Graffenreid, 2 Bay 187, the question, as in this case, was wheth-

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er the *testimony offered to prove the execution of a deed was sufficient to go to the jury. The deed purported to have been executed by Thomas and Dorothy Moore, and the handwriting of the two subscribing witnesses, one of whom was dead, and the other out of the state, was duly proved, as was also the handwriting of Thomas Moore, but the handwriting of Dorothy was not proved. The court, while admitting the general rule of law "as laid down in 3 Burr. 1247, and Doug. 89, 90, (which, however, will be found not to lay down any such rule,) that it is necessary after you have proved the handwriting of the witnesses, then to prove the handwriting of the party to the bond or deed," said that this case formed "a strong and marked exception to the general rule," because the handwriting sought to be proved was that "of an old and infirm woman who did not sign her name more than once probably in fifty years, and it was next to an impossibility to find a man living who could prove her handwriting," and, therefore, they applied the rule that "where the best evidence a thing is capable of cannot be procured, then the next best ought to be admitted, not as conclusive, but as presumptive evidence of the fact." The non-suit was, therefore, set aside in order that the testimony might be submitted to the jury. So in Young v. Stockdale, 2 McC. 531, a deed twenty-six years old, but whether recorded or not does not appear, was held to be sufficiently proved by proof of the handwriting of the grantor and one of the subscribing witnesses, all the parties being dead, and the other subscribing witness, a young man at the date of the deed, and his handwriting unformed, and, therefore, very difficult, if not impossible to be proved. In Shiver v. Johnson, 2 Brev. 397, it was held that where the maker of a note signs by his X mark, and the subscribing witness is out of the state, proof of the handwriting of the witness will be sufficient proof of the execution of the note, "from the necessity of the case." To the same effect is Whitaker v. Bussey, 2 N. & McC. 374; see also Collins v. Lemasters & Lee, 2 Bail. 141, for a case in which very slender proof was not only allowed to go to the jury, in proof of the execution of a bond signed by a marksman, but which, upon appeal, was held sufficient to sustain the verdict notwithstanding the fact that the evidence adduced

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by the defendant, after his *motion for a nonsuit was overruled, contradicted that offered in behalf of the plaintiff.

There does appear to be some conflict in the decisions in this state as to what shall be sufficient evidence of the execution of an instrument to which there are subscribing witnesses, when the testimony of such witnesses cannot be obtained, but such conflict arises mainly, as we think, from the fact that certain dicta are thrown in some of the cases, which, in subsequent cases, are erroneously quoted as authority. The case of Oliphant v. Taggart, 1 Bay 255, decided in 1792, which is sometimes cited to show that, in this state, it is necessary to prove the handwriting of the obligor or grantor, as well as that of the subscribing witnesses, seems to be the first case upon the subject. The case, however, does not establish any such doctrine. The action was upon a bail bond, purporting to have been executed in the presence of one witness who had left the country prior to the trial. The plaintiff offered to prove the handwriting, not only of the witnesses, but also that of the obligor; but the counsel for the defendant objected, "under the circumstances of the case," and produced the affidavit of the subscribing witness, made prior to his departure for France, in which he swore positively that he had never seen the defendant sign the bond in question. Thereupon the court said that the evidence offered was legal and proper, but, in view of the fact stated in the affidavit submitted, it would be improper to let the case go to the jury then, and directed a commission to issue for the examination of the subscribing witness. The next case is that of Hopkins v. De Graffenreid, decided in 1798, supra, which has already been commented on. Hopkins v. Albertson, 2 Bay 484, decided in 1803, simply holds that in order to prove a will as a link in a chain of title to real estate, where all three of the subscribing witnesses are dead, it is necessary to prove the handwriting of all three of the witnesses, but no question was raised, and nothing was said, as to the necessity of proving the handwriting of the testator also. Myers v. Taylor, 1 Brev. 245, decided in 1803, held that in an action on a bond it was necessary to prove the handwriting of the subscribing witnesses, in proof of the delivery of the bond, as well as that of the obligor. The report of the case does

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not *show that any question was raised as to the necessity of proving the handwriting of the obligor, for, that having been proved, the only question was whether it was not necessary to prove, also, the handwriting of the subscribing witnesses. In another report of this case, under the style of Meyers v. Taylor, 2 Bay 506, Judge Bay appends an "N. B.," in which he says that the judges in a subsequent case, the name of which he does not give, upon a reconsideration of the point, held that the rule had been laid down too strictly, and that proof of the handwriting of the obligor would be sufficient without proof of the handwriting of the subscribing witnesses. The case referred to is probably that of Madden v. Burris, 1 Brev. 387, decided in 1804, in which the court held that the endorsement on a note, to which there was a subscribing witness, was sufficiently proved by testimony that such endorsements were genuine without producing the subscribing witness to the endorsement, or proving his handwriting. The next is Gervais v. Baird, 2 Brev. 37, decided in 1806, in which the action was on a note signed with a X mark, to which there was a subscribing witness, who was not produced, nor was any proof of his handwriting offered, but another witness proved that the defendant was in the habit of making her mark in the same manner in which it was made on the note, and said that he believed the mark was hers: Held, that the proof was sufficient upon the authority of Madden v. Burris, supra.

It is true, that Grimke, J., in delivering the opinion of the court, did say: "Proving the handwriting of the subscribing witness would not be sufficient." This remark is, however, clearly nothing more than an obiter dictum, and not called for by anything occurring in the case, as it does not appear that there was any offer or attempt to introduce such proof. Paisley v. Snipes, 2 Brev. 200, decided in 1807, was an action on a note purporting to have been signed by the defendant with a X mark, to which there was a subscribing witness, who, it was admitted, was a resident of the state. The court held that proof of the handwriting of such witness was not sufficient, upon the authority of Gervais v. Baird, in which, as we have just seen, the question did not arise. A better reason for the decision was, however, suggested, based upon the construction of the act of 1802,

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*which seemed to require, in the absence of the subscribing witness, proof of the signature of the maker or obligor, and, therefore, proof of the signature of the subscribing witness would not fulfill the requirements of the act. The court does go on to say: "If the maker of the note be a marksman, that circumstance will not avoid the necessity of proving his signature. In many instances the mark of a man who cannot write can be known and distinguished, and, therefore, the case admits of the same proof that is necessary in cases where the maker can write. But if the mark cannot be proved in this way, it must be proved by the subscribing witness to the note, or by some other person who was present and saw the mark made." These remarks were plainly not necessary to the decision of the question arising in that case, for, as the subscribing witness was admitted to be a resident of the state, it was

clearly insufficient to prove his handwriting. They may, therefore, be regarded as mere dicta; and this we are fully warranted in saying, for in the very next case upon this point, decided by the same court, in 1810, (Shiver v. Johnson, 2 Brev. 397), as we have seen above, the contrary was held, the court saying: "The signature of a marksman may be proved by the peculiarity of his mark, [as in Gervais v. Baird, supra,] or his acknowledgment, if the witness whose name is subscribed to the note does not attend; and proof of the handwriting of such witness is not sufficient, if he be within the state, [as in Paisley v. Snipes, supra;] but if the subscribing witness be not within the state, proof of his handwriting is sufficient from the necessity of the case." This doctrine has been affirmed in the still later case of Whitaker v. Bussey, decided in 1820. The next case is Cornneil v. Bickley, 1 McC. 466, decided in 1821, of which there is no report, except that the point decided is stated to be that where the subscribing witnesses to a deed are out of the state, their handwriting must be proved, notwithstanding the fact that the handwriting of the grantor has been proved, and, therefore, throws no light upon the question under consideration, although it is sometimes cited to sustain the proposition that it is necessary to prove the handwriting of the obligor or grantor, as well as that of the subscribing witnesses. Next comes the case of Plunket v. Bowman, 2 McC. 138, de-

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cided in 1822, which is much *relied upon by the respondents, and serves as a basis for the case of Russell v. Tunno, which will be hereinafter considered. In Plunket v. Bowman, the action was on a bond. The subscribing witness being dead, his handwriting was proved, and the question was, whether this was sufficient proof of the execution of the bond. It was held that it was not, as the next best evidence, where the subscribing witness is inaccessible, is proof of the handwriting of the obligor, with the additional proof of the handwriting of the subscribing witness. It will at once be seen that the rule thus laid down is manifestly inconsistent with the terms of the act of 1802, and the decisions construing that act; as it is certainly well established now that proof of the signature of the obligor, except where the defendant denies such signature under oath, is sufficient proof of the execution of the bond, and that "the additional proof of the handwriting of the subscribing witness" is wholly unnecessary. Hence it is entirely true, as Johnston, J., said, in the subsequent case of Edgar ads. Brown, 4 McC. 91, that the argument of the court (Plunket v. Bowman) proceeds entirely on the common law rule, and the provisions of the act of 1802 are wholly overlooked. This, however, is not so important to the immediate point we have under consideration, and is only adverted to for the purpose of showing that the case was not so carefully considered as to give it that weight to which it would otherwise be entitled. What is more to the point is that in the decision of the court in this case, not a single one of the decisions in this state upon the subject is referred to. Gantt, J., who delivered the opinion, rests his decision entirely upon the doctrine "that the best evidence is to be produced which the nature of the case admits," and argues that you have not got the best evidence until you have proof of the signature of the obligor, and hence he deduces the rule that to prove the execution of any instrument to which there is a subscribing witness it is necessary to prove not only the signature of such witness, but also that of the maker. He admits that Phillips, in his Treatise on Evidence, and he might have said Starkie, also, lays down the rule differently, but he undertakes to show that the two cases upon which Phillips relies, (Prince v. Blackburn, 2 East 250; Adams v. Kers, 1 Bos. & Pul. 360), do not sustain his

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position. It is very *true that the former case can hardly be regarded as authority for the rule laid down by Phillips, because, although the only evidence offered in that case was proof of the handwriting of the subscribing witness, yet, as no question was raised as to the necessity of proving also the handwriting of the obligor, it cannot be considered as decisive of the point. But the case of Adams v. Kers is directly in point, and fully sustains the proposition laid down by Phillips and Starkie. For, in that case, the question was distinctly made. The only proof offered was that of the handwriting of one of the subscribing witnesses, and it was insisted that it was necessary to prove also the handwriting of the obligor. Butler, J., held that it was not, saying: "In this case, one of the attesting witnesses was dead, and the other was beyond the reach of the process of the court; the best evidence, therefore, which could be obtained was given. The handwriting of the obligor need not be proved; that of the attesting witness, when proved, is evidence of everything on the face of the paper, which imports to be sealed by the party."

Judge Gantt, however, concludes his opinion by saying, that when it is impossible to prove the handwriting of the obligor and of the subscribing witness, "I will not say but that the one or the other may be dispensed with, provided it is manifest that nothing is kept back, and that the best evidence which the nature of the case admits of has been produced." So that even this case can scarcely be regarded as establishing, as an absolute rule, that the signature of the obligor must, in all cases, be proved. In Sims v. De Graffenreid, 4 McC. 253, decided in 1827, the only point that seems to have been raised was whether proof of the handwriting of one of the subscribing witnesses to a deed, who was

dead, was sufficient; the witness who proved this knowing nothing of the grantor or of the other subscribing witnesses, and it was held that it was not. It is also said: "The signature of the grantor and of the other subscribing witness, if he were dead or out of the state, should have been proved." The case is, however, so meagerly reported that it is impossible to say whether this is the language of the court or only that of the reporter, for the whole case seems to be nothing more than a mere abstract. But, even if it were the language of the court, it cannot be

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re*garded as authority, as to the necessity for proving the handwriting of the grantor, for the only question seems to have been whether proof of the handwriting of one of the subscribing witnesses was sufficient. The question does not seem to have been what proof would be sufficient, but whether the proof offered was sufficient. The case of Trammell v. Roberts, 1 McM. 305, decided in 1841, really decides nothing on the point under consideration. The sole question raised in that case was, whether it was necessary to examine the subscribing witness to a note, who was a resident of the state, when the defendant filed with his plea an affidavit that the signature to the note was not his, after it had appeared in evidence that the defendant had admitted that his name had, under his authority, been signed to the note by another, and it was held that as the affidavit filed took the case out of the provisions of the act of 1802, under the stringent rule of the common law, the subscribing witness must be produced, if within the reach of the process of the court. Richardson, J., in delivering the opinion of the court, does use this language: "In such a case, and at common law, the subscribing witness must have testified in person, and in case he was beyond the jurisdiction of the court, then other witnesses, by proving his handwriting and the signatures of the makers of the note, would furnish legal, though secondary, evidence of the same facts," and for authority he refers to 1 Stark. 126–30. This, however, is nothing more than a dictum; and while it is sustained by the authorities cited, so far as the necessity for producing the subscribing witness, or proving his handwriting, if he is beyond the jurisdiction, is concerned, it is not only not sustained but directly contradicted by the author cited, so far as the necessity for proving the handwriting of the obligor is concerned. For, in 1 Stark. on Ev. 341, it is said: "It seems, however, to be now perfectly settled, for the reason already given, that evidence of the signature of one of the attesting witnesses alone is sufficient, as in the case of Adams v. Kers, where it was proved that one witness was dead and that the other was in Jamaica, and proof of the handwriting of the deceased was held sufficient, without proof of the handwriting of the other witness or the obligor." The next case is that of State v. Chaney, 9 Rich. 438, decided in

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1856, in which it was held *that a bill of sale of personal property could not be received in evidence upon mere proof of the handwriting of the subscribing witness. But as there was no testimony as to whether such witness was or was not within reach of the process of the court, the case is of no authority upon the point in question. Then comes the case of Russell v. Tunno, 11 Rich. 303, decided in 1858, upon which the respondents in this case chiefly rely. In this case one of the questions was as to the execution of an assignment, purporting to have been executed in New Orleans, by Russell, in the presence of two witnesses, La Roque and Monaghan. To prove the assignment three witnesses were examined by commission in New Orleans, La Roque being one of them. He testified that he did not know any of the parties to the suit, one of whom, it will be observed, was the supposed assignor; that he remembered nothing whatever about the execution of the deed; signed his name as a witness; believed the signature of Monaghan to be genuine, as he was acquainted with his handwriting; did not know what was done with the deed of assignment; believed the notarial certificate attached to it to be in the handwriting of Monaghan, and the signature and seal thereto to be genuine; knew nothing whatever about Russell. The other two witnesses proved the signature of Monaghan, the notary, and that he had left New Orleans clandestinely and gone to parts unknown. Upon this testimony the Circuit judge allowed the question as to the execution of the assignment to go to the jury, and, on appeal, the court held that "some evidence was necessary in addition to what was adduced on the Circuit to show the due execution of the assignment by Russell, as proof of his handwriting or something else, to connect him with the instrument before the paper could go to the jury." This decision was by a divided court —three to two—the sixth judge being absent. In delivering the opinion of the court, Withers, J., said: "This question, also, is attended by contrariety of decision, for there is not uniformity of opinion in English or American cases, perhaps, we may say, not even among our own. We have, however, a rule prescribed in Plunket v. Bowman, 2 McC. 138, which we think it proper to follow so far forth as this, that where a subscribing witness to an instrument is dead, or beyond the jurisdiction, something more than merely proof of

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*his handwriting is required before the defendant shall be held connected with the paper as maker." He then proceeds to comment on Edgar ads. Brown, 4 McC. 91, in which it was held that proof of the signature of the obligor to a bond, executed in Delaware, without any proof as to the signature

of the subscribing witnesses, who were not within the jurisdiction, was sufficient proof of the execution of the bond, saying that it was in conflict with Myers v. Taylor, 1 Brev. 245, but overlooks the fact that the last-named case had been overruled by Madden v. Burris, supra, and Gervais v. Baird, supra. He also cited Paisley v. Snipes, 2 Brev. 200, to show that proof of the signature of the maker was necessary, ignoring the important fact that, in Paisley v. Snipes, the subscribing witness was admitted to be a resident of the state, and that precisely the contrary had been held in the subsequent case of Shiver v. Johnson, supra, where the subscribing witness was not a resident of the state. He also relies upon Trammell v. Roberts, 1 McM. 305, quoting the language of Richardson, J., hereinbefore quoted, which, as we have seen, was not only a mere dictum, but unsustained by the authority cited to support it, so far as the necessity for proving the handwriting of the obligor, in addition to that of the subscribing witness, is concerned. The learned judge then proceeds to show that the testimony of the subscribing witness who was examined, instead of strengthening rather weakened the evidence of the execution of the assignment, for he knew nothing whatever of Russell, and nothing as to the delivery of the deed or what disposition was made of it. "He shook if he did not rebut such presumption as might have arisen from proof of his handwriting merely, where that might have been accepted." The English authorities relied upon in this case, are Parkins v. Hawkshaw, 2 Stark. (N. P.) 239; 3 E. C. L. R. 332; Nelson v. Whittall, 1 B. & Ald. 19; Whitlock v. Musgrove, 1 Exch. 511. But in Parkins v. Hawkshaw the precise question which we are considering did not arise, as there was no attempt to prove the bond by proof of the handwriting of the subscribing witness. On the contrary, such witness was himself examined, and he testified that he saw the bond executed by a person who was introduced as Hawkshaw, and though he gave some description

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of his person *he could not identify him with the defendant in the case. In Nelson v. Whittall, Bailey, J., expressed his dissatisfaction with the rule laid down by Phillips, that proof of the handwriting of the attesting witness is sufficient, where such witness is beyond the jurisdiction, and thought that such testimony alone was not sufficient to connect the defendant with the note, but that something more should be required. In Whitlock v. Musgrove, which was an action on a note purporting to be signed by a marksman, it was held that, while it was not necessary to prove the signature of the maker, it was necessary, in the absence of such proof, to prove "something else to connect the party sued with the instrument." The authority of these cases, however, must certainly be regarded as very much shaken by the more recent cases of Sewell v. Evans and Roden v. Ryde, 4 A. & E. (N. S.) 626. See, especially, the remarks of Lord Denman, C. J., and Patterson, J., in the latter case.

The last case among the decisions in this state which we have been able to find upon this subject is that of Jones v. Jones, 12 Rich. 116, decided in 1859, in which it was held that where the attesting witness to a note, signed with a + mark, was a free person of color, proof of his handwriting is not sufficient proof of the execution of the note, for the very obvious reason, as the court says, that "the witness could not have been called, not by reason of any intermediate disability supervening, but originally by reason of status; a fortiori, the proof of his handwriting merely was more objectionable." It is very true that the court, per Withers, J., does proceed to add these words: "But if he had been competent to attest and to prove the deed, and had died, such evidence as was offered would be insufficient. Other evidence of the defendant's signature would have been necessary still," for which Russell v. Tunno, supra, is cited as authority. But these words were not only clearly unnecessary to the determination of the question raised in the case, but the authority cited does not go to the extent of holding that "other evidence of the defendant's signature would have been necessary still," in such a case, for it is conceded in Russell v. Tunno that in case of a paper purporting to be executed with a mark,

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proof of the *handwriting of the subscribing witness would, under our decisions, be sufficient.

In New York the question seems to be settled, and there proof of the handwriting of the subscribing witness, when such witness is beyond the jurisdiction, seems to be sufficient without proof of the handwriting of the obligor or grantor. Mott v. Dougherty, 1 Johns. Cas. 230; Shuby v. Champlin, 4 Johns. 461; Davis v. Kimball, 19 Wend. 437.

From this review of the cases it will be seen that it cannot be said that there is any well-established rule upon the subject of universal or even general application; and while, perhaps, it would have been better to have adhered to the rule laid down by Phillips and Starkie as simple, definite and of easy application, well sustained, as it is, by high authority, we do not feel called upon to overrule the case of Russell v. Tunno, but are not willing to extend the rule there laid down beyond what that case imperatively demands. Conceding, however, the full force of that rule, we think that the testimony adduced in this case was amply sufficient to require that the question of the execution of the deed from Sarah Hane to Henry Lyons should have been submitted to the jury. For that rule does not require that the signature of the obligor or grantor shall be proved in addition to proof of the handwriting of the sub-

scribing witnesses, but only that something more than mere proof of the handwriting of the subscribing witnesses is necessary; and in this case, as we have seen, there was something more than such proof. In addition to this it is conceded, as we have just said, in Russell v. Tunno, that in case of paper purporting to be signed with a + mark the rule is different under our decisions.

The judgment of the Circuit Court is set aside and a new trial ordered.

New trial granted.

WILLARD, C. J., and HASKELL, A. J., concurred.

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11 S. C. *445

*(Case No. 711.)

BENJAMIN SLOAN, Administrator of W. K. Easley v. EMMA M. WESTFIELD, Administratrix of John Westfield.

(November Term, 1878.)

[1. *Equity* ⇐382.]

A motion on the law side of the court, before the judge presiding, for a new trial on the minutes of an issue ordered out of chancery, upon the ground that there was no evidence to sustain the verdict of the jury, is irregular and properly refused. Flinn & Hart v. Brown, 6 S. C. 209, explained.

[Ed. Note.—Cited in Whitesides v. Barber, 22 S. C. 50.

For other cases, see Equity, Cent. Dig. § 818; Dec. Dig. ⇐382.]

[2. *Equity* ⇐381.]

A judgment entered up upon the verdict in such case, without further proceedings in the original cause in chancery, is erroneous, and upon proper motion should be set aside.

[Ed. Note.—Cited in Charlotte, C. & A. R. Co. v. Earle, 12 S. C. 54; Thorpe v. Thorpe, Id., 168; Ivy v. Clawson, 14 S. C. 273; Cooper v. Smith, 16 S. C. 333; Peake v. Peake, 17 S. C. 427; Brownlee v. Martin, 21 S. C. 402; Keenan v. Leslie, 79 S. C. 476, 60 S. E. 1114.

For other cases, see Equity, Cent. Dig. § 813; Dec. Dig. ⇐381.]

[3. *Appeal and Error* ⇐987.]

[In a trial at law it is only for errors at law that the case can be brought before the Supreme Court for correction, while in chancery there is a general appellate jurisdiction, and the whole matter would be subject to review, and the evidence might be examined, and the correctness of the finding subjected to the judgment of the Supreme Court.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3895; Dec. Dig. ⇐987.]

Before Cooke, J., at Greenville, January Term, 1878.

The facts are more fully stated in the opinion of the court than in the brief. The jury found a verdict for the plaintiff, whereupon defendants moved upon the minutes of the court for a new trial, upon the ground, substantially, that there was no evidence to sustain the verdict. The motion was refused, and defendants appealed.

Messrs. Simpson & Moore, for appellants.

Messrs. Earle & Wells, for respondents.

April 15th, 1879. The opinion of the court was delivered by

HASKELL, A. J. The appeal is from a refusal on the part of the Circuit judge to grant a new trial. Facts, which are of importance, are not clearly set forth in the statement of the case, and it becomes necessary that the nature of the original proceedings, as elicited at the hearing of the appeal, be stated. The party represented to be the plaintiff claims to be a creditor of the estate represented by the defendant. A proceeding in the nature of a creditor's bill, or of such character, it seems, had been instituted, and Benjamin Sloan, as administrator of Easley,

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came *in with other creditors to establish his claim. The claim was resisted in toto, and the Circuit judge made an order stating the fact in dispute, and directing a trial of that issue by a jury. Code, § 95; Rev. Stat. 587. There was, therefore, no such independent action at law as the title to the case in appeal would indicate, but the trial of an issue of fact arising out of another case of which the title is not stated. That case, although in the Court of Common Pleas, and in the form prescribed by the code of procedure, is of the nature of a case in chancery, and subject to the rules of distinction which exist between proceedings at law and in chancery under the constitution of 1868. That instrument recognizes the division of jurisdictional powers, although it confers both powers upon the same judge, and vests the Court of Common Pleas with jurisdiction in all matters of equity as well as law. The Code of Procedure, Section 92, abolishes all distinctions in form between legal and equitable proceedings. But the substantial difference, and the rules of practice essential thereto, are alike retained by the constitution. One of these instances is thus provided for in Section 95 of the code, as follows: "Feigned issues are abolished, and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial." See, also, Rev. Stat., p. 632, § 277. Such was the order in this case, viz., for a trial as under a feigned issue. The jury found for the "plaintiff," and the "defendant" moved, forthwith, before the judge who heard the issue, asking for a new trial upon the ground that there was no evidence to sustain the verdict. The motion was refused.

The first question is whether, under such circumstances, such motion was regular. The

case of Flinn & Hart v. Brown, 6 S. C. 209, is in some respects different from this, but is important. "The subject matter of the [that] suit looking to the end it proposed, and the character of the relief which it claimed on behalf of the plaintiffs, constituted it 'a case in chancery,' as distinguished from one at law, and its mode of trial must

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be in *conformity with the rules and course of procedure prescribed for the trial of 'cases in chancery.' Sullivan v. Thomas, 3 S. C. 547." The only question which the jury could try in that case was that of fact as to whether "the additions to the deed were made by James M. Brown, Sr., after its execution." But the judge charged the jury in this way: "If the additions to the deed were made by James Brown, Sr., after its execution, under all the circumstances, it would render it void." He thus submitted to the jury the determination of the whole cause, and the jury found accordingly that the deed was void. The motion was made for new trial because of error in the judge's charge, but was refused and judgment entered up. The appeal went up, not from the order refusing new trial, but from the judgment, which was the final judgment in the cause. The decision on the appeal was not because of error in not granting a new trial by jury, but was upon the final judgment and remanding the case "to the Circuit Court for hearing." The case, so far from being authority for a motion for new trial of such issue, is, in its whole purport, to the contrary, although that point was not directly in question. The decision is founded upon the constitutional provision which distinguishes chancery from cases at law, and upon the well-recognized principle that the verdict of a jury upon such an issue is not binding, but is merely to "relieve and ease the conscience of the court," and, in fact, may be disregarded by the judge in the execution of his chancery power. The Circuit judge's error was on that point. He treated the whole matter as an action at law the moment the jury came in to the trial. It was a proceeding in equity, and the rulings on that point are all to which we refer as specially applicable to the case before us. There is an expression, however, in the opinion on which it may be well to remark to prevent misconstruction. It is said, "the verdict cannot be allowed to stand." It may be argued from those words that the court was really considering the motion for a new trial of the issue of fact. The context and the whole reasoning will show that to be a mistake, and that the court was considering not the verdict, but the adoption of it by the judge, and the reasons for his decision on that point, and his judgment based on the verdict. "It was within his

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power," the Supreme *Court says, speaking of the ruling of the Circuit judge, "entirely to have disregarded the verdict, and decreed in the face of it. But when he adopts it, not because it concurred with his own views of the testimony, but simply because it is the verdict of the jury, and must, therefore, control him; if he has erred in his instructions as to the law on a point made material by the effect which was given to it in his charge as an element necessary for the consideration of the jury, the verdict cannot be allowed to stand." That is to say: The first error on the part of the judge was to consider himself bound at all by the verdict, and the second was that even if he had regarded the verdict in its proper light, but had given it weight in his decision, the latter was a mistake, because the charge in the law branch of the case—the trial of the issue of fact by jury—was totally wrong, and calculated to mislead the jury, and should have deprived the verdict of all weight. To recur now to the point directly in question was the motion for a new trial proper. Could it be considered by the Circuit judge? This must be answered by reference to the rules of chancery practice. It makes no difference that whether by accident or that statute, as it then stood, the judge before whom the suit in chancery was and the judge who presided at the trial of the issue by jury, chanced to be the same person. The functions of the office are distinct, and the unity of the person only renders it the more important that the duality of those functions should be rigidly preserved. The recent change in the statute, by which the circuits are alternated among the judges, practically remedies much of the confusion which was arising under the former system. What was the practice in equity, under similar circumstances, is thus stated: "If the party against whom the verdict is found is dissatisfied with it, and wishes for a new trial, he must make application for it to this court, [viz., the Court of Chancery,] in which respect the practice upon issues differs from the practice upon actions at law brought under the direction of the court, a new trial for which must always be moved for in the court in which the action is brought. The reason for this distinction is laid down by Lord Eldon to be that if this court thinks proper to consider the case upon the record as fit to be gov-

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erned by the result of a *trial, the review or propriety of which belongs to a court of law, the opinion of a court of law is sought in such a form that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape; but upon an issue directed, this court reserves to itself the review of all that passed at law; and one principle upon which the motion for a new trial is made here, and not to the court of law, is, that this court regards the judge's report with a view to determine whether the information collected before the

jury, together with that which appears upon the record, is sufficient to enable it to proceed satisfactorily, to which it did not conceive itself competent previously." 3 Dan. Ch. Pr. *747. It is possible, and, indeed, not unfrequent, that the latter occurs, and the reason which would demand a new trial in the court of law, upon the ground, for instance, that the verdict is directly contrary to the evidence, would render another trial of the issue totally unnecessary to the Chancellor or the judge sitting in equity. The conclusiveness of the evidence furnishes all that equity needed. Thus the strongest reason for a new trial at law is the best reason why it would be denied on an issue emanating from a case in equity. "The consequence of the principle above laid down is that there is a material difference between courts of law and courts of equity in the rules by which they are guided in granting new trials." It will sometimes be granted in equity, where the verdict is against preponderating evidence, or rather against the weight of the testimony, especially, it is said, where the judge intimates in his report that he is not satisfied with the verdict; while in law it is granted either because the verdict is against evidence or is without any evidence to sustain it, or for excessive damages, &c. But neither in point of practice nor of law is the verdict conclusive, although new trial be refused when the trial is an issue sent from chancery. Sometimes, however, it is made conclusive by the court's having made that a condition of the order granting a trial of an issue of fact. 2 Story's Eq. Jur., §§ 1478–9, note a. The practice in this state was the same as laid down by the above authorities.

"Issues to the court of law are directed by this court (that of equity) for the purpose of informing the conscience of the Chancellors, and if this purpose be achieved we do not

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examine the *process very narrowly. If, upon a particular issue, we might suppose that the law court was in some error as to the law, we should not grant a new trial of the issue upon this express ground, for this would imply the arrogant pretension on our part that we understood the law better than those to whom its administration was committed by the polity of the state. But we would look to the materiality or the importance of the supposed error. If the verdict were, upon the whole, satisfactory, no notice would be taken of minute departures from our notions of principle or procedure. But, if we regarded the supposed mistakes of the court trying the issue to be so material that our consciences were not satisfied as to the general result of the trial, while we should not undertake to rectify the rulings of the other court, we might order the parties to try the issue again, and request of the other court that a particular course should be pursued as to the points on which we were dissatisfied." Thomasson v. Kennedy, 3 Rich. Eq. 440.

Neither the rules nor the reasons for them are changed by the alternation in the form of procedure, or by the powers of law and equity having been vested in one court.

In the case of Railroad Company v. Toomer, 9 Rich. Eq. 270, an issue of fact having been sent to the court of law, it is said that if an action "had been ordered the appeal would have been to the law court of appeals from the trial had, otherwise when the order is of an issue or an issue in the nature of an action. In such cases the motion must be made on the return of the issue in the court from which it emanated, not by way of appeal, for another issue or a new trial, if that court is not satisfied with what has been done." For a succinct statement of the practice, and the reasons for it, see, also, Adams' Eq. pp. *377–8.

The importance of a ruling upon this point is obvious, and the more so, when we call attention to the fact that under the constitution, the question whether the trial was at law or in equity involves the rights also of the parties on an appeal to this court. For, in a trial at law it is only for errors at law that the case can be brought before the court for correction, while in cases of chancery there is a general appellate jurisdiction.

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If, for instance, *the trial of such an issue is an action at law, exclusively within the jurisdiction of the judge presiding at the trial of the issue, and subject to his ruling on the question of new trial, nothing could be corrected by this court but error at law on the part of the judge; while, on the other hand, if the question had pursued its proper course, and had come up in the case from which it arose, the whole matter would have been subject to review, and the evidence might have been examined and the correctness of the finding subjected to the judgment of this court. It is unnecessary to dwell further. The motion for a new trial was entirely irregular and was properly refused.

The verdict, together with the judge's notes of the evidence, with any exceptions to his rulings on questions of law, should have been sent over to the chancery side of the court and made a part of the original proceeding. It was, however, stated by the attorneys on both sides that judgment had been entered up on the verdict as if the trial had been in a separate action. The appellants urged that they appealed to stay the execution of said judgment, and the respondent, in a preliminary motion to strike the case from the docket, urged that the motive on the part of the appellants was to retard the execution of said judgment. The matter was thus forced upon the attention of the court, and while it is not before the court for adjudication, for the appeal is not on a motion to set aside the judgment, the court, nevertheless, feels

called upon to say that such practice is entirely erroneous, and that upon proper motion such judgment should be set aside. To frame an issue was never intended to be the means of giving a preference or advantage to any party in a proceeding arising on the chancery side of the court.

The appeal is dismissed.

Motion refused.

Appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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11 S. C. *452

*(Case No. 713.)

THE CENTRAL NATIONAL BANK v. AMY G. ADAMS.

(November Term, 1878.)

[*Bills and Notes* ⟸421.]

Notice of dishonor of a promissory note was sent by mail, addressed to an endorser in care of the maker, at Adams' Cut, where there was no post-office, under information received by the notary, after the exercise of due diligence, that Adams' Cut was the endorser's post-office; the post-office nearest to Adams' Cut was one of the endorser's post-offices; the notice never reached the endorser or the maker —*held*, that due diligence had been used, and that the endorser was not discharged.

[Ed. Note.—Cited in Diercks v. Roberts, 13 S. C. 343.

For other cases, see Bills and Notes, Cent. Dig. §§ 1186, 1187; Dec. Dig. ⟸421.]

Before Aldrich, J., at Richland, July Term, 1878.

This case came up on appeal from an order of the Circuit judge, confirming the report of Hon. C. P. Townsend, special referee, to whom it was referred to hear and determine the same; he having heard the cause while a Circuit judge, without a jury, by consent, and resigned his office before rendering a decision. The judgment was for the plaintiff. The facts are sufficiently stated in the opinion of the court.

Messrs. W. H. Wigg and J. D. Pope, for appellant.

1. What is the contract of endorsement? 1 Dan. on Neg. Inst. § 667; 1 Pars. on B. & N. 353–356; Story on Bills, § 109; Chit. on Bills *214.

"And in default of notice the party entitled to notice is at once discharged." 2 Dan. on Neg. Inst., § 970; Byles on Bills *231.

2. How can notice be effected? (1.) By mail, addressed to the party at his proper post-office. (2.) By personal service only, if the party resides in the town or city, at his residence or place of business. (3.) By special messenger, if there be no post-office communication, and the party does not reside in the town or city.

If sent by special messenger and a delay longer than by regular mail ensues, this will discharge the endorser. Story on Bills *295; Byles on Bills *220. Where notice is to be

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sent by gen*eral post, it should be in writing and properly directed, or it may be fatal. Story on Bills 300.

3. Has notice been given to Amy G. Adams? If it is contended that notice was sent by mail, we answer: (1) That it was not addressed to Amy G. Adams. (2) That it was not sent to her regular post-office—Grovewood. (3) That it was addressed to no post-office at all, "Adams' Cut" being no post-office. 1 Pet. 580; 1 Am. Lead. Cas. 396, note 400; 2 Rich. 339. It must be duly directed to post-office of endorser and directed to him. Story on Bills 227–382.

The notice here is fatally defective. The bank—(1.) Employed the mail, but directed the letter to no known post-office. This is fatal. (2.) The bank does not direct the notice to Mrs. Adams, at her post-office, but to the care of James P. Adams, not at his post-office even, but to a place that is not a post-office at all. This is fatal. (3.) The bank uses the mail, but addresses the letter to James Adams, at a place that is not a post-office, and then employs him as the messenger to pick up the letter somewhere, and asks the messenger to deliver the notice to Mrs. Adams. (4.) The evidence shows that Mr. James P. Adams, the bank's messenger, never received the letter. But is it diligence to direct a notice to the endorser and to use as its messenger the very person whose interest it was to destroy the letter and not deliver the notice?

The fatal error on the part of the notary is in addressing to a place, within a few miles, which place was not a post-office. Inquiry at the public post-office would have given the information; to fail to do so was negligence.

Mr. F. W. McMaster, contra.

1. The notary exercised all the diligence required by the law. Dan. on Neg. Ins., § 1115; 2 Rich. 338; Chamb. on Com. & Neg. Pa. 147; Story on Bills, § 300.

2. As to the post-office. Pars. on Notes 490, 495, 522, 527; Story on Bills, § 387; 1 Johns. 294; 1 Pet. 580; 2 Pet. 547–552; 1 Pick. 401; Dan. on Neg. Ins., § 1015, notes.

3. Inquiry sufficient. 21 Wend. 643; 9 How. 552.

4. Mrs. Adams at fault. Chamb. on Com. Pa. 148.

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*April 15th, 1879. The opinion of the court was delivered by

McIVER, A. J. This was an action against the defendant as endorser of a negotiable note, and the sole question raised by the appeal is whether the plaintiff used due diligence in giving notice of the dishonor of the note. The facts are undisputed, and are as

follows: On the 25th of September, 1875, James P. Adams executed his note payable to Amy G. Adams, who, as an accommodation, endorsed the same to the plaintiff. The note not being paid at maturity, it was protested, and notice of non-payment was, in due time, sent by mail, postage pre-paid, in a letter addressed to "Amy G. Adams, care of James P. Adams, Adams' Cut." There was no such post-office as Adams' Cut, but the instructions to mail agents, in case a letter is directed to a place where there is no post-office, are to leave it at the nearest post-office, and Gadsden is the nearest post-office to Adams' Cut, on the South Carolina railroad. The appellant lives equidistant between Gadsden and Adams' Cut, and letters for her frequently came to Gadsden, which were taken out by her friends and servants. The letter containing the notice in question was never received, either by Mrs. Adams or James P. Adams. The regular post-office of appellant, "until the last two years," was Gadsden, since which time Grovewood has been her post-office. Owing to the want of date as to when the testimony was taken, it is impossible to say when these "last two years" commenced to run, and as the case does not show the date of the trial, we have no means of determining when it was that appellant's post-office was changed from Gadsden to Grovewood, or whether such change had been made before or after the maturity of the note. All that we know is, that the note became payable on the 5th of October, 1875, and the original hearing before Judge Townsend, when the testimony was taken, was some time in the latter part of the year 1877. The appellant lives about a mile and a half from Grovewood and four miles from Gadsden. James P. Adams testified that he never took out Mrs. Adams' letters; that Grovewood was his post-office, but he occasionally got letters directed to him at Gadsden and Hopkins, and that he had received private letters dropped at Adams' Cut, but not through the mails. The notary

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who sent the notice to Mrs. Adams got *his information as to Mrs. Adams' post-office from Walter Fisher, who frequently hunted in that neighborhood; was well acquainted with the residence of the defendant, and was the person from whom the notary always got his information when he wanted to send notices of protest into that neighborhood. When the facts are undisputed the question of diligence is a question of law. Bank of Columbia v. Lawrence, 1 Pet. 578 [7 L. Ed. 269]; Thompson v. Bank, 3 Hill 82 [30 Am. Dec. 354]; Bateman v. Joseph, 12 East 433. And while it is unquestionably the duty of the holder to give notice to the endorser of the dishonor of a note, except in certain cases, not necessary to be mentioned here, he is only bound to use due diligence in communicating the notice, and is not required to see that such notice actually reached the party for whom it is intended. If he employ the usual and ordinary mode of conveyance, he has done all that the law requires of him. Bank of Columbia v. Lawrence, supra. The usual and ordinary mode of conveyance by which such notices may be transmitted, where the parties reside in different places, though in the same county, is the mail. Foster v. Sineath, 2 Rich. 338. And the usage of the officers employed in the various details of the operations of the post-office department, as prescribed by law and the rules and regulations of the department, are proper and important to be considered in determining a question of diligence. Dickins v. Beal, 10 Pet. 579 [9 L. Ed. 538].

Now in this case there is no doubt but that the notice to appellant was mailed in due time, there being no question raised as to that, and the only question is as to whether it was properly directed. It was not directed to any legal post-office, but by the regulations of the post-office department, it was the duty of the mail agent to leave the letter at the nearest post-office, which was Gadsden, so that the question may be considered as if the letter has been directed to Gadsden, which certainly had been the post-office of appellant, and for aught that appears to the contrary in the "case," was still her post-office at the time the notice was sent, though not her post-office at the time of the trial or at the time her testimony was taken. But we are not disposed to rest our decision upon this, and will assume that Mrs. Adams had changed her post-office before the notice

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was sent. Even upon this as*sumption we still think that due diligence was used. For there is no evidence whatever to show that plaintiff knew or had any reason to suppose that she had changed her post-office; and the testimony shows that the letter containing the notice was directed in conformity with information obtained from a person who was likely to know her address. The rule is, that where the holder is ignorant of the address of the endorser, he is only bound to use due diligence by inquiring of persons likely to know to ascertain such address, and if, after using such diligence, the information which he receives, and upon which he acts, proves to be incorrect, it will be sufficient. Harris v. Robinson, 4 How. 336 [11 L. Ed. 1000]; Lambert v. Ghiselin, 9 How. 552 [13 L. Ed. 254]; Chapman v. Lipscomb, 1 Johns. 294. As is said in Harris v. Robinson: "It is enough to send the notices to the place where the information received reasonably requires him to send them. If the place it reaches is the wrong one, he is not then in fault." Whether due diligence has been used in making such inquiries, is a question of fact. Bateman v. Joseph, 12 East 433; Thompson v. Bank, 3 Hill 82-3 [30 Am. Dec. 354]. And that question has been determined against the appellant, both by the referee and the Circuit judge.

In addition to this, the testimony shows that Mrs. Adams continued to receive letters from the post-office at Gadsden; and where persons are in the habit of receiving letters addressed to them at two or more post-offices, a notice addressed to either of such offices will be sufficient. It is not necessary, in such case, that it should be addressed to the office nearest to the residence of the party for whom the notice is intended. Bank v. Carneal, 2 Pet. 551 [7 L. Ed. 513]. In Saco National Bank v. Sanborn, 63 Me. 340, (18 Am. R. 224,) the endorser had lived for many years in the town of Baldwin, but at the time the note upon which the suit was brought, became payable, he lived in the adjoining town of Denmark. The notice was directed to "Baldwin," but there was no post-office of that name, there being three post-offices in the town known by the names of "North Baldwin," "East Baldwin," and "West Baldwin." The notice was sent upon information received from persons most likely to know. It also appeared that at the time of the maturity of the note, there were two directories in common use in Saco which

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gave the defendant's *residence as Denmark: Held, that due diligence had been used. The court uses this language, which we think, is a correct statement of the rule: "Proof that a letter containing the proper information, seasonably put into the post-office, directed to the endorser at the place where, after diligent inquiry, he was supposed to reside, will sustain the averment of notice, although, as matter of fact, the endorser did not reside there and the letter never reached him." And, again, the court says: "If the endorser changes his residence and does not give the holder notice of such change, and he does not, in fact, know it, and is not guilty of negligence in not knowing it, notice sent to his former residence is sufficient. And when nothing has occurred to suggest the idea of a change, no inquiry is necessary." These remarks apply with increased force to a change of post-office, which, of course, is not likely to be so notorious as a change of residence. If, therefore, as we have seen, by reason of the post-office regulations, the notice in this case, though in fact directed to Adams' Cut, was practically sent to Gadsden, the nearest post-office, which, to say the least of it, had been the post-office of defendant up to about the time the notice was sent, the notice was unquestionably sufficient, as there is no evidence whatever that the plaintiff knew or had any reason to suppose that her post-office had been changed.

It is argued, however, that the manner in which the letter containing the notice was directed, Mrs. Amy G. Adams, care of James P. Adams, was objectionable. We are unable to perceive the force of this argument. The usual object of that mode of address is to expedite the delivery of the letter, and so far from its being any evidence of negligence, it would seem to point to a contrary conclusion. If the letter had been directed to James P. Adams, with a request that he would forward the notice enclosed to the defendant, there might be some force in the argument used at the hearing, that the plaintiff had employed Mr. Adams as a messenger to deliver the notice to Mrs. Adams. But such was not the case. The letter was directed to Mrs. Adams, and would have been delivered to her if she had called in person at the post-office or sent an agent or servant for her mail, whereas if it had been directed

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to Mr. Adams it could only have been *properly delivered to him or his order. By the mode of address which was adopted, her chances of receiving it promptly were increased rather than diminished, as, doubtless, was the purpose in using that mode. Nor are we able to perceive the force of the argument that it was anything but diligence to direct a letter containing a notice to the endorser of the nonpayment of a note to the maker of such note—"the very person whose interest it was to destroy the letter and not deliver the notice." For this argument rests upon two assumptions, neither of which is well founded: 1. That the letter was directed to the maker of the note. 2. That a person who receives a letter directed to another in his care, is at liberty to open such letter and acquaint himself with the contents.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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11 S. C. 458

(Case No. 714.)

THE STATE, ex rel. THOMAS P. BRANCH, v. S. L. LEAPHART, State Treasurer.

(November Term, 1878.)

Under an act passed in 1873 to reduce the volume of the public debt, the state was pledged to make an annual levy of two mills, the money so raised to be kept in the treasury, and applied only to payment of interest on the bonds and stocks issued under the authority of that act, the surplus to be used as a fund for the redemption of the principal. In 1877, and in March, 1878, the legislature failed to make such specific levy, but levied in their supply acts of those dates a tax to be applied inter alia to interest on such securities issued under the authority of the act of 1873, as should be declared valid under certain proceedings then respectively pending, to inquire into and determine their validity. After the investigation ordered in act of 1877 had been completed, but pending the further proceedings directed by the act of March, 1878, the legislature, in their supply act of December, 1878, made an appropriation of the money then in the state treasury, realized under the levies of June, 1877, and March, 1878, to interest on certain unquestioned securities issued under act of 1873,

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and *under a subsequent act of the legislature. Upon an application for mandamus to the state treasurer to compel payment according to the directions of the appropriation of December, 1878, *held*—

[1. *States* ⊂⊃132.]

That the appropriation by the act of December, 1878, of the moneys in the treasury raised under the supply acts of 1877, and March, 1878, affected no fund derived under the act of 1873, and violated no contract of the state.

[Ed. Note.—For other cases, see States, Cent. Dig. § 130; Dec. Dig. ⊂⊃132.]

[2. *States* ⊂⊃118.]

That the appropriation of an unexpended balance in the treasury at the close of a fiscal year is not an act of borrowing, and is not repugnant to Section 3, Article IX., or to Sections 7 and 14, Article IX., of the state constitution.

[Ed. Note.—Cited in State ex rel. Walker v. Derham, 61 S. C. 262, 39 S. E. 379.

For other cases, see States, Cent. Dig. § 117; Dec. Dig. ⊂⊃118.]

[3. *States* ⊂⊃126.]

That this appropriation was not in violation of Section 4, Article IX., of the state constitution. McIver, A. J., dissenting as to the moneys derived from levy made under act of March, 1878.

What is the meaning of this section?

Willard, C. J., holds, that the object of a tax is sufficiently indicated by the general title of the act levying it, and when there is no law creating or sanctioning the subject matter of an appropriation, or it is no longer attainable, the moneys derived under such act may be appropriated to other objects under the same general head, if no legislative contract be thereby violated. Distinction drawn between this case and Morton v. Comptroller-General, 4 S. C. 430.

Haskell, A. J., concurs with Willard, C. J., and holds further, that the object of an appropriation under an act to defray the ordinary expenses of the government is accomplished by the close of the fiscal year, and all moneys then in the treasury under such act become an unexpended balance, requiring further appropriation by the legislature.

McIver, A. J., holds, that the object of a tax levy is the specific purpose to which the money so to be raised is applied by the act directing the levy, and that this money cannot be thereafter diverted, until such object has been accomplished, or has become impossible of attainment.

[Ed. Note.—For other cases, see States, Cent. Dig. § 125; Dec. Dig. ⊂⊃126.]

This was an original proceeding in this court, praying a writ of mandamus, commanding the state treasurer, in accordance with the provisions of the appropriation act of December, 1878, to pay to the relator interest maturing in 1879 on certain bonds, reported to the legislature in February, 1878, by the bond commission to be valid obligations of the state, and specified in Schedule 5 of their report; and also to pay interest on certain bonds and stock issued under the act of March 22d, 1878, and designated as Deficiency Bonds and Stocks.

The application was resisted in behalf of certain bond creditors whose securities were specified in Schedule 6 of the report of the bond commission, and were undergoing inves-

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tigation under the *proceedings instituted in the Special Court of Claims organized under joint resolution of March 22d, 1878.

The grounds of resistance sufficiently appear in the arguments submitted in opposition to the application for the writ.

Mr. A. G. Magrath, for relator.

The money in the treasury out of which the relator asks payment was not raised under the funding act of 1873, nor by a specific levy, but by a levy for a gross amount of taxes under acts of 1877 and 1878. These acts are not in pari materia with the funding act. This money was intended to pay interest on the unrecognized debt, when recognized; under act of December, 1878, it is appropriated to pay interest on the recognized debt. The original disposition of this fund created no contract, express or implied. It was kept by the state in the hands of its own agent, and its power of disposition was uncontrolled.

The legislature never intended to regard the scheme of the funding act. And there can be no presumption of the surrender by the state of the powers which belong to it. An irrevocable disposition by the state of this fund would be equivalent to a transfer and assignment. Cases upon this point will be found collected in 3 Lead. Cas. in Eq. 363. None of the tests there given would establish the intention of the state here to part with the power to control. That control has been exercised in act of December, 1878.

An act will be declared unconstitutional by the courts, only when it is clearly so. See 6 Cr. 87; 4 Wheat. 625; 66 Penna. St. 164; 15 Rich. 66; 2 Bail. 673. This act is said to violate the constitution of the United States. What contract is violated? The state has not recognized the obligation of bonds in Schedule 6 of the report of the bond commission—only those in Schedule 5. The direction to her agent to pay interest on a bond is not a contract with the holder of the bond, which would prevent the state from directing a different disposition by her agent of her own money. It is said that it disturbs the scheme of the funding act; this the state does not acknowledge. And the opponents of this motion have abandoned all rights under the funding

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*act by their voluntary submission to the investigation ordered by the state.

Nor does it violate Article IX., Section 4, of our constitution. By reference to the tax act and appropriation act of March, 1878, it will be observed that revenue is to be raised only for the one fiscal year, and is to defray the annual ordinary expenditures. The operation of a supply act expires with the year. 15 Rich. 138. This is in accordance with the mode and practice which has prevailed in Great Britain. Hall Const. Hist.: 1 May

Const. Hist. 478. And we have it incorporated in this section of our constitution. It was not intended to be a check upon the legislature, but to secure obedience by the agent to the directions of the legislature. To maintain that money once appropriated to any object could, under no circumstances, be disposed of by a future legislature, would lead to irrational results, and impose upon the legislature limitations at variance with the constitution and at war with the welfare of the people.

Mr. Samuel Lord, Jr., contra.

1. Sections 3, 7 and 9 of the funding act entered into and formed a material part of the contract made by the state with the holders of bonds issued under its direction and authority, and that by this contract the state obligated itself, first, to levy an annual tax of two mills upon the dollar upon the entire taxable property of the state; second, to keep the fund so created separate and apart from all other funds; third, to apply it to the payment of the annually-accruing interest upon the bonds and stocks issued under the act; and, fourth, to apply any surplus remaining in the treasury, after the payment of interest, to the purchase of the bonds issued under the act, in accordance with the provisions of the ninth section.

That these sections of the act are a part of the contract of the state with the bondholders, is settled by the following cases: 4 S. C. 430; 8 S. C. 71; 2 Otto 531.

This money, then, having been levied under a contract between the bondholders and the state, which required it to be appropriated to a certain purpose, to wit, to the payment of the coupons which matured respectively during the year for which the taxes

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*were levied, and the legislature having, in pursuance of the contract, appropriated it to that purpose, the attempt made by the act of December, 1878, to divert the fund to an entirely different purpose, is a violation of the contract made with the bondholder, and repugnant to Article I., Section 10, of the constitution of the United States.

Instead, therefore, of ordering the treasurer to obey the act of December, 1878, it would clearly be the duty of this court to impound this fund to prevent its diversion, and to see that it is kept separate and apart for the purposes specified in the act of 1873, and to which it was appropriated by the acts of June, 1877, and March 1878.

It is true that the legislature has annexed to this appropriation a condition, but we submit that this condition is one not warranted by the terms of the contract embodied in the act of 1873, and that so much of the act of 1878 as imposes it is unconstitutional and void.

We do not, of course, deny the right of the state to question the validity of any bond, but we do deny its right to require the holder to establish his claim in a special court, of limited jurisdiction, authorized to try only "test cases," and to which he can only have access through the "consent of the attorney-general and his associates." A law which imposes terms like these violates the obligation of the contract under the guise of regulating the remedy. 8 Rich. 81; 6 Otto 448.

It is at least clear that until the disputed bonds have been declared invalid by a competent court, the state cannot determine that question in her own favor, and dispose of that portion of the fund which has been set apart for the payment of the interest due upon them.

Even if all the disputed bonds be void, this contemplated diversion cannot be legally made, because the seventh section of the act of 1873 requires the surplus of the tax remaining in the treasury, after payment of the interest, to be applied to the extinguishment of the debt. The object of this stipulation was to add to the worth and security of the bond, and it constitutes an essential part of the contract. The act of 1878 undertakes to appropriate, to a wholly different

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purpose, a fund specifically *appropriated for the payment of the bonds by the very act under which they were issued, and by Article IX., Section 4, of the constitution.

The necessary effect of the proposed appropriation will be to break up the whole scheme of the funding act and destroy all the benefits anticipated from it—benefits on which those who accepted its terms had a right to rely. It was the special object of that scheme, by providing extraordinary security and sanctions for the payment of the consolidated bonds, to induce the public creditors to reduce their claims fifty per cent. and exchange them for these new securities, and thus diminish the aggregate indebtedness of the state $10,000,000. This result would enhance the general credit of the state, and enable it to meet all its obligations and engagements with more certainty and less liability to failure. The creditors who surrendered their old bonds and took fifty per cent. of the amount in new bonds, in full satisfaction, did so on the faith that the scheme should be carried into effect as a whole. It cannot be supposed that they would have made the sacrifice they did without relying, as they had a right to do, on the whole scheme being rigidly carried out. The proposal to pay the coupons on the bonds of the petitioner, which shall mature in 1879, out of the taxes levied in 1877 and 1878, not only destroys the most essential features of the scheme, but makes an unjust discrimination between one class of creditors and another. 2 Otto 540.

2. The act of December, 1878, is simply a borrowing of this fund to defray the current

expenses of the state, and is therefore in violation of Article IX., Section 3, of the constitution.

3. If the payment on the interest is not an ordinary expense of the state, then the forced loan made by the act of December, 1878, must be designed to defray an "extraordinary expenditure," and comes within the provisions of Sections 7 and 14 of Article IX. Upon all above points, see Graham v. Horton, 6 Kan. 343.

4. The diversion of the funds contemplated by the act is a palpable violation of Section 4, Article IX., of the constitution. The effect of this provision is to deprive the legislature of all power of misapplication by an

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authoritative and imperative ap*propriation to the specific object set forth in the tax law as the ground of raising the specific tax. 4 S. C. 458.

5. Mandamus will not be granted if the interests of third parties are involved who are not before the court, even though it is averred that the claim of such parties is void. High on Man., § 39; 29 Texas, 508.

Mr. W. H. Brawley, on same side.

April 6th, 1878. The opinion of the court was delivered by

WILLARD, C. J. The relator asks a writ of mandamus to compel the state treasurer to pay from the treasury money appropriated to pay the class of claims to which those of the relator belong, by the nineteenth section of the act to make appropriations, approved December 24th, 1878. 16 Stat. 757. The only question presented for consideration is the constitutionality of the act making such appropriation. The various objections to this act will be noticed in the order presented in the points in behalf of the respondent.

The first objection is that it violates a legislative contract made with certain holders of bonds and stocks by an act entitled "An act to reduce the volume of the public debt, and to provide for the payment of the same," approved December 22d, 1873. 15 Stat. 518.

The object of this act was to consolidate the pre-existing bonded debt of the state, including outstanding state stocks, reduced to fifty cents on the dollar, and to re-issue the same in bonds of an uniform character, to be known as consolidation bonds and in stocks. A large number of bonds and stocks issued under this act are now outstanding, and it is alleged that the act of 1878 is unconstitutional in its operation on the rights of some of the parties holding these securities. Section 3 of the act of 1873 is as follows: "That the bonds and certificates of stocks herein authorized to be issued shall have upon their face the words 'consolidation bonds,' 'certificates of stocks,' and shall also bear upon their face the declaration that the payment of the interest and the redemption of the principal, is secured by the levy of an annual tax of two (2) mills upon the

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dollar upon the *entire taxable property of the state, which declaration shall be considered a contract entered into between the state and every holder of said bonds and stocks."

In order to bring the appropriation act of 1878 into conflict with these provisions, it will be necessary to show that there were at the passage of that act funds derived from the source indicated in the section of the act of 1873 just recited; that by the operation of that section such funds are secured to certain objects by the terms of a legislative contract, and that the appropriation act of 1878 has assumed to divert them from that object.

It must be conceded that the appropriation to pay the relator's demand is an appropriation for an object inconsistent with that of the act of 1873, and that it assumes to make a disposition of certain funds in the treasury.

The question then remains whether these funds were placed through the operation of a previous legislative contract beyond the reach of such legislation.

The scheme of the act of 1873, as it regards the remedy afforded for the payment of interest, (the word interest being here intended to include that covered by both coupons and interest orders on stocks) appears to have been that the legislature should annually cause to be levied a tax of two mills on the dollar on all the taxable property of the state, to be exclusively devoted to the payment of such interest.

Accordingly, at the same session and upon the same day in which the act of 1873 became a law, the general assembly, in the annual supply bill for the fiscal year 1873–74 levied a tax of one mill "to pay the half-yearly interest upon the public debt of the state (adjusted at the present session,) due and payable on July 1st, 1874." Again a tax of two mills was levied in each of the years 1874–75, and 1875–6, for the specific purposes contemplated by the act of 1873. Subsequently to the last-mentioned fiscal year the specific levy for that purpose has not been made. If it had been made to appear that any moneys collected under either of the tax levies above mentioned remained in the treasury, and were subject to being affected by the provisions of the appropriation act of 1878, a question would have been presented whether such funds were not placed, under the operation of the

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*act of 1873, beyond the power of the general assembly to make any other disposition of them than that contemplated by the act of 1873. But that fact is not made to appear, and cannot be assumed.

We must assume that whatever funds are in the treasury of the class here involved were derived under the supplies ordered for the fiscal years 1876–77, and 1877–78. As we shall see hereafter, there are claims for the payment of interest for both of those fiscal years outstanding, and undergoing inquiry as to their validity. The question then presents itself, whether any portion of the moneys levied and collected under the tax act for the fiscal year 1876–77, are devoted to the payment of such unpaid interest of that year by the provisions of the third section of the act of 1873 already cited. The tax act of 1876–77 was passed June 9th, 1877. 16 Stat. 286. It levies a tax of seven mills on the dollar for the following purposes, to wit: To meet appropriations. First, to defray current expenses of the government for the fiscal year ending October 31st, 1877; second, to pay interest due on January 1st, 1877, and on July 1st, 1877, upon the consolidated bonds and certificates of stock which have been issued under the act to reduce the volume of the public debt and provide for the payment of the same, approved December 22d, 1873, which shall be found valid and bona fide by the commission to investigate the same, and be approved by the general assembly at the next regular session thereof; and third, to pay such other indebtedness of the state as may be reported to be valid by the said commission, and to which it may be applied by the general assembly at its next regular session." The question then is, whether any of the moneys collected under this act are brought under the operation of the third section of the act of 1873, already recited, so that their disposition is to be governed by that section of the act of 1873 to such extent as to defeat any of the provisions of the immediate tax act, under which it was raised, inconsistent with that section of the act of 1873. This question cannot be determined by the result of an inquiry whether the legislature was bound by the act of 1873 to raise such a fund as that act called for; for if it be conceded that such is the case, that could not change the character of the fund in the treasury raised for other

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*purposes, even though inconsistent therewith. This case does not involve the questions of the general duty of the legislature under the act of 1873, but simply the character and destination of a specific fund in the treasury, and that must be determined by the law of its creation, not by an inquiry as to what that law should have been, but what it is. It will be found that the tax act of 1876–77 contemplates different objects from those indicated by the act of 1873, and provides no fund that can be disposed of under the last-named act without violating the law under which such fund was created.

The tax levy for 1876–77 is not such a tax contemplated by the act of 1873. That intended by the act of 1873 was a specific tax of two mills on the dollar, for the payment of interest and the redemption of the principal of the consolidated debt. The term consolidated debt is here intended to describe the class of bonds and stocks with their coupons and interest orders issued under the act of 1873. Such a tax would produce a fund of an ascertained amount, the whole of which, when realized, would be devoted exclusively to the object just stated. The tax act for 1876–77 levies a gross sum for all purposes, and sets apart no ascertainable proportion of the sums collected for either of the several objects for which it was passed. First, the current expenses of the government are provided for; next, it is to pay only such interest on the consolidated debt as should accrue during that fiscal year upon such of the consolidated bonds and stocks as should be found "to be valid and bona fide by the commission to investigate the same, and be approved by the general assembly at the next regular session thereof;" and third, on a class of obligations to which the relator's claims belong.

The provision for the payment of the interest on the consolidated debt does not recognize the act of 1873 as the test of the validity of the bonds and stocks issued under it, but contemplates an investigation by the general assembly of the validity of the issues made under that act by means of a commission, which was created at that session for that purpose, and finally reserves to itself, at its next regular session, the final determination as to the validity or invalidity of such issues. It is therefore clear that the tax law of 1876–77 cannot be re-

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garded as intended to *carry out the objects and intents of the third section of the act of 1873.

We will next consider whether any money collected under the tax act of 1877–78, (16 Stat. 549,) is controlled by the provisions of the third section of the act of 1873. This act levies a tax of four and a half mills on the dollar, "for the purpose of meeting appropriations to defray the current expenses of the government for the fiscal year commencing November 1st, 1877, and to meet such other indebtedness as have been or shall be provided for in the several acts enacted by the present session of the general assembly for the same." It is not claimed that any appropriation was made at this session professing to carry out the objects and provisions of the third section of the act of 1873.

It is therefore clear that the conclusion already stated in reference to the act of 1876–77, has a still stronger bearing on its application to the act of 1877–78, and we

must finally conclude that the appropriation under which the relator claims does not affect any fund in the treasury, derived under the third section of the act of 1873, or secured to particular objects under that section, as it regards their legal destination. Such being the case, the appropriation of these funds to other objects than those designated by the third section of the act of 1873, by the appropriation of 1878, cannot be claimed to be repugnant to any constitutional right to such funds derived under the third section of the act of 1873.

The seventh and ninth sections of the act of 1873 have been pointed out as bearing on the constitutionality of the appropriation act of 1878. Section 7 relates exclusively to the disposition of a "surplus fund," for which provision is made in Section 6, and Section 9 relates to the application of that surplus fund, after payment of accruing interest to the purchase of consolidated bonds and stocks, by way of reducing the principal of such bonded debt. It is a sufficient answer to this objection that no such fund appears to exist, nor could it be created out of funds derived to the treasury under the acts of 1876–77 and 1877–78, without violating the provisions of those acts, as it regards the destination of the funds so ordered to be raised, as we have already seen.

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This *cannot be done through any operation of the act of 1873, as we have also seen.

The second point made is, that the provisions of the act of 1878 are, in effect, the borrowing of money to defray current expenses, in violation of Article IX., Section 3, of the constitution, which directs that the general assembly shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year. The appropriation of money remaining in the treasury at the close of a fiscal year, unexpended for appropriations for that year, has not the slightest resemblance to an act of borrowing.

The foregoing also disposes of the third point involving the same idea, that the transaction in question is an act of borrowing.

The fourth point is, that the relator claims a direction of funds in violation of Article IX., Section 4, of the constitution, which provides that no tax shall be levied, except in pursuance of a law, which shall distinctly state the object of the same, to which object such tax shall be applied.

Much embarrassment surrounds the construction of this section of the constitution, if regarded as standing alone, without the aid of other sections; but the difficulty in the main disappears when it is stated in its proper relation to other sections.

Two cases naturally arise under this section. First, that of the annual tax levy for the support of the government of the state; and, second, special taxes laid with a view to special objects. The object of the general tax levy is fixed by the third section of Article IX. That section provides that "the general assembly shall provide an annual tax sufficient to defray the estimated expenses of the state for each year." In the next paragraph that relates to raising taxes to pay the deficiency of a preceding year, the expenses of the state are termed "ordinary expenses of the state." Ordinary expenses include the current expenses of the government and debts to mature during the current fiscal year. This must be deemed to be what is meant by the "object," as that term is used in Article IX., Section 4, where the tax law is of the general nature prescribed in Section 3. The effect of this section of the constitution, in the case of an annual tax for ordinary expenses, is to confine the proceeds of

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*that tax to the exclusion of objects that cannot come under that general description; in other words, to prevent the taking away of funds raised for the support of the government from that object and applying them to special objects of a different class; the manifest object being to prevent the state government from being embarrassed by the improper use of the means necessary for its support.

The other case is, where the tax is special; that is, other than such as is called for as an annual tax by Section 3. It necessarily follows that the object of such tax will be special also. In that case the declared object of raising the tax must govern the application of the fund raised thereby.

It is very clear that what constitutes the object, in the sense of the constitution, is some legal occasion that calls for the expenditure of money. That is, some obligation, present or prospective, created by law. Clearly, the constitution did not intend that the money raised under a special tax should be applied towards the purpose stated in such tax law, independent of there being any law constituting an appropriation for its disbursement.

Suppose, for instance, that money is raised to erect a public building, and no act for the erection of such building was passed during the fiscal year for which it was raised; clearly there is no authority to be gathered from that provision of the constitution that could warrant the disbursement of such fund toward such purpose without such a law. This shows clearly that the object intended by the constitution is that which is created by some law; or, in other words, some obligation, present or prospective, created and sanctioned by law.

So, if an appropriation should be made of funds raised for a special object under a special tax to some purpose consistent with such object, and the legislature should repeal such appropriation, it could not for a moment be contended that such money could be disbursed after such repeal, in the face of Section 12, Article IX., of the constitution, that de-

clares that "no money shall be drawn from the treasury but in pursuance of an appropriation made by law." When for any reason the legislature could not repeal such appropriation as when it was made through the operation of the constitution itself, of course the

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question here con*sidered could not arise. Such a case was presented in Morton v. Comptroller-General, 4 S. C. 430. In that case it was held that it was the manifest intent of the constitution that the provisions of acts intended to borrow money should operate as legislative contracts, so that the authority for the levy of a tax to pay the interest on any such loan, which is required to be given in such acts, could not be taken away by any subsequent act of repeal. Consistently with that object of the constitution, and as a material means of rendering it effectual, independent of future legislation, it was held that Section 4 operated in that particular class of cases as a constitutional appropriation of the proceeds of such special tax. Where, however, the legislature retains its ordinary power over appropriations, not having assumed to bind itself by a legislative contract, there can be no doubt but that it can repeal the authority for the disbursement of public money, whether raised under general or special levy. And it is equally clear that when the object for which money was raised is no longer attainable, it is subject to all ordinary demands upon the treasury sanctioned by law. Such is the ordinary practical construction of the constitution, and it is the only one consistent with that flexibility of financial arrangements that can secure the practical ends of government. It will be found that the tax acts of 1876–77 and 1877–78, are each general annual taxes for the ordinary expenses of the state government, and as such the only effect of Section 4, Article IX., of the constitution, is to confirm the application of the funds raised thereunder to such purposes as properly fall within the description of "ordinary expenses of the government;" that is, to current expenses and debts maturing during the fiscal year.

The act of 1876–77 provides for the payment of the current expenses of the government and certain indebtedness matured or to mature. It is, therefore, clearly a general tax levy, and, as such, entirely subject to the control of the legislature, provided the purposes to which it is appropriated fall within the general class of "ordinary expenses." It is unnecessary to consider this act particularly, for the provisions made by it only apply to certain indebtedness that should be reported valid by the commission to investigate the public debt, and should be approved

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*by the general assembly, while none of the class of claims urged as the reason for withholding the mandamus were so reported or approved. The act of 1877–78 raises a gross sum of four and a half mills for all purposes, exclusive of the school tax, and its declared object is "for the purpose of meeting appropriations to defray the current expenses of the government for the fiscal year commencing November 1st, 1877, and to meet such other indebtedness as has been or shall be provided for in the several acts enacted by the present session of the general assembly providing for the same." The effect of this is the same as if the purpose had been declared "to meet appropriations for current expenses and debts." Obviously, such an act can only be regarded as a general annual tax levy for "ordinary expenses," and, as such, the legislature may control, at any time, the disposition of the funds raised under it; subject to the proviso already stated, namely, that such appropriation must be of the nature properly described as "ordinary expenses of the government."

It is unnecessary to consider the construction of Section 12 of the joint resolution providing a mode of ascertaining the debt of the state and liquidating and settling the same, approved March 22d, 1878, (16 Stat. 673,) under which arises the only possible claim on the money in the treasury that could be made in behalf of that class of claims that are urged in opposition to the mandamus, as the provisions of that section, so far as they conflict with the appropriation of 1878, under which the relator claims, are repealed by the appropriation act of 1878.

It is not necessary to consider the terms of the appropriation of 1878, for it is conceded in the argument that unless it is found to be unconstitutional it supports the relator's present claim. The act repealed all former laws inconsistent with it, and therefore, if the joint resolution of March 22d, 1878, contained anything to support the present claim in behalf of the respondent, it must necessarily conflict with the subsequent appropriation of December 24th, 1878, and thus stand repealed.

The foregoing leads to the conclusion that there is nothing in the fourth section of Article IX. of the constitution that impugns the validity of the appropriation under which the relator seeks the writ of mandamus in this case.

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*The fifth and last point has no application to this case under the view that has already been presented. The mandamus should issue in conformity with the prayer of the petition.

HASKELL, A. J. The court is of one opinion on all the points in this case except as regards the meaning and application of the following provision in the state constitution: "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same, to which object such tax shall be applied." It is thought by one mem-

ber of the court that this provision is violated by Section 19 of the act December 24th, 1878. 16 Stat. 765. A majority of the court, however, is of a different opinion, and I concur with the conclusion stated in the opinion delivered by the Chief Justice, but think it proper that some of the reasons for such conclusion on the constitutional point should be given more in detail, especially when a member of the court has expressed his dissent and stated his reasons. The act of March 22d, 1878, page 549, (16 Stat.,) entitled "An act to raise supplies and make appropriation for the fiscal year commencing November 1st, 1877," makes in its first section the general state levy (that is the constitutional name, Section 5, Article X.,) for the fiscal year, and in obedience to the constitution declares the object for which such levy is made, to wit: "Levied for the purpose of meeting appropriations (1) to defray the current expenses of the government for the fiscal year commencing November 1st, 1877, and (2) to meet such other indebtedness as have been or shall be provided for in the several acts enacted by the present session of the general assembly providing for the same." By reference to the acts the general object is thus divided into respective parts by specific appropriations. On page 540, (Stat. 16,) is an act of the same date as the last, "to make appropriations to meet the ordinary expenses of the state government for the fiscal year commencing November 1st, 1877." This act omits a considerable portion of the "ordinary expenses" of the government, although it does provide for many of the current expenses, including the executive and judicial departments. On page 520, same volume of statutes, is "An act to make appropriations for the payment of the per diem

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and mileage of the members of the *general assembly, the salaries of the subordinate officers and employés thereof, interest on the public debt and for objects herein named." The act is of precisely the same character as that (page 540) entitled "An act to make appropriations to meet the 'ordinary expenses' of the government." It (the act, page 520,) makes appropriations to meet the expenses of the legislative branch of the government, the expenses of a Court of Claims, of a commission to codify the laws, of divers other matters, such as "deficiencies" during the preceding fiscal year, and finally, by Sections 11 and 12, sums are appropriated for the payment of interest on the public debt; by Section 11, $189,340.27, "if so much be necessary," and by Section 12, $338,214.57, "if so much be necessary." The first to be applied to interest on certain bonds and stocks contained in Schedule 5 of the commissioners' report, and the second to be applied to interest on bonds and stocks enumerated on Schedule 6 of the same report. Conditions are annexed: First, that these payments must be made out of specific funds therein designated; second, that none of the money appropriated by Section 12, page 525, 16 Stat., should be paid out of the treasury on presentation of said coupons and interest orders, "either for the last or present fiscal year, until the consolidation bonds and certificates of stock on which they have accrued shall be finally adjudicated as to the validity of the said bonds and stock in favor of said bonds and stock, in the manner provided for by a joint resolution passed at this session of the general assembly, entitled 'A joint resolution to provide a mode of ascertaining the debt of the state and of liquidating and settling the same,' and none other." There is likewise an appropriation act of the same year, page 547, to pay back salaries due to several persons who had been lately professors of the University of South Carolina, and for other purposes, among the latter of which was a provision of $500 to pay the per diem and mileage of such members of the bond commission as might be summoned to attend the Court of Claims. It is needless to pursue these acts further. Several have been cited to show that although they vary in title they are all in substance of the same character, and are in effect mere component parts of the general appropriation act for the fiscal year commencing Novem-

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ber 1st, 1877, and in fact they are so *declared by the first section of the general act of levy and appropriation for the said fiscal year, (16 Stat. 549), which has been above cited. The acts are thus presented to the view to remove confusion and to enable us to examine them in what I shall endeavor to show to be the true light as mere appropriations to meet the "estimated expenses" of the current fiscal year, composed in part of the "ordinary expenses" for that year, and "deficiencies" or past claims due but still unpaid.

The facts are that all the money levied and appropriated to meet such expenses as are provided for by Section 12, page 525, was not drawn from the treasury during that fiscal year. The reason why the money was not drawn is admitted. The legal validity of the bonds and stock had not been established during the fiscal year in sufficient amount to consume the entire appropriation. The legislature, at its regular session in December, 1878, by the nineteenth section of the act to make appropriations for the fiscal year commencing November 1st, 1878, (16 Stat. 757,) enacted that the unexpended balance of the money collected into the treasury for the payment of the interest on the public debt should be applied to the payment of interest "on bonds and certificates of stock mentioned in Schedule 5 of the report of the bond commission. * * * [and] on such of the bonds and certificates of stock mentioned in Schedule 6 of said report of said commis-

sion which have been found valid by the special court known as the Court of Claims, * * * and on such of the bonds and certificates of stock as have been issued during the past year under Sections 13 and 14 of the said joint resolution, approved March 22d, 1878," and to the payment of interest on certain other bonds and stock issued under an act approved March 22d, 1878. The question is whether that nineteenth section of the act of December 24th, 1878, is in violation of Article IX., Section 4, of the state constitution. The affirmative of that proposition is forcibly presented in the dissenting opinion delivered in this case, and as it is a question which of necessity is apt to arise at every session of the legislature, it is entitled to grave consideration. The question, in plain language, is this: When in any fiscal year a tax is levied by the legislature and appropriated to a specific object, and that

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object has not, or *does not, acquire legal force at any time during the said fiscal year, but it is possible that it may acquire such legal force in the future, can the legislature, in the next fiscal year, apply the fund to another purpose, or is the money tied up in the treasury by Article IX., Section 4, of the constitution, until the original object has acquired active energy or has become impossible, and in the eye of the law ceased to exist? I think that puts it fairly and in a stronger light than it can stand in this case, for Section 12 appropriates $338,214.57, "if so much be necessary," and judgment was passed on some of the bonds during the fiscal year, and they, coming within the provisions, had the right to draw the interest; and it might well be argued that the appropriation had been drawn, and that the unexpended balance, not having been necessary, was an unappropriated sum lying over to the credit of the state. But I prefer taking the question in its strongest light, that the law may be ascertained. The term "legal force," as I used it above, does not refer to this abstract legal validity of the claim, but to its legal right, under the act, of levy and appropriation. For instance, every consolidated bond may be valid, but the legislature did not, either under the stipulations of the act of 1873 or the constitutional provisions of Article IX., Sections 7 and 14, levy and appropriate to pay interest on the bonds generally. The levy and the appropriation provide for interest only on such of the bonds as may be passed upon favorably under proceedings in a specific court. Then, and not until then, does the interest due on such bonds become an object possessed of legal force by virtue of said acts of levy and appropriation. That constitutes the "legal force" used in the statement of the proposition. There is a proposition in the joint resolution establishing the Court of Claims, (16 Stat. 669, § 12,) "That the coupons and interest orders on any of the several classes of consolidation bonds or certificates of stock mentioned in the said Schedule 6 shall be paid out of the proceeds of the taxes for the last and the current fiscal years, respectively, whenever there shall be a final adjudication as to the validity of the said several classes of bonds and certificates, in the manner here provided, and none other." That section does not constitute a contract. Whatever may be its weight as a declaration

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or *pledge when considered by the legislature in its own proceedings, the judiciary has nothing to do with that. No obligation of contract would be impaired by its repeal, and it has been repealed by the act of December 24th, 1878, Section 20, page 765. That section, therefore, does not, in any respect, come before this court in the discussion of the present questions.

With these explanations I will proceed. The system of collection and expenditure of money for public purposes is very fully provided for in Article IX. of the state constitution. The rules therein prescribe the methods. One is to raise money for the "ordinary expenses of the state," and the other for "extraordinary expenditures." The first is by "annual tax," Article IX., Section 3; the second is by loan on state bonds, Article IX., Sections 7 and 14. The latter does not come within the discussion. Under the former, or the "ordinary expenses," are included all expenditures not provided for by money borrowed under Article IX., Sections 7 and 14. When bonds have been issued to raise money to meet an "extraordinary expenditure," they become a standing liability of the state, and the interest, as it falls due, becomes an "ordinary expense," to be included among the "estimated expenses" to make up the amount to be levied annually and appropriated annually. The only difference between the interest on such bonds and any other annual expense is that the interest is made, by the constitution, an obligatory expense, while many other expenses may be at the option of the legislature—as, for instance, the expense of the Court of Claims, the bond commission, and many other matters to which the constitution does not refer. The constitution, in its provisions on finance and taxation, appears to have two objects conspicuously in view. The first, that the state shall pay annually all the expenses of each year, and thus prevent accumulation of debt. The second is, that if "extraordinary expenditure" is deemed necessary, and the annual tax would be excessive, money shall not be raised except by bonds secured by certain laws prescribed by the constitution. To impose no more than the people were able and willing to pay each year, and to preserve the credit, were leading objects. Article IX., Section 3, undertakes to accomplish the first by ordaining that "the

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general assembly shall provide for *an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever it shall happen that such ordinary expenses of the state for any year shall exceed the income of the state for such year, the general assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year." The direction is plain, positive and mandatory to pay as they went, each year. The tax levy is annual, the appropriation is annual, and the winding up of accounts in the treasury is of necessity annual; for otherwise the deficiencies of the last and the need of the present fiscal year could not be ascertained. Section 4 is the natural sequence of Section 3: the "estimate of expenses" would be little more than a vain form if it were not to be based upon definite objects. Taxation for indefinite purposes would unavoidably lead to a squandering of the public money, and the people are entitled to information on such points. The positive law that the taxes shall be applied to the objects for which they are collected, and the law that the tax shall not be laid until the object has been defined, alike enable the people to know of and to prevent the repetition of unreasonable expenditures, and tend to preserve the credit of the state year by year. Such law further prevents the gross injustice of preference in appropriation after the levy has been made, as the law which inhibits the drawing of any money from the treasury except in pursuance of appropriation made by law, (Article IX., Section 12,) prevents such abuse on the part of the executive in the disbursement of the public funds. But the whole tenor of this article of the constitution leads to the conclusion that all these provisions apply to the annual transactions. The tax is levied for the expenses of the current fiscal year. The objects to which the tax must be applied are the items contained in those estimated expenses. Expenses include the payment of recognized indebtedness, as well as any outlay that the legislature may deem proper to make during that year. It is a very grave question whether the legislature has the right to levy any money which it does not intend to devote to an object during the current fiscal year. That question, however, does not now arise. But, on the other hand, the presumption is

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that the *legislature does intend to apply the money to an object which exists or may exist during the current fiscal year. Such appears to be the scope of the fourth section, and the proper rule of construction is, that the whole annual provision is confined within the limits of the fiscal year, and that if the appropriation can, by its words or the context, be made applicable during the fiscal year, the act must be confined to that year, and must be regarded as having expired at its termination. With regard to the act in question, it was entirely possible for the Court of Claims to have heard the cases and decided upon all the bonds and stocks within the fiscal year. As if, for example, the court had convened in May, as the act directed, and proceedings had been at once commenced, and on inspection the case had been so plain either way that the court would have rendered judgment immediately, as it did with regard to some of the bonds, and no appeal being taken, the matter would have been ended. If such had been the result, there could be no question. What has been the result is wholly immaterial in construing the law. What could have been the result is the point. It is unquestionable that the legislature could levy and appropriate for the fiscal year; it is questionable whether they could levy in one year and bind over indefinitely for the future.

In this case the levy was made, the condition was executed in part, and it was not impossible that it may have been executed as to the whole, within the fiscal year. There are no words in the act directly or indirectly extending the operation of the act beyond the fiscal year. The court is obliged to presume that the act meant what in law it ought to mean, there being no words to the contrary. The operation of the act being thus confined to the fiscal year, the "object" has been accomplished. So much of the money as "may be necessary" has been or is ready to be applied to such interest demands as were settled by the adjudication of the said court of claims within the fiscal year, and the rest is an unexpended balance which reverted at the expiration of the fiscal year to furnish, with the levy and money derived from other sources of income, the fund to meet the ordinary expenses of the ensuing year, including deficiencies coming over from the last. Such is the practice, and such we think is

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the *law made by the constitution. For instance, take the appropriation made by the fourteenth section of the same act of March 22d, 1878, page 526, "that the sum of $7500, if so much be necessary, be, and the same is hereby, appropriated to pay the salaries, clerk hire, and the expenses of the commission elected at this session of the general assembly to codify the laws, etc." Suppose, as I believe was the case, that no commission was elected at that session. The object of the levy and of the appropriation was plainly stated, and the money could not be applied during that fiscal year to any other purpose, but was held by the state treasurer under the appropriation caption in his books. It there remained until the end of the fiscal year. The object certainly was legal; indeed it is one directed by the constitution itself—Article V., Section 3. But it is hard to conceive that the money thus appropriated must

be in the treasury until in some subsequent year provision may be made to revise and codify the laws, and then the money be applied. I see no real difference between that instance and the one now in hand. A construction of the constitution which would permit the legislative body at one session to levy and appropriate and extend the appropriation over subsequent years, and which would deprive the legislative body of the power to repeal such act at its subsequent sessions, and of power to use the money for any other purpose, would be sanctioned only by the plainest and most positive mandate. None such is found in the instrument itself. Such a provision would hedge in the legislature in such manner, that the representatives at a preceding session could deprive their successors of one of the most important of their powers. This would cripple the government and destroy the remedial effect of recurrent elections; for what would the relief be if the preceding body could have levied and appropriated in advance? The money would lie idle or the legislators would be obliged to carry out some design preconceived, and which perhaps their own judgment could not sanction. That would be compulsory legislation, which is contrary to the spirit of the government. The proposition is so serious in its nature and might lead to such abuse that, however virtuous the intention may be in any particular case, the principle could not be tolerated unless shown to be an

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unavoidable man*date emanating from the sovereign power. But, as already said, both the spirit and the words of the constitution appear to be to the contrary. The system therein prescribed is one of annual collection and disbursement, and is mandatory. The legislature, it is true, is not forbidden to do otherwise, and the power of the legislature is plenary in its nature. Direct prohibition, however, is rare in constitutional provisions. "But the affirmative prescriptions and the general arrangements of the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision." Cited in Potter's Dwarris on Stat. 64, Denio, C. J. A construction of Article IX., Section 4, which would permit appropriations extending beyond the fiscal periods to bind the legislature, would frustrate the main design of annual periodical settlements of the past, and provision for the present fiscal year, which is plainly expressed in Article IX., Section 3, of the constitution, and permeates the whole financial scheme. It would also seriously affect the character of the government itself.

I concur in the opinion delivered by the CHIEF JUSTICE.

McIVER, A. J. As I am unable to concur entirely in the conclusion which has been reached by a majority of the court, it is perhaps proper that I should state very briefly the reasons for my position, without elaborating the argument in support of such position. As the funds out of which the relator is seeking payment cannot be regarded as derived from taxes levied by virtue of any of the provisions of the act of December 22d, 1873, (15 Stat. 518,) it is unnecessary to consider the effect of the provisions of that act. On the contrary, it must be conceded that the funds out of which the legislature has, by the nineteenth section of the act of December 24th, 1878, (16 Stat. 765,) undertaken to provide for the payment of the claims of the relator and others standing in like position, were derived from taxes levied by virtue of the act of June 9th, 1877, (16 Stat. 286,) and the act of March 22d, 1878. (16 Stat. 549.) According to my view the real question in the case is whether the nineteenth section of the act of December 24th, 1878, is in conflict with Section 4 of Article

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*IX., of the constitution of this state. That section of the constitution reads as follows: "No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object the tax shall be applied." It follows, therefore, from this express mandate of the constitution that when a tax has been levied for a particular purpose or "object," that it is beyond the competency of the legislature to divert such tax from the purpose or "object" to which it has thus been appropriated by the constitution, until such object has been accomplished or becomes impossible of attainment. For it will be observed that the section of the constitution above quoted does not contain any negative words prohibiting the legislature from appropriating the taxes to any other purpose or "object" than that for which they were levied, but only an affirmative command that they shall be applied to such "object." Hence, when the "object" is accomplished or becomes impossible, the force of mandatory terms of the constitution is exhausted, and there is then no reason why the general assembly, which is invested with all legislative power not prohibited by the constitution, may not, by legislative act, direct the disposition of funds upon which the constitution no longer acts. The practical question therefore in this case is whether the funds out of which the relator claims payment were derived from taxes levied for some other purposes or "object," and if so, whether such purpose has been accomplished or has become impossible of attainment. What, then, was the object for which the taxes raised by the act of June 9th, 1877, and the act of March 22d, 1878, were levied? The act of June 9th, 1877, in its first section declares the object of that levy to be: "1. To defray the current expenses of the government for the fiscal year

ending October 31st, 1877. 2. To pay the interest due January 1st, 1877, and July 1st, 1877, upon the consolidated bonds and certificates of stock which have been issued under the act to reduce the volume of the public debt and provide for the payment of the same, approved December 22d, 1873, which shall be found to be valid and bona fide by the commission to investigate the same, and be approved by the general assembly at the next regular session thereof, and third, to pay such other indebtedness of the state as may be reported to be valid by the said

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commis*sion, and to which it may be applied by the general assembly at its next regular session." It will thus be seen that the taxes levied by this act were for three distinct objects. 1. Current expenses. 2. Interest due January and July 1st, 1877, on such of the consolidated bonds and certificates of stock as should be found valid and bona fide by the commission to investigate the same and be approved by the general assembly at its next session. 3. Such other indebtedness—by which I understand indebtedness other than consolidated bonds and stocks, e. g., floating debt, which, by the ninth section of the joint resolution raising the bond commission, (16 Stat. 320,) said commission were required to investigate and report upon—as may be reported valid by said commission. But as that commission, commonly called the bond commission, made no report upon any indebtedness of the state, other than that represented by the consolidated bonds and stocks, the objects for which these taxes were levied were practically the first two current expenses and interest on certain of the consolidated bonds and stocks. For it will be observed that the object of the levy was, not to pay interest on the consolidated bonds and stocks generally, but only upon those which should be reported valid by the bond commission and be approved by the general assembly at its next session. If, therefore, it be true, as is understood to be admitted, that these two objects have been accomplished—that is, if the current expenses of the government for the fiscal year ending October 31st, 1877, and the interest due January 1st and July 1st, 1877, upon such of the consolidated bonds and certificates of stock as have been reported valid, by the bond commission and approved by the general assembly have been paid, leaving a balance of such taxes in the treasury—I see no reason why the general assembly could not appropriate such balance to any other purpose it saw fit. The fact that these taxes were appropriated by the legisiature, by Section 12 of the act of March 22d, 1878, (16 Stat. 525,) to the payment of the interest on the consolidation bonds and stocks mentioned in Schedule 6 of the report of the bond commission, cannot affect this question, because that was not an appropriation made by the constitution, but only made by an act of the legislature, and therefore subject to alteration or repeal by a subsequent legisla-

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*ture. Nor am I able to perceive how this act of March 20th, 1878, can be regarded as having the force and effect of a legislative contract, binding upon subsequent legislatures any more than any other appropriation act. It is not so declared, and there is nothing in its terms which demands that it should be so construed.

Next, as to the object of the levy made by virtue of the act of March 22d, 1878. 16 Stat. 549. In the first section of that act the object is declared to be "for the purpose of meeting appropriations to defray current expenses of the government for the fiscal year commencing November 1st, 1877, and to meet such other indebtedness as have been or should be provided for in the several acts enacted by the present session of the general assembly providing for the same." These general terms render it necessary for us to examine "the several acts enacted by the present session of the general assembly," providing for indebtedness other than current expenses, in order to determine, definitely, what were the objects of such levy. This examination shows that one portion of such indebtedness, which was provided for in the appropriation act passed at that session of the general assembly Section 12 of the act of March 22d, 1878, (16 Stat. 525,) was the interest due on January 1st and July 1st, 1878, "on the consolidation bonds and certificates of stock mentioned in Schedule 6 of the report of the commission," commonly called the bond commission. One of the objects, therefore, for which the taxes raised by the act of March 22d, 1878, were levied, was for the purpose of paying the interest due January 1st and July 1st, 1878, on the consolidation bonds and stocks mentioned in Schedule 6 of the report of the bond commission, and until that object has been accomplished or until it becomes impossible of attainment, the legislature has no power, under the constitution, to divert such taxes from such object and apply them to other purposes. It is very obvious that such object has not yet been accomplished, because by the same act it is provided "that no money appropriated by this section shall be paid on the said coupons or interest or any part thereof, either for the last or present fiscal year, until the consolidation bonds and certificates of stock on which they have accrued shall be

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finally adjudicated" *to be good and valid obligations of the state; and it is conceded that no such final adjudication has been had as to a large amount of such bonds and stocks, but that, on the contrary, questions relating thereto are now pending in this court. Until these questions are "finally adjudicated," it is impossible to say whether

such object has become impossible of attainment.

It seems to be, therefore, that the funds now in the treasury arising from taxes levied by virtue of the act of March 22d, 1878, are, by the constitution, appropriated to the payment of the interest due January 1st and July 1st, 1878, on the consolidation bonds and stocks mentioned in Schedule 6 of the report of the bond commission, and that until that object is accomplished by the payment of such interest, or until it becomes impossible of attainment, by reason of a final adjudication against the validity of such bonds and stocks, the legislature has no power to appropriate such taxes to any other purpose.

My conclusion, therefore, is that the relator is entitled to a mandamus directing the state treasurer to apply the funds in the treasury, arising from the taxes levied by virtue of the act of June 9th, 1877, to the payment of the interest on his bonds falling due January 1st, 1879, but that he is not entitled to a mandamus requiring the state treasurer to apply the funds in the treasury arising from the taxes levied by virtue of the act of March 22d, 1878, to the payment of such interest; but that such taxes must remain in the treasury to meet the "objects" to which they have been appropriated by the constitution, until such objects have been accomplished or it becomes impossible to accomplish them.

Mandamus ordered.

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*(Case No. 716.)

FRASER & DILL et al. v. CITY COUNCIL OF CHARLESTON et al.

(November Term, 1878.)

[1. *Appeal and Error* ⇐1022.]

An appeal from findings of fact by a referee, which were sustained by the Circuit decree, dismissed there being neither a lack of evidence to warrant such findings, nor such preponderance of evidence on the other side as would justify a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇐1022.]

[2. *Appeal and Error* ⇐101; *Executors and Administrators* ⇐122.]

Where an executor has been removed from office and a receiver appointed in his stead, by the judgment of the Circuit Court, in accordance with a prayer of the complaint, and no exception is taken thereto on an appeal from other parts of the same judgment, the property passes into the possession of the court; and a subsequent judgment, in so far as it provides for a proper administration of the estate, furnishes no ground for appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 686; Dec. Dig. ⇐101; Executors and Administrators, Cent. Dig. § 951½; Dec. Dig. ⇐122.]

[3. *Municipal Corporations* ⇐938.]

A certificate of city stock, transferable, according to its terms, only at the office of the city treasurer, by appearance in person or by attorney, was endorsed in blank by the legal owner, and delivered to one who pledged the same to a bank as collateral security for a loan; the owner died, and the certificate was, by virtue of a transfer written over his name by the cashier, transferred to the bank on the books of the city treasurer, after the death of said owner. *Held*, that the endorsement and delivery was an equitable assignment, and that the subsequent transfer to the bank was proper.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1955–1957; Dec. Dig. ⇐938.]

[4. *Corporations* ⇐125.]

The provisions of the certificate itself, as to its transfer, are designed solely for the safety and security of the corporation itself, and of purchasers without notice.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 470; Dec. Dig. ⇐125.]

[5. *Municipal Corporations* ⇐938.]

Query: Will the hypothecation of a certificate of stock by the legal owner, or with his consent or subsequent acquiescence, without endorsement or power of attorney, constitute by delivery an equitable assignment, and act as an estoppel against the legal owner and creditors claiming through him?

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1955–1957; Dec. Dig. ⇐938.]

[6. *Appeal and Error* ⇐1212.]

A defence, even if not alleged in the answer, may be relied upon by defendants, when it is the point involved in an issue framed by order of this court for trial in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4713; Dec. Dig. ⇐1212.]

[7. *Pleading* ⇐129.]

A general denial of title admits the defence of title diverted by equitable assignment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270–275; Dec. Dig. ⇐129.]

[8. *Assignments* ⇐22.]

[Cited in Hampton & B. R. & Lumber Co. v. Bank of Charleston, 48 S. C. 130, 26 S. E. 238, and Maxwell v. Foster, 67 S. C. 385, 45 S. E. 927, to the point that an equitable assignment is good between the parties and all having notice.]

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 37; Dec. Dig. ⇐22.]

[9. *Corporations* ⇐149.]

[Cited in Hampton & B. R. & Lumber Co. v. Bank of Charleston, 48 S. C. 134, 26 S. E. 238, to the point that, though certificates of stock are not negotiable, a bona fide vendee for valuable consideration without notice will be protected.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539–546; Dec. Dig. ⇐149.]

Before Wallace J., at Charleston, February Term, 1878.

This case, having been before this court once before on appeal, will be found fully reported in 8 S. C. 318. It is unnecessary to repeat here any portion of the case up to that

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time. The *subsequent proceedings are set forth in the referee's supplemental report, which is as follows:

To the Honorable the Presiding Judge of the First Circuit:

I beg leave to make to the court the following report:

Chief Justice Moses, in delivering the opinion of the Supreme Court on the appeal taken in this cause, filed on the 12th of December, 1876, says:

"The only question presented by the appeal arises out of the exception of the city council of Charleston, one of the defendants in the cause, to so much of the Circuit decree as established the right to certain city stock in Col. Joseph Whaley, at the time of his death, and requires the said council to account for so much of the same as it has sold and transferred;" and the case was remanded to the Circuit Court to be referred to the referee "for the purpose of allowing the city council to offer evidence of their right to the stock which, on the death of Joseph Whaley, stood in his name, or to show how he may have been divested of his title thereto: the respondents to be at liberty to offer testimony in rebuttal." And by an order of the Circuit Court of the 28th of February, 1877, the cause was referred back to me, as special referee, to take the testimony which might be offered under the provisions of the order of the Supreme Court. By the original order of reference, filed on the 12th of September, 1874, I was appointed special referee to inquire and report upon the facts, with leave to report any special matter. Under the order of the Circuit of the 28th of February, 1877, I have held numerous references, and have taken the testimony offered by the city council, defendant, and the testimony offered by the plaintiffs in rebuttal, as provided for by the said order. I have been attended at these references by counsel representing the plaintiffs, and the other creditors of the late Joseph Whaley, deceased, and by counsel representing the city council of Charleston, defendant; counsel also appearing for the executor of Joseph Whaley, deceased, co-operating with the counsel for the city council.

The testimony was carefully taken down, and is filed with the report. Photographic copies were also made of all the signatures of Joseph Whaley introduced in evidence.

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*A considerable portion of the testimony was directed to the proof of handwriting and the examination of experts; and a comparison was instituted between the disputed signatures of Joseph Whaley and his acknowledged genuine signatures.

On the closing of the testimony, the points raised were very elaborately argued before me by Edward McCrady, Jr., Esq., and Samuel Lord, Jr., Esq., for the plaintiffs. Mr. Mitchell, representing the city council of Charleston, was present at the argument of plaintiffs' counsel, but declined to submit any argument himself. Mr. Mitchell took the position that the referee was not directed by the order of reference to do anything more than take the testimony and report the same to the court, and protested in advance against the argument proceeding, and against any waiver of his rights by his presence at the argument.

I proceed now, after a careful consideration of the whole case, to announce the conclusions of fact to which I have arrived.

The city stock, which stood in the name of Joseph Whaley, at the time of his death, is represented by certificates numbered 7, 12, 382, 383, 384, 386, 387, 393, 394, 395 and 396, and the object of the testimony offered by the city council was to show their right to this stock, or how the said Joseph Whaley may have been divested of his title thereto. I propose to take each certificate of stock separately, and state my conclusions as to each of them in turn.

Certificate No. 7, city stock, issue of June, 1852, for $23,000, principal sum.

This certificate, with the name of Joseph Whaley endorsed in blank, was pledged on the 5th of January, 1871, to the First National Bank, to secure a note of that date of William Whaley, endorsed Joseph Whaley, for $8000. This note was paid on the 20th of January, 1871.

On the 20th of January, 1871, this certificate was pledged to Pelzer, Rodgers & Co., to secure a note of William Whaley, for $10,000, at sixty days. The note of $8000, in the First National Bank, was paid out of this loan.

On the 3d of June, 1871, this certificate was pledged to Wm. C. Bee & Co., to secure a

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note of William Whaley and Joseph *Whaley of $11,500, at sixty days. The note was renewed for thirty days, and paid on the 8th of September, 1871.

On the 11th of January, 1872, this certificate, together with certificate No. 395, for $8000, and certificate No. 398, for $6000, and $6000 state bonds, was pledged by William Whaley to the People's National Bank, to secure his note of that date of $21,900. In this note were consolidated all the notes of Mr. William Whaley held by this bank. It was a "call loan," and was marked paid on the 12th of April, 1872.

On the 19th of February, 1872, this certificate, No. 7, was transferred on the books of the city treasurer to H. G. Loper, cashier of the People's National Bank, and a new certificate, No. 51, issued therefor in his name.

On the 23d of May, 1872, this stock certificate, No. 51, was bought for account of P. J. Coogan, city treasurer, by J. H. Wilson, broker.

The above-mentioned certificate, No. 398, for $6,000, had been transferred on the 13th of September, 1871, from certificate No. 385, standing in the name of Joseph Whaley, to the South Carolina Loan and Trust Company.

It does not appear from the evidence how this scrip was redeemed and became pledged

to the People's National Bank, to secure the aforesaid loan to William Whaley, of the 11th of February, 1872; nor does it appear from the evidence, by whose order the sale of the stock, represented by certificate No. 51, for $23,000, in the name of H. G. Loper, cashier, was made, or for whose account.

I find that the above-mentioned certificate, No. 7, for $23,000, with the name of Joseph Whaley endorsed thereon, was in the possession of H. G. Loper, cashier of the People's National Bank, prior to the death of Joseph Whaley, and was, by virtue of a transfer, written over the name of Joseph Whaley, transferred to him, in the books of the city treasurer, after the death of the said Joseph Whaley.

I find that the signature of Joseph Whaley, endorsed on this certificate, transferring the same to H. G. Loper, cashier, is the handwriting of Joseph Whaley.

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*Certificate of city stock No. 12, issue of January, 1866, for $5220, principal sum.

This certificate, with the name of Joseph Whaley endorsed thereon, was in the possession of the People's National Bank some time prior to the 11th of January, 1872, as collateral security for loan. On the 19th of February, 1872, it was, by virtue of a transfer, written over the name of Joseph Whaley, transferred on the books of the city treasurer to H. G. Loper, cashier, and a new certificate, No. 1745, issued therefor in his name.

On the 1st of March, 1872, the new certificate, No. 1745, was transferred by H. G. Loper, cashier, to William Whaley; and on the 3d of May, 1872, William Whaley transferred of this certificate $3220 to Wm. C. Bee & Co., $1000 to Robert Hunter, and $1000 to C. F. Hencken.

I find that the above certificate, No. 12, for $5220, with the name of Joseph Whaley endorsed thereon, was in the possession of H. G. Loper, cashier, prior to the death of Joseph Whaley, and was, by virtue of a transfer, written over the name of Joseph Whaley, transferred to him on the books of the city treasurer, after the death of Joseph Whaley.

I find that the signature of Joseph Whaley, endorsed on this certificate, transferring the same to H. G. Loper, cashier, is not the handwriting of Joseph Whaley.

Certificate of city stock No. 382, issue of March, 1856, for $5200, principal sum, and

Certificate of city stock No. 384, issue of March, 1856, for $4000 principal sum.

I find that these two certificates, with the name of Joseph Whaley endorsed thereon, were purchased, on the 23d of April, 1872, by P. J. Coogan, city treasurer, from J. H. Wilson, broker, and were, on the same day, transferred to the commissioners of the general sinking fund No. 2, of the city of Charleston. The said certificates were consolidated, and a new scrip, No. 409, for $9220, issued therefor.

It does not appear from the evidence by whose order the sale of these two pieces of scrip was made, or for whose account.

I find that this stock, standing in the name of Joseph Whaley, was sold and the transfer made after the death of Joseph Whaley.

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*I find that the signatures of Joseph Whaley, endorsed on certificate No. 382, transferring the same to the commissioners of the general sinking fund, is not the handwriting of Joseph Whaley.

I find that the signature of Joseph Whaley, endorsed on certificate No. 384, transferring the same to the commissioners of the general sinking fund, is not the handwriting of Joseph Whaley.

Certificate of city stock No. 383, for $4780, principal sum.

This certificate, with the name of Joseph Whaley endorsed, was pledged, on the 20th of October, 1871, to Wm. C. Bee & Co., to secure a note of William Whaley, endorsed Joseph Whaley, for $2300, at thirty days. The note was renewed at maturity for thirty days, and was paid on the 27th of December, 1871.

On the said 27th of December, 1871, this certificate was pledged to the First National Bank, to secure note of William and Joseph Whaley, for $23,000, payable on February 25th–28th, and was entered as paid February 28th, 1872.

On the 23d of February, 1872, it was pledged to M. Triest, with power of attorney endorsed over the signature of Joseph Whaley, to secure note of William Whaley, in favor of M. Triest, for $2300, at sixty days, and was, on the 28th of February, by virtue of said endorsement, transferred on the books of the city treasurer to the said M. Triest, and a new scrip, No. 404, issued therefor in his name.

The new scrip was transferred on the 22d of November, 1872, to C. J. Huguenin, and on the 28th of February, 1873, to the commissioners of the general sinking fund, and canceled.

I find that the above certificate, No. 383, standing in the name of Joseph Whaley, was pledged, and the transfer and power of attorney made to the said M. Triest, after the death of Joseph Whaley.

I find that the signature of Joseph Whaley, endorsed on this certificate, transferring the same to M. Triest, with power of attorney to the said M. Triest to transfer the same, is not the handwriting of Joseph Whaley.

Certificate of city stock No. 386, for $5000, principal sum, and

Certificate of city stock No. 387, for $5000, principal sum, issue of March, 1856.

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*These certificates, with the name of Joseph Whaley endorsed were pledged, on

the 14th of July, 1871, to R. T. Chisolm, to secure two notes of William Whaley of $2350 each, at six months. The notes were renewed at maturity for six months longer, and were paid in full on the 18th of July, 1872. The stock represented by these certificates was purchased on the said 18th of July, 1872, (together with certificate No. 393, for $10,000,) from J. Frazer Matthewes, by F. J. Pelzer, for account of the commissioners of the general sinking fund No. 2.

It does not appear, from the evidence, by whose order or for whose account the sale of the said stock was made.

I find that the stock represented by these two certificates in the name of Joseph Whaley, was sold, and the transfer made after the death of Joseph Whaley.

I find that the certificates of Joseph Whaley, endorsed on these two certificates, transferring the same to the commissioners of the general sinking fund, are not the handwriting of Joseph Whaley.

Certificate of city stock No. 393, issue of March, 1856, for $10,000, principal sum.

This certificate, with the name of Joseph Whaley endorsed, was pledged on the 4th of September, 1871, to the First National Bank, to secure a note of William Whaley, of that date, for $5000. The note became due on the 3d of November, 1871, and was paid on the 8th of January, 1872.

On the 18th of July, 1872, this stock was purchased, together with certificate No. 386, for $5000, and No. 387, for $5000, from J. Frazer Matthewes, by Francis J. Pelzer, for account of the commissioners of the general sinking fund. These three certificates were consolidated, and a new certificate, No. 428, issued. It does not appear, from the evidence, by whose order or for whose account the sale of said stock was made. I find that the stock represented by the above certificate No. 393, standing in the name of Joseph Whaley, was sold and transferred after the death of Joseph Whaley. I find that the signature of Joseph Whaley, endorsed on this certificate, transferring the same to the commissioners of the general sinking fund, is not the handwriting of Joseph Whaley.

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*Certificate of city stock No. 394, issue of March, 1856, for $10,000, principal sum.

This certificate, with the name of Joseph Whaley endorsed, was pledged to the People's National Bank on the 23d of August, 1871, to secure a note of William Whaley for $5000. This note was paid on the 3d of October, 1871. On the 4th of November, 1871, it was pledged to William C. Bee & Co., to secure a note of William and Joseph Whaley of that date, for $5000, at thirty days. This note was paid on the 7th of December, 1871.

On the said 7th of December, 1871, it was pledged to William B. Smith & Co. to secure a note of William and Joseph Whaley of that date, for $5000, at sixty days. This note was paid on the 8th of February, 1872. On the said 8th of February, 1872, it was pledged to D. Ravenel, Jr., assistant cashier of the Citizens' Savings Bank of South Carolina, to secure a note of William Whaley of that date, for $5000, at sixty days. The note was renewed at maturity on the same security, to become due on the 13th of June, 1872, and was paid on the 7th of June, 1872.

This certificate was, by virtue of a transfer written over the name of Joseph Whaley, transferred on the books of the city treasurer, between the 8th and 19th of February, 1872, to D. Ravenel, Jr., assistant cashier, and a new certificate, No. 402, issued to him, and receipted for on the last-mentioned date. I find that the above certificate, No. 394, standing in the name of Joseph Whaley, was pledged to D. Ravenel, Jr., assistant cashier, and transferred to him after the death of Joseph Whaley.

I find that the signature of Joseph Whaley, endorsed on the certificate, transferring the same to D. Ravenel, Jr., assistant cashier, is not the handwriting of Joseph Whaley.

Certificate of city stock No. 395, issue of March, 1856, for $8000, principal sum.

This certificate, with the name of Joseph Whaley endorsed, was pledged to H. G. Loper, cashier, on the 30th of August, 1871, to secure a note of William Whaley, for $4000. The note was paid on the 11th of January, 1872.

This stock was again pledged on the 11th of January, 1872, to the People's National Bank,

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and was a part of the $37,000 *city stock, pledged to secure the loan to William Whaley, of $21,900 above mentioned, which was paid on the 12th of April, 1872. On the 19th of February, 1872, it was, by virtue of a transfer, written over the name of Joseph Whaley, transferred on the books of the city treasurer to H. G. Loper, cashier, and became a part of certificate No. 401, for $14,000.

On the 23d of May, 1872, it was purchased by J. H. Wilson, banker and broker, for account of P. J. Coogan, city treasurer.

It does not appear, from the evidence, by whose order the sale of the said stock was made, or for whose account.

I find that the above certificate, No. 395, was in the possession of H. G. Loper, cashier of the People's National Bank, prior to the death of Joseph Whaley, and was, by virtue of a transfer written over the name of Joseph Whaley, endorsed thereon, transferred on the books of the city treasurer to the said H. G. Loper, cashier, after the death of Joseph Whaley.

I find that the signature of Joseph Whaley, endorsed on this certificate, transferring the same to H. G. Loper, cashier, is not the handwriting of Joseph Whaley.

Certificate of city stock, No. 396, issue of March, 1856, for $6122, principal sum.

This certificate, with the name of Joseph

Whaley endorsed, was held by the People's National Bank, some time prior to the 11th of January, 1872, and collateral security for loan.

On the 23d of February, 1872, it was, by virtue of a transfer, written over the name of Joseph Whaley, transferred on the books of the city treasurer to H. G. Loper, cashier, and a new certificate, No. 400, issued therefor in his name.

On the 23d of April, 1872, the said stock certificate, No. 400, was sold by J. H. Wilson, broker, to P. J. Coogan, city treasurer.

It does not appear, from the evidence, by whose order the sale of the said stock was made or for whose account.

I find that the transfer of the above certificate, No. 396, to H. G. Loper, cashier, was made after the death of Joseph Whaley.

I find that the signature of Joseph Whaley, endorsed on said certificate, transferring the same to H. G. Loper, cashier, is not the handwriting of Joseph Whaley.

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*I find that, by the last will and testament of Joseph Whaley, deceased, no power of sale is vested in his executor, and that no order has been made by the judge of probate for Charleston county, authorizing the sale of city stock belonging to the estate of Joseph Whaley.

Respectfully submitted.

G. W. Dingle, Referee.

January 4th, 1878.

Exceptions to Report of Referee.

Subject to the notice served on the plaintiffs' attorneys to set aside the report of the referee filed in this case, and to the motion for an order directing the referee to report the testimony of the city council in this case, and under the order of the Supreme Court and the Circuit Court, and the testimony of the plaintiffs in rebuttal thereof, the city council excepts to the report of the referee:

1. That in the report of the referee it plainly appears that in reporting, as he professes to do, conclusions of facts, such conclusions involve and depend on conclusions of law which are not in any order submitted to the referee; which he could not undertake to decide, and concerning which it would be necessary for him to have the instructions of the court upon the questions of law which were involved in and necessary for the ascertainment of conclusions of fact.

2. That the report of the referee, if it shall be considered properly filed as to the conclusions of facts therein set forth, is insufficient, because it does not report the conclusions of fact upon the testimony offered by the city council; that the testimony of the city council was positive in its character to show the right of the city council until the testimony so offered was impeached; that as no counter testimony did impeach it, and as nevertheless such testimony was discredited, it was necessary and proper for the referee to state the grounds upon which the positive testimony of the city council was, by the referee, discredited.

3. That in coming to a conclusion of facts, the referee has relied upon testimony which is wholly inferential, disregarding that which was positive and sustained the validity

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of the transfers, *without stating for what reason he declined to give weight to testimony which was positive and uncontradicted; and relied upon that which was merely inferential.

4. That the witnesses, Mrs. Rachel L. Whaley, Mrs. Bessie W. Seabrook and Mrs. Riordan, the last two the granddaughters of Joseph Whaley, and the parties who, if the transfer of the city stock, so far as Joseph Whaley was concerned, was not complete, were entitled to share in the same, but who testified against their own interest and to the declarations of Joseph Whaley, as having exercised absolute disposition of said stock, have been, in the findings of the referee, wholly discredited, without witnesses or circumstances to impeach their testimony.

5. That the referee, in coming to his conclusions of facts, disregarded the testimony of William Whaley, to the effect that Joseph Whaley kept the city stock himself, giving him the stock from time to time; the stock so given to William Whaley, according to the testimony of the other witnesses in the case, plainly appearing as absolutely parted with by the said Joseph Whaley, and so given to the said William Whaley for the purposes considered necessary by the said William Whaley.

6. That the referee did not report as a conclusion of fact, that the testimony offered in the case plainly proved such control of the city stock, given by Joseph Whaley to William Whaley, as would prevent the said Joseph Whaley, were he living, from asserting title to the same against a purchaser for value bona fide, and without notice.

7. That the claim of the plaintiffs to the stock depends upon the right of Joseph Whaley to the stock; and where a purchaser for value bona fide, and without notice, would prevail against Joseph Whaley were he alive, the same will prevail against all claiming to be his creditors, and whose rights are such as Joseph Whaley had. That the referee should have reported, as a conclusion of fact, that the city council being purchasers for value bona fide and without notice, the plaintiffs had no claim to the stock which Joseph Whaley was estopped from setting up against the city council.

8. That the referee should have reported, as a conclusion of fact, that the handwrit-

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ing of Joseph Whaley, on all the notes *and bonds held by parties claiming an interest in the stock in question in this case, and which

was in evidence, was the same as that which appeared on the city stock; and such was the testimony of E. H. Sparkman and others produced by the plaintiffs as experts. Or, that if he did not adopt that conclusion of fact from this evidence, but did adopt the conclusion that it was not, the referee should have so reported as a conclusion of fact.

9. That the referee erred in denying to the city council the right of reply to the testimony of John E. Phillips; and also in denying to the city council the right of reply generally to the testimony of the plaintiff in rebuttal.

10. That the endorsement of the name of the owner of stock in blank, or to a designated person, on a certificate of city stock, is in fact the absolute disposition of the stock by the person whose name is so endorsed; and as such cannot be impeached in the hands of a holder bona fide and without notice.

11. That the referee should have reported that the city council proved their right to the stock claimed by them by transfers of the same, the said city council being purchasers bona fide for value and without notice; and that the title of Joseph Whaley in and over the said stock, had ceased so far as purchasers bona fide for value and without notice had been extinguished by his endorsement in blank and otherwise on said stock, leaving the same in possession of William Whaley, to be dealt with as he, William Whaley, chose, and without notice on the part of Joseph Whaley of any restriction upon the use of the endorsement of his name; and that evidence being uncontradicted that the said Joseph Whaley did, during his lifetime, deliver the said stock to William Whaley.

12. That the referee erred in not reporting that the city stock scrip No. 7 was in the possession of the People's National Bank during the lifetime of Joseph Whaley, and at the time of his death, with an absolute transfer and assignment thereof to H. G. Loper, cashier of the People's National Bank; and that it was sold by the said bank to the city council, the city council being the purchaser bona fide for value and without notice.

13. That the referee erred in not reporting that the city stock scrip No. 12, was in the possession of the People's National Bank

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*during the lifetime of Joseph Whaley, and at the time of his death, with an absolute transfer and assignment thereof to H. G. Loper, cashier of the People's National Bank; and that it was sold by the said bank to the city council, the city council being the purchasers thereof bona fide and without notice; and that the handwriting of the said Joseph Whaley, as it appears on the said scrip, was genuine, and the same as appears on all the notes and bonds introduced in evidence in this case as valid claims against the estate of Joseph Whaley, and to pay which it is claimed that the title of city council, as purchaser, should be set aside, and the parties holding such claims be held entitled to the said stock against the city council.

14. That in regard to scrips Nos. 382 and 384, the referee should have reported, as the only conclusion of fact, that the transfer thereof was made to the city council, a purchaser thereof bona fide for value and without notice, under an assignment and transfer thereof in blank by the said Joseph Whaley at some time in his life, when the said Joseph Whaley parted with the possession of said scrips; and that the handwriting of the said Joseph Whaley, as it appears on the said scrips, was genuine, and the same as upon all the notes and bonds introduced in evidence in this case as valid claims against the estate of Joseph Whaley and to pay which it is claimed that the title of the city council as purchaser should be set aside, and the parties holding such claims be held entitled to the said stock against the city council.

15. That the referee should have reported as a conclusion of fact in regard to scrips Nos. 383, 386, 387, 393, 394, 395 and 396, that said scrips were transferred and assigned by Joseph Whaley, in his lifetime; that the said city council became purchaser thereof bona fide for value and without notice; that the transfers thereof were made on the books of the city treasury, by parties claiming and holding under transfer and assignment of the said Joseph Whaley, in his lifetime; and that the handwriting of the said Joseph Whaley, as it appears on all of the said scrips, was genuine, and the same as it appears on all the notes and bonds introduced in evidence in this case, as valid claims against the estate of Joseph Whaley, and to pay which

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it is *claimed that the title of the city council as purchaser, should be set aside, and the parties holding such claims be held entitled to the said stock against the city council.

16. That the city council excepts to all that part of the report of the referee, in which he has gone into the account and narration of the history of each of the several scrips now held by the city council, and that such account and narration is not correct, and that the same in nowise can be introduced to affect the title of the city council to the scrips held by it, nor admissible in a proceeding to which the parties to be affected by it, and through whom title comes to the city council are not before the court nor parties in the cause.

Julian Mitchell,
A. G. Magrath,
Attorneys for City Council.
Thos. Y. Simons,
Corporation Counsel.

I adopt the above for the executors of Joseph Whaley.

W. James Whaley,
Attorney for Executors.

Decree.

The complaint in this case is in the nature of a creditor's bill, the plaintiffs in their own behalf claiming, as creditors of Joseph Whaley, to have certain city stock, at the time of the death of Joseph Whaley standing on the books of the city treasury in his name, and transferred subsequently to his death, administered as assets of the estate of Joseph Whaley. The city council of Charleston will, for the present, be considered as the defendant principally interested in the relief asked in the complaint.

A large portion of this stock was purchased by the city council for the commissioners of the sinking fund, and other portions of the stock have been transferred on the books of the city treasury to other persons. The plaintiffs ask that the city stock purchased by the city council and transferred to the commissioners of the sinking fund, and the city stock also on the books of the city treasury transferred to other parties purchasing the same, be accounted for as part of the estate of Joseph Whaley.

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*Joseph Whaley died on the 26th day of January, 1872, leaving a will unrevoked, and appointed therein an executrix and two executors; of these, his son, William Whaley, named in the will as executor, only qualified. The complaint in this case has been substituted for another, filed in the name of the People's Bank, to which the city council was not a party. An order made in that case allowed this complaint to be filed in place of that, and another order directed all the claims proved in the case of the People's Bank to be transferred to this case of Fraser & Dill, and be considered as proved in this.

Under an order of reference in this case, the case was referred to G. W. Dingle, Esq., who proceeded to hold his reference in the same, and made his report.

This report was confirmed, and an appeal taken to the Supreme Court. The Supreme Court, for the reasons set forth in the opinion, sent the case to the Circuit Court with directions, according to which, under the order of the Circuit Court, the reference was opened, testimony taken, and a report made to this court, to which exceptions have been filed.

According to the opinion of the Supreme Court, the real issue as to the stock was the right of ownership in it at the death of the testator.

That the plaintiffs' right to the relief asked was through the right of the testator to it at the time of his death, and its liability as his property to respond to the demands which they hold against him as creditors.

The case was then remanded for the purpose of allowing said city council to offer evidence of their right to the stock, which, on the death of Joseph Whaley, stood in his name, or to show how he may have been divested of his title thereto, the respondents to be at liberty to offer testimony in rebuttal. The Circuit Court, in its order of reference, was guided by the directions of the Supreme Court as to the scope of the reference, and the parties appeared before the referee, the defendant, the city council, to offer evidence of its right to the stock, or to show how the title of Joseph Whaley was divested.

The title set up by the city council was that of a purchaser for value bona fide, and without notice. The property of Joseph

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*Whaley in the stock was claimed to have been divested by his blank endorsement on the scrip before his death, and his parting with the scrip so endorsed to third persons, to whom the transfer was made after the death of Joseph Whaley, these persons producing to the city treasurer the certificates of stock purporting to have the endorsement thereon of Joseph Whaley, and surrendered to the city treasurer, by whom new certificates were given, and from these persons the city council purchased the stock.

This is the history of the greater portion of the stock purchased by the city council. Other stock, purchased by other parties and transferred to them, different perhaps in some respects from this, but in the view now to be taken of the case it is not necessary particularly to distinguish it from that held by the city council at this part of the decree. In the argument of the case two propositions were discussed.

1st. Supposing the endorsement of Joseph Whaley to be in his own handwriting, what is the legal nature and effect of that endorsement?

2d. Is the endorsement in the proper handwriting of Joseph Whaley?

The second of these propositions is a question of fact. To this question quite a number witnesses were examined before the referee, and their testimony filed with the report. A number of the proven or admitted signatures of Joseph Whaley were also put in evidence, and these, together with the disputed signatures upon the scrip, were photographed and pasted together upon large sheets of paper and submitted to me at the hearing. After a careful review of all the testimony, my mind is forced to the conclusion that the findings of the referee are correct, and the exceptions thereto are overruled, and the report confirmed and ordered to stand as the findings of the court upon matters of fact.

It is useless to discuss the effect of an endorsement not made by Joseph Whaley. Of course Joseph Whaley was not divested of his title to scrip by endorsements not made by himself or by his authority.

This disposes of the question of the validity of the transfer by the city council of all the city stock which stood on the books of

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*the city treasurer in the name of Joseph Whaley at the time of his death, except scrip No. 7, for $23,000.

In relation to this scrip, the facts found are as follows: "I find that the above-mentioned certificate No. 7, for $23,000, with the name of Joseph Whaley endorsed thereon, was in the possession of H. G. Loper, cashier of the People's National Bank, prior to the death of Joseph Whaley, and was, by virtue of a transfer written over the name of Joseph Whaley, transferred to him in the books of the city treasurer, after the death of Joseph Whaley.

"I find that the signature of Joseph Whaley, endorsed on this certificate, transferring the same to H. G. Loper, cashier, is the handwriting of Joseph Whaley. This certificate, then, was in the possession of Loper before the death of Joseph Whaley, endorsed by Joseph Whaley, and transferred on the books of the city treasurer to Loper after the death of Joseph Whaley." It appears, in the report of the referee, that there was issued to Loper, by the city council, scrip No. 51 in lieu of scrip No. 7. This stock was pledged to secure a call loan to the People's National Bank, on the 11th of January, 1872.

The call loan was marked paid on the 12th of April, 1872. Scrip 51 was bought by the city on the 23d of May, 1872. How the call loan was paid does not appear. There is nothing in the testimony to show that this stock was ever in the possession of Joseph Whaley in his lifetime, or of his personal representative after his death, after it was pledged to the People's National Bank on the 11th of January, 1872. Then Loper, the cashier, holding this scrip on the 11th of January, 1872, the scrip endorsed in blank by Joseph Whaley, and nothing appearing to impeach the transaction through which he held, must be regarded as the lawful holder, coupled with an interest, and had the right to do with it all that was necessary to effectuate the purpose of his so holding, and as it appears that the certificate representing this stock was sold by him, he is entitled to the presumption that it was so sold by him to effectuate the purpose of the pledge. Baldwin v. Ely, 9 How. U. S. 600 [13 L. Ed. 266].

Up to the time of the sale, Joseph Whaley in his lifetime, or his personal representative

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after his death, had the right to *redeem; but by the sale in pursuance of the agreement to pledge, the right to redeem was barred and the purchaser took a good title. The purchase related to the time of the pledge, and effectually divested Joseph Whaley of all title to the stock. Whether Loper held a power of attorney coupled with an interest, and therefore had the right to cause this stock to be transferred after the death of Joseph Whaley, and thus acquire the legal title, or whether he held a mere naked power which was determined by the death of Joseph Whaley, are questions that need not be decided in this decree in the view now taken of the case.

It is admitted in the argument that a delivery of the scrip with a power of attorney to transfer endorsed, passes the equitable but not the legal title.

According to the face of these certificates of stock, they can be transferred only upon the books of the treasury upon the appearance of the owner of the stock in person, or by attorney, and the surrender of the certificate. This is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable title.

The general construction which has been put upon other charters of their banks containing similar provisions as to the transfer of their stock, is that the provisions are designed solely for the safety and security of the bank itself and of purchasers without notice, and that as between vendor and vendee a transfer not in conformity to such provisions is good to pass the equitable title and divest the vendor of all interest in the stock. See Black v. Zacharie, 3 How. U. S. 513 [11 L. Ed. 690], and numerous authorities there collected. If any creditor had attached the stock without notice, perhaps the property would not have passed to Loper as against the attaching creditor, but there is nothing of that kind in this case. Whether Loper could effectually cause the stock now under consideration to be transferred, and thus acquire the legal title, under the view now taken, is of no consequence to the plaintiff in this action, as Joseph Whaley was as completely divested of the title to the stock by conveying the equitable title, as he could have been by transferring the legal title, so far as the plaintiffs in this action are concerned, and the fact that this stock was

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*transferred after the death of Joseph Whaley, can restore no rights to his estate that had been parted with in his lifetime. In the argument at the hearing the testimony to the effect that the signatures of Joseph Whaley upon the notes held by plaintiff and other creditors were in the same handwriting as the disputed signatures upon the city scrip, was pressed upon my attention, and it was suggested that if the disputed signatures upon the scrip were not genuine, then the signatures upon said notes were not genuine, and the holders thereof had not the right to sustain the relation of plaintiffs to this action. It was said, upon the other hand that for argument sake, admitting that the signatures of Joseph Whaley upon the notes were not genuine, there were other creditors of Joseph Whaley in whose

behalf this complaint would be sustained. It was further said in this behalf that the notes referred to were in judgment, and had been therefore passed upon by a court of competent jurisdiction and could not be collaterally impeached, and could only be assailed in a direct proceeding instituted for that purpose. The issue thus raised is not ripe for decision in this decree, but may again arise in the subsequent progress of the cause.

As matters of law, I find that Joseph Whaley was divested of the stock represented by scrip No. 7, by endorsing the same to H. G. Loper, cashier, and the subsequent sale of the stock by Loper, in pursuance of his contract with Joseph Whaley.

I find that Joseph Whaley was not divested of the stock represented by certificates numbers 12, 382, 383, 384, 386, 387, 393, 394, 395 and 396, by any endorsement of the name of Joseph Whaley thereon, as such endorsement is not the handwriting of Joseph Whaley, or made by his authority, and that the said stock is still a part of the estate of Joseph Whaley.

It is therefore adjudged and decreed that the city stock which stood in the name of Joseph Whaley at the time of his death, except that represented by certificate No. 7, belonged to the estate of the said Joseph Whaley, and is subject to the payment of his debts.

It is ordered that the said city council do cancel, or cause to be canceled, the certificates of stock transferred to the general sinking fund, and which has been adjudg-

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ed to belong to the estate of *Joseph Whaley, that is to say, certificates numbers 382, 384, 386, 387, 393, 395, 396, and do issue new certificates therefor in the name of the receiver, hereafter to be appointed in this cause, and that the said council do account with and pay over to the said receiver all dividends or interest thereon which have become due thereon since the death of the said Joseph Whaley.

3. It is further ordered that the said city council do account with the said receiver, when appointed, for so much of the said city stock which stood in the name of Joseph Whaley at the time of his death, and since transferred to other persons, that is to say, certificates of the following numbers, 12, 383, 394, and that said city council do pay to the said receiver when appointed, the market value of the said stock at the time of the said transfers, and do account with and pay over to the said receiver the amount of any and all dividends which may have become due from the time of the death of the said Joseph Whaley, up to the time of such payment.

4. It is further ordered that it be referred to G. W. Dingle, Esq., to inquire and report a suitable person to be appointed receiver in this cause, and the amount of security he should give in the same.

5. It is further ordered that said receiver have leave to institute such proceedings as he may be advised may be proper and necessary to try the validity of any claims against the estate of Joseph Whaley, and defend such proceedings as may be instituted against him.

W. H. Wallace,
April 8th, 1878. Circuit Judge.

From this degree the plaintiffs appealed, upon the grounds set forth in their argument.

The city council also appealed upon the following grounds:

First. Because there was no sufficient proof before the court that the complainants were creditors of the deceased, Joseph Whaley, and, therefore, no case was before the court in which an order could be made for an ac-

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counting with them by the *executor, or other act to be done connected with the administration of the estate and concerning which they had a standing in court.

Second. That the judgment of his Honor Judge Wallace rested upon an alleged want of proof of the genuineness of the signature of Joseph Whaley, the deceased, because of which the transfer of the scrip was held invalid. But there was the same want of proof of the genuineness of the signature of Joseph Whaley on the notes of the plaintiffs and others; and if the endorsements of the certificates of stock were invalid, the endorsements of the notes and the name of Joseph Whaley, signed to the bond, were equally so.

Third. Because his Honor Judge Wallace erred in holding that the issue as to the validity of the endorsements of the notes was not ripe for decision: that such issue was ripe for decision, and such decision should have been made dismissing the bill so far as the holders of such notes were before the court.

Fourth. Because while in the three preceding exceptions, the endorsements of the certificates of stock and of notes have been presented as equally affected by the proof of handwriting: nevertheless, in regard to the certificates of stock, there was competent and positive testimony sustaining the validity of the endorsements of the stock.

Fifth. Because his Honor Judge Wallace erred in deciding that in this case it was proper to appoint a receiver; that if exceptions were taken to one of the executors, there was before the court, in the person of W. James Whaley, Esq., an executor of Joseph Whaley, who had, subsequent to the transactions set forth in the pleadings, qualified as such executor, and against whom no charge of improper conduct could be made.

Sixth. Because if it were so that a receiver would be appointed upon the proof before the court his Honor Judge Wallace, failing to decide the question of the invalidity of the endorsements of the notes, should have ordered the receiver not to recognize the en-

dorsements of the notes as constituting valid claims against the estate of Joseph Whaley, until so established by the judgment of a court.

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*The following is a summary of the leading argument on each side, upon the law points involved:

[For prior opinion, see Whaley v. City of Charleston, 8 S. C. 344. For subsequent opinions, see 13 S. C. 533, and 19 S. C. 384].

Mr. Julian Mitchell, for city council.

The most striking fact in this whole case, and upon which the testimony is unanimous, is that, leaving out the Lathers bond and scrip No. 7, the signatures on the claims and debts of the estate held by the creditors are in the same handwriting as the signatures on all the city stock save No. 7.

We therefore say they are estopped from denying the validity of their debts, and consequently are bound by their own testimony that the scrip signatures are the same as on their debts.

It is said that estoppel is an odious doctrine, but in this case, if the view of the creditors that the signatures on the scrip are not genuine, then the doctrine of estoppel becomes one of the most just, equitable and righteous doctrines a court of equity has ever been called on to enforce. Are they, then, estopped?

1. They claim by virtue of debts of Joseph Whaley to make Joseph Whaley's estate liable; a denial of the genuineness of the endorsements creating their claims is a denial of the liability of the estate, and ends their case.

2. They claim that the endorsements are genuine; have sworn to them in order to get their judgments, and each one, in his affidavit of proof of claim, has alleged the validity of the endorsements.

3. They have introduced them as such, i. e., genuine notes, waiving the ruling of the referee; no one of them objected to their introduction; no one objected to the witnesses testifying to them. The examination of the whole book of testimony does not show a single objection made by any of the parties in the cause to the genuineness of their claims; in fact, such a thing could not have been done, because, by so doing, they would have been out of court. But it is said that Gibbon's note, Scott's bond, Davie's note and verdict of Gadsden v. Whaley, save the complaint. This cannot be so—

First. Because the parties holding these claims, being parties in the cause, raised no objection to the validity or genuineness of the signatures on the notes when presented

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in evidence; nor did *any one of them impeach them, and, therefore, they are, by the familiar principle of evidence, bound by their omission to object.

Secondly. Because the Gibbon note, the Scott bond and Davie's note were all given at or about the very dates when the other notes were given, and the presumption is very strong that they bear the same signature.

Thirdly. The Gadsden v. Whaley claim on their verdict has not yet reached the point of judgment upon which the court could base a decree in this case, and the court would hold those whose notes have been proved in the cause, as bound by their position as to the genuineness of the signatures thereon, and without remedy against the city council.

The law, as laid down to sustain the above doctrine, is as follows: Bigelow on Estoppel 20, 25, 584, 617, 618; Greenl. on Ev., § 535; 5 Man. & G. 131–192; 16 Q. B. 229–237; 5 Hill 183; 8 Rich. 117; 16 Q. B. 198; Stephens' Ev. 52; 8 Paige 41; 30 N. Y. 519–541; 18 N. Y. 382; 3 Hill 215.

All the creditors, therefore, in this case are estopped from denying the signatures on the notes and claims to be genuine, and their own testimony says it is the same signature on the scrip. How, then, can they recover?

While on this point I deem it best to discuss the fourth ground, to wit:

If all of the above grounds were to fail, then this stock is only liable, as the property of Joseph Whaley, for his debts, and if it appears, at any stage of the cause, that any party fails to have a valid debt, he will not be entitled to any portion of the stock or any remedy against the city council. Broom's Legal Maxims 712, 728, 734, 736; 15 Mass. 204.

But the plaintiffs insist that the city council cannot now question the signatures to the notes and obligations.

This proposition of theirs rests on two grounds:

1. That in those claims which were reduced to judgment, the judgment is conclusive as against every one, and cannot be questioned.

But the city council was no party to the proceedings. How can it then be bound by any judgment obtained therein?

The rule is unquestioned that a third per-

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son can always attack *or impeach a judgment to which he was not a party or privy when such judgment is the ground of any claim against him. Freem. on Judg., § 334; 4 Cush. 31; 1 Hill 302; 8 S. C. 262.

2. The second ground is, that all these claims having been proved in this case without any exception to their proof within the time allowed by the rule of court, they cannot now be questioned or assailed.

But it is not possible for a Court of Chancery to use these claims as a shield to protect the fraud involved in the other cases. See the powers of the equitable jurisdiction of the Court of Chancery in C. J. Moses' decree, Sp. Eq. Jur.

II. The estate became divested of its title

by the absolute transfer of the stock by the testator in his lifetime, of which there is no doubt as to scrip No. 7. Or by the hypothecation of the stock by virtue of a power of attorney executed during his life, and coupled with an interest, and therefore irrevocable.

The law as to the irrevocability of such powers coupled with an interest is as follows: 2 Liv. on Ag. 308; 18 How. 427; 13 N. Y. 599; 7 Wall. 415; 11 Wall. 369; Sch. on Per. Prop. 631-634; 1 Bail. 624; 12 Rich. 41; 4 E. D. Smith 440; 4 Duer 1; 1 Duer 354.

III. "The plaintiffs have no more right to the stock than that which Joseph Whaley, were he alive, could set up, and he, by parting with the control and disposition of the stock by handing the same over to his son, placed him in a position to deal with it as his own, and therefore if innocent parties are prejudiced by such action of the testator, the loss must fall upon the estate." 2 Whart. on Ev., § 1154; Rich. Eq. Cas. 246; 2 Johns. Ch. 589; 10 Ad. & El. 437, 90; 6 Ad. & El. 469; 1 Curtis 136.

1. The last ground we will notice is the first as laid down in the beginning of the argument. The city council is a bona fide purchaser for value without notice.

The endorsements on the back of all the scripts are not powers of attorney, but absolute transfers. By the scrip itself, and the ordinances of the city, they are made payable

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to the party or his *assigns. All the requirements of the ordinance as to the transfer of title have been complied with. The title is actually transferred by virtue of the endorsement, and there is nothing to be done as between vendor and vendee—it is not a power, for there is nothing to be executed. The mere fact of the transfer in the books of the city is for the benefit of the corporation, as a safeguard to them. The authorities all hold it is an assignment and not a power.

These scrips are also negotiable instruments, and by an examination of the authorities here given, it will be seen the Supreme Court has so held.

Bonds of municipal corporations are commercial instruments. 2 Otto 642; 4 Otto 287; 11 Wall. 377. Important on the point that these securities savor of a negotiable character. 13 N. Y. 599. The case most directly in point is 19 Wall. 477. See, too, 9 How. 580; A. & A. Corp. 543, 547; 20 Wend. 91; 2 Pick. 243; 11 Rich. 344.

The provision usual in charters that no transfer of stock shall be effectual until entered in the books of the corporation, is a regulation designed for the security of the corporation itself and of third persons taking transfers without notice of any prior equitable transfer. It relates to the transfer of the legal title and not of any equitable interest subordinate to that title; as between vendor and vendee, a transfer not in conformity to such provisions passes the equitable title and divests the vendor of his interest. 2 Cow. 777, 778; 11 Wend. 628; 10 Mass. 476; 8 Pick. 90; 3 How. U. S. 483; 23 How. Pr. 359; 17 N. J. Eq. 117; 9 Pick. 202; 11 Wend. 627; 10 Mass. 476; 7 Lans. 307; 49 N. Y. 286; 48 N. Y. 585; 40 Cal. 614; 2 S. C. 25; 57 N. Y. 616; 10 Bush 54; 53 Ga. 514; 42 Md. 384.

It may be urged that the conclusions of the referee and the Circuit judge, so far as the facts found are concerned, are final, and cannot be disturbed. In answer to this we say that in chancery cases this court has the undoubted right to review the testimony, and reverse, modify or confirm the conclusions of the court below in like manner as the old Court of Appeals in Chancery could have done. 6 S. C. 90, 379.

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*The present case is one of chancery jurisdiction, and falls within the rule.

Mr. Edward McCrady, Jr., and Mr. Samuel Lord, Jr., for plaintiffs.

The Plaintiffs' Appeal.

1. From so much of the decree of his Honor Judge Wallace as holds that Joseph Whaley was divested of the city stock represented by scrip No. 7, by endorsing the same to H. G. Loper, cashier, and the subsequent sale of the stock by Loper, in pursuance of his contract with Joseph Whaley.

The city council, unable to show a power of sale under the will, or an order of the Court of Probate authorizing the sale at which they purchased, have undertaken to show that H. G. Loper from whom they bought, held the same with a blank endorsement and power of attorney from Joseph Whaley, coupled with an interest. But how have they succeeded in doing this?

We think his Honor has assumed the very point in issue. Did Joseph Whaley endorse the stock to H. G. Loper, cashier? Did Loper have any contract with Joseph Whaley? There is no evidence that Joseph Whaley had any transaction whatsoever with Loper, nor has it even been suggested in evidence that there was any such. Whatever contract there was, was between Loper and William Whaley. But first, let us inquire was this scrip No. 7 a negotiable instrument which would pass by mere endorsement.

a. Was this certificate of stock a negotiable instrument?

This stock is the creature of statute, and is governed by the provisions of the statute which authorized its issue. Its very form is prescribed by ordinance, and on its face it is announced that it is "recorded in and transferable only at the office of the city treasurer, by appearance in person or by attorney, according to the rules and forms instituted for that purpose."

His Honor the Circuit judge seems to assume in his opinion that there was not only

a blank endorsement, but also a power of attorney from Joseph Whaley to transfer, and it is just here that this case differs from most, if not from all of the cases relied upon

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*by the city. There was in each of those cases not only an endorsement, but a power of attorney accompanying it. See 6 Rich. Eq. 334; 37 Eng. L. & Eq. 195; 11 Barb. 385; 21 How. 397; 22 Wend. 359.

A case very similar to this has recently been discussed and decided in the Court of Appeals in New York. This case is Merchants' Bank of Canada v. Livingston et al., found in The Reporter for August, 1878, p. 178.

In our case, the city council has never claimed that the People's Bank, or Loper, had dealt with William Whaley or the agent of Joseph Whaley. Their answer rests their defence upon the authority and agency of Loper.

Judge Wallace cites 3 How. 513, which undoubtedly sustains his position, but with this qualification, that Judge Story, in that case, was speaking of the legal title, and refers to the case, 2 Wheat. 393, in which he also delivered the opinion of the court.

b. The city council must stand upon the issues made in the pleadings.

It is clear that the transaction we are examining was not, as the city council allege, with Joseph Whaley, but with William Whaley, that the loan "was made to William Whaley," and the stock taken as "collateral security for money borrowed by Mr. William Whaley." The defence which the city set up in its answer is a legal one. It claims the legal title to the stock by reason of the transfer made by Joseph Whaley to Loper. The defence it has endeavored to establish by evidence is an equitable title under a blank endorsement.

The well-established rule is that a defendant must not only answer definitely, but that he can avail himself of no other defence, not even if on the trial another defence is developed by the evidence. 12 N. Y. 579. The same has been recognized and enforced by this court. 4 S. C. 52. See, too, 1 Russ. & M. 527.

But the city has not established the equitable title it would now set up.

The city council cannot put itself in the position of a stranger who is an innocent purchaser. The city knew, or at least is charged in law with the fullest knowledge,

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in regard to this *stock. The city is charged with the knowledge of the facts from its own books.

c. The defence of the city is in violation of the statute of frauds. (Rev. Stat. 480.)

The facts proved show that the estate of Joseph Whaley is charged for the debt of William Whaley. This cannot be done unless upon an agreement in writing, or some note or memorandum thereof, signed by Joseph Whaley, undertaking to answer for the debt of William Whaley.

d. The debt for which the stock was pledged was paid, and the stock redeemed more than a month before the city purchased it.

2. We proceed to consider the question based by the complainants' second ground of appeal, to wit, that the Circuit judge erred in directing the receiver to institute such proceedings as he may be advised are proper and necessary to try the validity of any claims against the estate of Joseph Whaley.

It will be convenient to consider, in this connection, the question raised in its appeal by the city, to wit, that there was no sufficient proof before the court that the complainants were the creditors of Joseph Whaley.

It is clear, 1. That no evidence has been introduced calculated even to cast suspicion upon the judgments held by Mary F. Davie, George E. Gibbon, R. K. Scott and Richard Lathers, or on the verdict recovered by Mrs. Gadsden, or the account proved by Mr. Ravenel, for advances made to Joseph Whaley in his lifetime.

Conceding, therefore, that all the other claims presented are spurious, these parties have offered sufficient proof before the court that they are creditors of Joseph Whaley, and, as such, entitled to maintain this action.

2. That the validity of none of the claims proved has, at any stage of these proceedings, been questioned, either by the executors of Joseph Whaley or by his legatees, or by his creditors, or by any other party entitled to raise that issue.

In support of the exceptions we are now considering, we submit the following propositions:

1. That the proper functions of a receiver, in a case like this, to which the executors are parties defendant, and the creditors

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*have been called in and have proved their claims, are simply to receive the funds paid into court and distribute them under the order of the court.

2. That this court has not the power to invest the receiver with such power and subject him to such obligations; that persons interested in the estate of Joseph Whaley, and not parties to these proceedings, will be bound by a judgment against him.

3. That it was competent, at the proper stage of these proceedings, for the executors of Joseph Whaley, or for any creditor, to object to any or all of the claims proved against his estate and not already in judgment. No such objection was raised by these parties, or any of them, at any stage of the proceedings. It was only raised on the Circuit indirectly in the argument of the counsel for the city, and is now only raised on appeal by the city, which had and has no right to raise it in any form or at any time,

the city not being a creditor of Joseph Whaley, but simply a wrongdoer in unlawful possession of his property.

4. It is now too late for any of the parties to these proceedings to object to the validity of any of the claims reported as proved and established in the case. The referee's report was filed on the day of , 1875. Many objections were taken, but no objection was made to any of these claims. The report of the referee was confirmed by an order of court, made on the 28th of June, 1875, and the referee was directed to inquire and report in what order and rank the debts of Joseph Whaley, reported by him as proved and established in this cause, are to be paid. This decree was objected to on other grounds, but no objection was made on this ground. The only question which any of the parties to this case can now be permitted to agitate, is as to the order in which these claims are to be paid. On all other questions they are concluded. 1 Rich. Eq. 24; 7 S. C. 131.

5. If the legatees of Joseph Whaley, or other parties not now before the court have any equities, they must assert them in their own names in the mode prescribed by law and by the established practice of this court.

Even the creditors of a party defrauded have no right—though the fraud have the effect to diminish his means of paying them—

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*to set aside the fraud. "It is for the debtor," says the court in Pettus v. Smith, 4 Rich. Eq. 197, "to do so."

As we have already said, the city council is not even a creditor of Joseph Whaley or of his legatees. If the notes are fraudulent, the fraud was not perpetrated with a view to injure the city. It has no right, then, to raise this clamor.

Nor is it the duty of the Circuit Court, or of this court, to move in the right of those interested until they invoke the aid of the court. "Courts," says Chancellor Wardlaw, "are not the professional advisers of any portion of the community." See 7 S. C. 240.

6. As to the claims resting on judgment, we insist that the court cannot, in this case, pass upon the genuineness of the endorsements upon which judgment was obtained, because that question is concluded by the judgments rendered, and such judgments cannot be impeached collaterally, but can be set aside only on some direct proceeding before the court in which they were rendered. 4 Otto 552; Bail. Eq. 334; 2 Hill Ch. 469; 5 S. C. 8; 3 Otto, 165.

The record, in this case, discloses no ground for any imputation of fraud against any of these judgment creditors, and still less is it proved that there was any collusion between them and the executor of Joseph Whaley. If, as has been so often insinuated by the attorneys for the city, the notes held by them are forgeries, they are the innocent victims of fraud and not its perpetrators.

April 16th, 1878. The opinion of the court was delivered by

HASKELL, A. J. Both parties appeal. The first, second and third grounds of appeal on the part of the city council are upon points which had either been already decided at the former trial, and not appealed from, or do not properly arise in the present case—at least at this stage of the proceeding. The fifth ground of appeal raises an objection to the appointment of a receiver. That point had been decided by the former judgment in this case and assented to by all parties, and is not a proper subject of appeal. The sixth ground is wholly without foundation. It will be time to appeal after something to appeal

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from has arisen. *There is no evidence that the receiver has recognized any of the notes referred to, or that their validity will be recognized except upon proper legal evidence. To set aside what has already been fixed by judgment and not appealed from, or by consent of the parties, can only be done upon proceedings for which the Circuit judge, in this case, made ample provision. The fourth ground of appeal is upon the finding of facts by the Circuit judge. This court is unable to perceive either a lack of evidence to warrant such finding, or such preponderance of evidence on the other side as would justify a reversal of the finding. The court is impressed with the force of the proposition that the hypothecation of such securities by the legal owner, or by another person with the previous consent or subsequent acquiescence of the legal owner, without endorsement or power of attorney, may constitute, by delivery, an equitable assignment, and act as an estoppel against the legal owner and creditors claiming through him. The question was not made in the court below, or, at least, has not received adjudication, and there is no appeal upon that ground. But, apart from that, the evidence does not give foundation of fact sufficient for the proposition of law to rest upon. There is no evidence to show that any of the parties to the transaction, or the officers of the city government by whom the transfers were made, were ever aware of or misled or induced by any expression of knowledge or acquiescence on the part of the testator. On the contrary, the evidence is conclusive that reliance was placed solely upon what was taken to be the signature of the testator, and there is no evidence of any negligence on his part which could be charged with contributing to the mistake on their part. In the eye of the law it is the same as if there had been no signature on the certificates of stock. The absence of signature was notice of lack of authority, and put the parties on their guard. The case would be different if the legal owner had been asked and had expressed his assent. There is no evidence that the testator knew of any of the

transactions out of which these questions arise. Of course this does not refer to certificate No. 7, which is not now being considered. It is true that there is testimony of some general expressions made by him, but there is no link to connect them with the

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special transactions which *are before the court. He could not have acquiesced in the transfers of the legal title to the stock, for the transfers were made after his death; that, therefore, cannot be in question. The question is as to the hypothecation, and the essential fact is that the certificates, being in the possession of another person, were hypothecated or sold by him without authority in writing, but with the knowledge and consent or subsequent acquiescence, with or without previous knowledge, on the part of the legal owner. Did such fact exist, or is there any evidence to give it color? The evidence upon which it rests is parol testimony, given by members of the family and intimate friends of the testator. They testify as to language used by the testator in conversation with them severally or together at different times, but not in the transaction of business. The drift of all this testimony is, that the testator had himself assigned the certificates by proper endorsement in writing, or, as it is said by one of the witnesses, "signed away the last of his city stocks." This directly contradicts the fact on which the whole argument rests, viz., that although he had not "signed away" the certificates, he nevertheless had delivered them, and consented to, or afterwards acquiesced in, uses to which they were to be or had been applied without authority of law. The truth is that these witnesses testified to prove, by corroborative statements of the deceased, that the signature on the certificates was in his handwriting. They did not, nor did they mean to, say that he acquiesced, or made any expression of acquiescence, in assignments which he had not made. Besides, there is no evidence that any of these certificates were pledged prior to July, 1871, just six months prior to testator's death, but nearly all, certainly, were pledged within that time, and some within a very short time before his death. The brevity of time, together with the great age of the testator, speak strongly against the probability of his having become acquainted with the facts as they have been developed by the trial, and there is no evidence that any of the parties to any of these transactions communicated to him that a certificate or certificates had been pledged. Such being the circumstances, some of the statements on which stress is laid are dated by the witnesses as having been made about

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eighteen months prior to *the death of the testator, and twelve months prior to the time when the first of the transactions on which these statements are brought by the appellant to bear have been found to have actually occurred. With these remarks, made to prevent any impression that this court has decided upon the legal point made in the argument, but which is not involved in the case, the appeal on behalf of the city of Charleston must be dismissed.

The plaintiffs appeal from so much of the judgment as relates to scrip No. 7 of the city stock, and from so much as gives to the receiver leave to "institute such proceedings as he may be advised may be proper and necessary to try the validity of any claims against the estate of Joseph Whaley, and defend such proceedings as may be instituted against him." The prayer of the appellants' complaint asks that a receiver may be appointed to take possession of the property and its proceeds, and administer the same in the place and stead of the executor. The previous judgment in the case had granted the prayer and appointed a receiver clothed with power to administer in the place and stead of the executor, and no appeal was taken. The court had thus taken possession of the property, and is bound to see to its proper administration. The right to prosecute and defend the legal rights of an estate is absolutely essential. It could rest in no one more properly than in the officer of the court appointed to act in the place and stead of the executor. The judgment goes no further than that, and furnishes no ground for appeal. The leave to "try the validity of claims" by the institution of proper proceedings is, indeed, purely directory. If, when proceedings have been instituted, they are erroneous in any respect, objection can then be taken and judgment can be had. As the case now stands, the court sees nothing in this point that requires consideration.

The other matter of appeal is the judgment that, "as matter of law, * * * Joseph Whaley was divested of the stock represented by scrip 7, by endorsing the same to H. G. Loper, cashier, and the subsequent sale of the stock by Loper in pursuance of his contract with Joseph Whaley." Whatever may be the room to argue, generally, that power of attorney is revoked by the death of the donor,

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it does not affect the conclusion *arrived at in this case. If the stock had not been transferred and sold, and the bank were now to bring an action upon the facts as found, the executor would be ordered to make the transfer. If nothing has been which the court would not have ordered to be done, it is not the disposition of the court of equity to have it all undone because of immaterial informalities. The creditors have no rights which Joseph Whaley would not have had. "A creditor is not a purchaser, and cannot assert any right that could not have been enforced by the debtor. Hence an assignment which is valid as between the parties will also be good against creditors. Westoby v. Day, 2

Ellis & Bl. 605. And it has been held to follow that the delivery of a certificate of stock to a purchaser, attended with a power of attorney to transfer, will confer a right that cannot be impeached or set aside by a subsequent execution or attachment against the vendor." Ryall v. Rowles, Lead. Cas. in Eq. Part II., Vol. II., (4th ed.) 1661; Id., p. 90; Bank v. Campbell, 2 Rich. Eq. 179; Moss v. Bratton, 5 Rich. Eq. 1. The rights of a creditor are subordinate to equitable as well as legal rights against the debtor. Bank v. Campbell, supra. The testator had signed the scrip in blank, and delivered it. It makes no difference whether the sale or pledge was made in person by the legal owner or by a party to whom he delivers it with a blank power. The pledge in this case seems to have been made by the party to whom delivery had been made by the original or legal owner. There is no difference between a sale and a pledge on the point now in question. There is no question about the right to redeem; no objection to the price for which the stock was sold, and no fraud charged. The sole question is that propounded in the order remanding the case, viz., Had the testator been divested of his title, and was the right of ownership in another at the time of testator's death? If he had been divested of his title, that is an end of the matter so far as these appellants are concerned, and that is all that is before the court for consideration. The bank came honestly into possession of the endorsed certificate in the ordinary course of business, "and is entitled to hold it against him who passed it, or enabled another to pass it to him." State Bank v. Cox, 11 Rich. Eq. 344 [78 Am. Dec. 458]. There is no real difference between that case of the Bank

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v. Cox and this case. *The power of attorney in each instance was blank. The fact that in Bank v. Cox there was a form of a power, and in this case nothing, is a distinction without a difference. Each was lacking until something was written by the holder over the signature of the endorser, so that in legal effect, they are the same. The death of Joseph Whaley makes no difference. The executor of Madame Szeniere would have had no more power than she possessed. All the authorities agree, though some go much further, that the delivery of the certificate of stock, endorsed with a blank power, and for value, is an equitable assignment which binds the legal owner, and that it arises from a power coupled with an interest which is irrevocable during the lifetime, and is not revoked by the death of the legal owner. The case of Hunt v. Rousmanier, 8 Wheat. 174, was decided upon the ground that the power was not coupled with an interest, and therefore did not amount to an equitable assignment. The delivery of the certificate of stock constitutes an equitable assignment, for the reason that the certificate is the muniment or evidence of title, and its delivery is symbolical delivery of the stock. Angell & Ames on Corp., § 564. The right of the bank against the creditors of the testator is the same for purposes of defence as it would have been against him in his lifetime, and the city council is entitled, as against the claims of these creditors, to any defence which the bank might have. The creditors have no interest in the stock which Joseph Whaley had not when he died. Joseph Whaley unquestionably had assigned the certificates, and that constituted an equitable assignment of the stock. The bank could have compelled the city to transfer the stock. The city has only done what the court would have ordered to be done, and has in nowise damaged the creditors, and is not amenable to them for its conduct in the matter. With regard to the regulations on the subject of transfer, it is unnecessary to add anything to the conclusions stated by the Circuit judge and those reached by the court in Bank v. Cox, supra.

This case involves only the question as to the rights of the creditors. The moment the equitable assignment has been ascertained their rights are concluded. The legal owner would have been estopped, and they have no

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rights which he had not *at the time of his death, or when, in his lifetime, liens were fixed upon the specific property. An equitable assignment is good between the parties; and, all having notice, the formal transfer in the mode prescribed by the charter or the regulations is binding on all parties. Sabin v. Bank of Woodstock, 21 Vt. 353, cited in 2 Lead. Cas. in Eq. 1665. The case of Merchants' Bank of Canada v. Livingston, recently decided in the New York Court of Appeals, and relied on by the appellants, is not in conflict with the principles in Bank v. Cox, supra, or in McNeill v. Bank, 46 N. Y. 325. If the attorney in that case had acted upon his power, as the real owner, the stock would have been bound; but he, in fact, claimed not to be the owner of the stock, and failed to show authority to borrow money on it for the real owner. There is no evidence that William Whaley gave notice to the bank that he was not the real owner of the stock, and the blank endorsement is direct evidence that he is the real owner by virtue of an equitable assignment. Besides, Bank v. Cox, supra, is conclusive on the point, and we feel no disposition to question its authority. The language of the Circuit judge that "Joseph Whaley was divested * * * by endorsing the same [the scrip] to H. G. Loper," &c., refers not to the actual transaction, but to the legal effect of the endorsement. When the transfer is made by virtue of a blank power, it must be treated in law as an assignment from the one who was the legal owner to the person who becomes the legal owner by transfer on the books of the corporation. There is,

therefore, no material discrepancy between the facts and the conclusions of law.

It is contended by the appellants that the city council is confined to the issues made in the pleadings, and that the defence now relied on is not alleged in the answer. There is nothing in the objection. The issue on which the second trial was had, with the consent of all parties, was framed by the order of this court remanding the case for trial upon the point stated. In the answer, however, there is a denial of Section 9 of the complaint, which constitutes a general denial of the title to the stock, and under this the defence could have been made.

Other exceptions taken were not pressed

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in the argument, and *it seems unnecessary to state further the reasons upon which the rulings of the Circuit judge are sustained.

The judgment is affirmed. Motion refused.

Judgment affirmed.

WILLARD, C. J., and McIVER, A. J., concurred.

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11 S. C. 522

(Case No. 717.)

JANE STEGALL v. O. S. BOLT et al.

(November Term, 1878.)

[1. *Appeal and Error* ⇐119; *Costs* ⇐215.]

An appeal lies to this court from a judgment of the Circuit Court confirming a taxation of costs in an action at law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 824; Dec. Dig. ⇐119; Costs, Cent. Dig. § 797; Dec. Dig. ⇐215.]

[2. *Costs* ⇐22.]

Where an action for injury to personal property, in which the damages claimed exceed $100, is brought in the Circuit Court, a judgment in favor of plaintiff for any amount will carry costs.

[Ed. Note.—Cited in Kapp & Rothschild v. Loyns, 13 S. C. 289.

For other cases, see Costs, Cent. Dig. § 58; Dec. Dig. ⇐22.]

[3. *Costs* ⇐4.]

[Cited in Kapp & Rothschild v. Loyns, 13 S. C. 289, to the point that the rule of the statute prevailing at the time of rendering verdict governs the allowance of costs.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 2, 3, 109; Dec. Dig. ⇐4.]

Before Kershaw, J., at Pickens, June Term, 1878.

This was an action for injury to personal property, brought by plaintiff against several defendants, demanding judgment for $350, her damages. The defendants all answered, denying that they had injured the property of plaintiff at all, or that she had been in any way damaged by them. At the trial upon this issue, on March 22d, 1878, the jury rendered the following verdict: "We find for the plaintiff damages—fifteen dollars." Upon this verdict judgment was entered up, the clerk of court taxing up full costs in favor of plaintiff. The defendants' counsel was present at the taxation and objected upon several grounds, which were renewed, on appeal, to the Circuit Court at the next term, on a motion to set aside the taxation. Judge Kershaw confirmed the taxation, except as to one item, not brought before this court by the appeal.

From this order of Judge Kershaw the defendant appealed, upon three grounds, to

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wit: (1.) Because plaintiff, having recov*ered but $15, was entitled to no costs. (2.) If to any, then the costs should not exceed the damages. (3.) That defendant was entitled to costs.

Mr. R. A. Child, for appellant.

At the common law there were no costs, as such, and the right to them is wholly of statutory origin. The plaintiff, therefore, can claim no costs, except such as are given in one of the four subdivisions of Section 330 of the code. The first two subdivisions have no bearing upon this case. Subdivision 3 does not give costs here, for this is a case in which a court of trial justice has jurisdiction. Code, § 74, Subd. 2. For it would be strange legislation to make costs depend upon the amount a plaintiff might choose to claim, without regard to the recovery. But while a trial justice has not jurisdiction of the amount claimed, he has of this action. 3 Wait Pr. 465; 43 How. Pr. 33; 7 Abb. (N. S.) 225.

This is an action for recovery of money and comes under Subdivision 4. 3 Wait Pr. 467; 13 How. Pr. 296; 9 Bosw. 601; 28 Barb. 284. And not having recovered $20, she cannot recover costs, but must pay costs to the defendants. Code, § 331; 8 Abb. (N. S.) 17; 2 Cal. 213; 1 How. Pr. 135; 3 Wait Pr. 468. But in no event can the plaintiff recover more costs than damages; for this case was tried after act of March 4th, 1878, amending Section 330 of the code, and the statute, at the time of trial, must govern. 3 Wait Pr. 456; 15 How. Pr. 156; Id. 74; 14 How. Pr. 279; 15 How. Pr. 420; 18 How. Pr. 532; Id. 305.

Messrs. Earle & Wells, contra.

No appeal will lie on mere question of costs. It comes under none of the heads of Section 11 of the code. Not under the first, for it does not affect the merits. Nor under the second, for it is not a special proceeding. Code, § 3; 3 S. C. 417. Nor under the third. 11 N. Y. 274; 3 How. Pr. 425; 16 N. Y. 294.

The question of appeals from orders affecting costs only, has been frequently adjudicated in New York. 41 N. Y. 362; 4 Abb. (N. S.) 202; 36 N. Y. 93; 34 N. Y. 355; 32 N.

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Y. 479; *24 N. Y. 505; 28 How. Pr. 470; 3 How. Pr. 426. So, too, with our own old Court of Appeals. 1 McC. Ch. 210; 1 Hill

Ch. 92; 2 Hill 554; 2 Strob. Eq. 166; 5 Rich. Eq. 5.

If appeal lies, taxation is correct. A trial justice had no jurisdiction, because the amount claimed exceeded $100. Code, § 74, Subd. 2; 6 S. C. 389. The Subdivision 4 of Section 330 of the code, with its amendment by act of March 4th, 1878, cannot apply here; for it refers in its first sentence solely to actions for recovery of money, and not to actions ex delicto; and it nowhere mentions actions for recovery of damages for injury to personal property. See, too, 2 Bail. 88; 13 Rich. 98; 2 Bail. 212.

April 16th, 1879. The opinion of the court was delivered by

McIVER, A. J. This is an appeal from an order of the Circuit judge allowing costs in favor of the plaintiff against the defendants. The action was brought in the Court of Common Pleas to recover damages for injuries to personal property, in which the amount claimed exceeded the sum of $100. The case was tried on the 22d of March, 1878, and resulted in a verdict for the plaintiff for $15 damages. The respondent raises the preliminary objection, which must first be disposed of, that an appeal will not lie from an order confirming the taxation of costs by the clerk. There can be no doubt but that appeals from the decision of the Circuit Court of Law upon questions relating to the taxation of costs were constantly heard prior to the adoption of the code, as will appear from the numerous cases to be found in our digests deciding such questions. It is very true that in the court of equity it was always held that appeals upon a mere question of costs would not be heard by that court; but it was for the reason that, in that court, the question as to which party should pay the costs was a question for the discretion of the court, and did not follow the result, necessarily, as in cases at law; and, under the rule that questions of discretion were not appealable, it followed that decisions upon such questions were not appealable. Lewis v. Wilson, 1 McC. Eq. 210; Lyles v. Lyles, 1 Hill Eq. 92; Singleton v. Allen, 2 Strob. Eq. 174; Hext v. Walker, 5 Rich. Eq. 7. We do not

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understand that the code *has abridged the rights of parties in this respect. By the constitution this court has jurisdiction "for the correction of errors at law," and if an error of law has been committed by the Circuit Court in allowing or disallowing costs, we see no reason why it may not be corrected. Costs form a part of the judgment, as much so as the interest which may accrue "from the time of the verdict or report until judgment be finally entered," and, like such interest, must be inserted in the judgment. Code, §§ 336–7. And if they are illegally inserted in, or omitted from the judgment, to that extent the judgment is erroneous and illegal, and may be corrected by this court. Although this question does not seem to have been distinctly decided in this state since the adoption of the code, yet this court has, in at least three instances, proceeded to adjudicate questions of costs. Columbia Water Power Company v. Columbia, 4 S. C. 402; Thompson v. Thompson, 6 S. C. 279, and Mars v. Conner [9 S. C. 70], MS. decision, filed August 8th, 1877. We are unable, therefore, to see any valid reason why we should not hear this appeal. We proceed, then, to inquire whether there was any error of law in allowing the costs in this case. By Section 330 of the code of procedure, it is declared that costs shall be allowed of course to the plaintiff upon a recovery in certain specified cases, and if this case falls within any of the classes there specified, it follows that there was no error in allowing the costs. The class within which it is claimed to fall is that designated in Subdivision 3 of that section, by words "actions of which a court of trial justice has no jurisdiction." The only question, therefore, is whether this was an action of which a court of trial justice has no jurisdiction. As we have seen, it was an action to recover damages for injury to personal property, in which the amount claimed exceeded the sum of $100. In Section 74 of the code we are told that "trial justices shall have civil jurisdiction in the following actions, and no others. * * * 2. An action for damages for injury to rights pertaining to the person, or the personal or real property, if the damages claimed do not exceed one hundred dollars, and in cases of bastardy." Hence, while the jurisdiction of a trial justice extends to certain actions for injury to personal property, by the express

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terms of the statute, it does not extend *to all such actions, but only to those in which "the damages claimed do not exceed one hundred dollars." We are compelled, therefore, by the express terms of this statute to say that this action, in which the damages claimed exceed $100, is an action of which a court of trial justice has no jurisdiction, and, therefore, under the provisions of Section 330, above quoted, the plaintiff, upon recovery, was entitled to costs. It may be, and doubtless is the fact, that cases can be found in other states which take a different view of similar statutory provisions, but these cases, however much they may be entitled to respect, are not binding upon us as authority, and we are unable to see how, in the face of the plain words of the code, we can put any other construction upon these words than the one we have adopted. And although it may be regarded by some as "strange legislation" to make the jurisdiction of a court to depend upon the amount a plaintiff may claim in his complaint, as has been suggested in the argument for appellants, we have only

to say that it is not our province to legislate, or to supply any supposed deficiencies on the part of the law-making department of the government, even should there be no difference of opinion as to the existence of such deficiencies, but our duty is simply to declare the law as we find it written. We may add, however, that the view which we have adopted is in close analogy to the principles decided in the case of Scarborough v. Reynolds, 13 Rich. 98.

It is argued, however, that the act of March 4th, 1878, (16 Stat. 409,) amends Section 330 of the code by providing that in no case shall the plaintiff be allowed costs to an amount exceeding the amount of his verdict, and that as costs are to be regulated by the statute in force at the time the verdict is rendered, the plaintiff in this case could not be entitled to more costs than the amount of her verdict—$15—it having been rendered after the passage of said act.

Without expressing any opinion as to whether the statute in force at the time the verdict is rendered is to regulate the amount of the costs, it is sufficient to say that the act of March 4th, 1878, makes no change whatever in any part of Section 330, except in the fourth subdivision of that section, and that part of the section, to wit, Subdivision

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3, under which the plaintiff claims *her costs in this case, remains as it was before, unaffected by the provisions of the act of March 4th, 1878. This is manifest from the terms used in that act. The language is: "That Subdivision 4 of Section 330 of the code of procedure, be amended by striking out all the words down to and including 'dollars' in the second line of said subdivision, and inserting the following," &c. Words could not make the intention plainer, that the sole purpose was to amend only the fourth subdivision of that section, leaving all the rest of the section as it was before.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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11 S. C. 527

(Case. No. 718.)

ADGER & CO. v. JOHN JULIUS PRINGLE et al.

(November Term, 1878.)

[1. *Mortgages* ⟸439.]

Making creditors of an ancestor parties defendant to an action brought by mortgagees of the heirs-at-law to subject the descended and subsequently-mortgaged real estate to sale, and to procure distribution of the proceeds, is a question of pleading and practice, and not of jurisdiction, and consent of parties is a waiver of objection.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1296; Dec. Dig. ⟸439.]

[2. *Mortgages* ⟸426.]

The creditors of the ancestor are proper parties to such action.

[Ed. Note.—Cited in Douthit v. Hipp, 23 S. C. 207, 208; Sale v. Meggett, 25 S. C. 80.

For other cases, see Mortgages, Cent. Dig. § 1286; Dec. Dig. ⟸426.]

[3. *Dismissal and Nonsuit* ⟸59.]

After issue joined and testimony taken, the mere announcement by plaintiffs at a reference that they withdraw their claim as against some of the defendants will not operate as a dismissal of the complaint against such defendants.

[Ed. Note.—Cited in Latimer v. Sullivan, 37 S. C. 121, 15 S. E. 798; Stewart v. Blalock, 45 S. C. 68, 22 S. E. 774; State v. Southern R. Co., 82 S. C. 15, 62 S. E. 1116.

For other cases, see Dismissal and Nonsuit, Cent. Dig. § 159; Dec. Dig. ⟸59.]

[4. *Payment* ⟸24, 65.]

Whether a debt of the ancestor is discharged by the bond of the heirs is a question of fact depending upon intention. It is not payment, unless so accepted by the creditor, and the burden of proof is upon the party affirming it.

[Ed. Note.—Cited in Gibbes v. G. & C. R. Co., 13 S. C. 254; Johnson v. Clarke, 15 S. C. 80; Murray v. White, 16 S. C. 515; National Bank of Chester v. Gunhouse & Co., 17 S. C. 499; Sullivan v. Sullivan Mfg. Co., 20 S. C. 92; Chalmers v. Turnipseed, 21 S. C. 142; Gowdy v. Gowdy, 83 S. C. 351, 65 S. E. 385.

For other cases, see Payment, Cent. Dig. §§ 29, 196; Dec. Dig. ⟸24, 65.]

[5. *Appeal and Error* ⟸1022.]

The concurrent finding of a question of fact by referee and Circuit judge is conclusive upon this court, unless such finding is without testimony to sustain it, or is manifestly against the weight of evidence.

[Ed. Note.—Cited in Gadsden v. Whaley, 14 S. C. 217; Pressley v. Kemp, 16 S. C. 343, 42 Am. Rep. 635.

For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. ⟸1022.]

[6. *Mortgages* ⟸563.]

When bond and mortgage are taken to secure the payment of book account for present and future advancements, and a promissory note for a part of the account is afterwards taken, but not entered upon the books of mortgagee, and is then endorsed before maturity for valua-

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ble considera*tion to one ignorant at the time of the existence of the bond and mortgage, which are afterwards assigned to secure a debt to a creditor, who examines the books and knows nothing of the note—upon sale of the mortgaged premises the proceeds should be applied pro rata to the note, and to the balance of indebtedness of mortgagors to mortgagee. Semble, and per Wallace, Circuit judge.

[Ed. Note.—Cited in Ex parte Williams, 17 S. C. 405.

For other cases, see Mortgages, Cent. Dig. § 1624; Dec. Dig. ⟸563.]

[7. *Descent and Distribution* ⟸133.]

Mortgage by heirs-at-law of lands descended, before action brought by creditors of the

ancestor, will be postponed to debts of such creditors.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 489; Dec. Dig. ⊂ 133.]

Before Wallace, J., at Charleston, March, 1878.

This was an action brought by Adger & Co. against the widow and children of J. J. I. Pringle, certain persons claiming to be bond creditors of the deceased, and certain creditors of the widow and children. The facts are clearly set forth in the report of G. D. Bryan, Esq., special referee. His report is as follows:

By an order of the said court, of date the day of , A. D. 1875, the above cause was referred to me to hear and determine the issues of fact and the issues of law raised therein, and report the findings thereon to the said court separately.

I find the following facts:

On the 11th of March, 1864, John Julius Izard Pringle departed this life, leaving as his heirs-at-law his widow, Mrs. Jane Pringle, his three sons, John Julius Pringle, Joel R. Poinsett Pringle and D. Lynch Pringle, and his daughter, Mary Izard Pringle (now Madame Mary Izard Des Frances); and seized of the following real estate, to wit: White House plantation, situated on the Pee Dee river, containing about two hundred and forty acres of swamp or rice land, and fifty acres of charred pine or rice land; and Greenfield plantation, situated on Black river, containing about one hundred acres of swamp or rice land, and one thousand nine hundred acres of pine or high land; and also of considerable personalty, consisting chiefly of negro slaves, which latter property was all lost by the results of the late war. By the last will of the said John J. I. Pringle, Mrs. Jane Pringle, his wife, was named as executrix, but no disposition was made of his property. Joel R. Poinsett Pringle was killed during the late war; he was unmarried and died intestate.

At the time of the death of the said John

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Julius Izard Prin*gle, there was due from time to time to Alexander Robertson and John F. Blacklock, a bond in the penal sum of $7000, conditioned for the payment of the sum of $3500, and of date the 22d of January, 1856. This bond was, on the said 22d of January, 1856, assigned by the said Alexander Robertson and John F. Blacklock to Mrs. Mary C. Allston, and under her will was assigned by her executors, on the 23d of January, 1860, to Mrs. Anna J. Gadsden, one of the defendants herein. There was also due from the said John Julius Izard Pringle to Alexander Robertson and John F. Blacklock, as executors of Mrs. Mary C. Allston, a bond in the penal sum of $12,000, conditioned for the payment of the sum of $6000. Both of the bonds were destroyed or lost during the late war.

On the 10th of October, 1866, the defendants, Mrs. Jane Pringle, John Julius Pringle, D. Lynch Pringle, and Madame Mary Izard Des Frances (then Mary Izard Pringle,) being then the surviving heirs of the said John Julius Izard Pringle, made and delivered to the defendant, Mrs. Anna J. Gadsden, their joint and several bond, in the penal sum of $7000, conditioned to pay the full and just sum of $3500, in three equal annual installments, with interest from the 22d of January, 1865, which bond was given in substitution for and renewal of the bond of the said J. Julius Izard Pringle, lost or destroyed, as aforesaid. The interest on this bond has been paid up to the 22d of January, 1874.

On the 17th of February, 1867, the defendants, Mrs. Jane Pringle, John Julius Pringle, and D. Lynch Pringle, and Madame Mary Izard Des Frances (then Mary Izard Pringle,) the surviving heirs of John Julius Izard Pringle, made and delivered to Alexander Robertson and John F. Blacklock, executors of Mary C. Allston, their joint and several bond, in the penal sum of $12,000, conditioned for the payment of the full and just sum of $6000, in four equal successive annual installments, with interest payable annually—which bond was given in substitution for and renewal of the bond of the said John Julius Izard Pringle, lost or destroyed as aforesaid. This bond was thereafter assigned by

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the said Alexander Robertson and John *F. Flaklock, executors, to the defendants, Mary A. Lide and B. A. Lide.

After the death of the said John Julius Izard Pringle, his wife and children took possession of the plantations "Whitehouse" and "Greenfield," and planted them for the benefit of the estate, but, owing to large losses, no profits were derived therefrom. The money for this purpose was obtained from James R. Pringle, James R. Pringle & Son, and James R. Pringle & Co.

On the 31st of March, 1870, the defendants, Mrs. Jane Pringle, John Julius Pringle, D. Lynch Pringle, made and delivered to James R. Pringle, and James R. Pringle, the younger, under the firm name of James R. Pringle & Son, their joint and several bond, in the penal sum of $50,000, conditioned to pay the said James R. Pringle & Son the said sum of $50,000, or so much thereof as would repay, indemnify and hold harmless the said James R. Pringle & Son for and from any loss, for any then present, or any future loans or advances made by them to the said obligors, on their individual accounts, or on account of any then present or future loans or advances, and such interest thereon as might be agreed upon, as at that time had been or might thereafter be made, from time to time, by the said obli-

gees, for or on account of Whitehouse plantation, Keithfield mills and Keithfield plantation, and Greenfield plantation, and the expenses, management, and cultivation of said plantations and mills, the amount of the indebtedness of the said obligors to the said obligees, whether on their individual account or on account of the said plantations and mill, to be ascertained at any time by reference to the books of account of the said obligees, James R. Pringle & Son. To secure the performance of the conditions and covenants in the said bond contained, the said obligors on the same day, to wit, the 31st of March, 1870, executed and delivered to the said James R. Pringle & Son a mortgage of all their right, title, interest and estate in and to the said Whitehouse and Greenfield plantations and Keithfield plantation and mills, which mortgage was duly recorded in the proper office.

On the same day, to wit, the 31st of March, 1870, the defendant, Madame Mary Izard Des Frances (then Mary I. Pringle,) made and delivered to the said James R.

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Pringle & Son, her *bond in the sum of $5000, and thereby covenanting to save harmless the said James R. Pringle & Son from any loss which they might sustain for or on account of any then present or any future loans or advances, which they had or might make to her individually, or on account of her proportion, being two-ninths of any advances which had or might be made on account of the plantations known as Whitehouse and Greenfield—the said indebtedness to be ascertained by reference to the books of account of the said James R. Pringle & Son. To secure this bond she executed and delivered to the said James R. Pringle & Son a mortgage of all her right, title and interest and estate in and to the said two plantations, Whitehouse and Greenfield, which said mortgage was duly recorded. At the time of the execution and delivery of these two bonds and mortgages, the obligees, James R. Pringle & Son, knew that the bonds held by the defendants, Mrs. Anna J. Gadsden, Mrs. Mary A. Lide and B. A. Lide, as aforesaid, were unpaid, and were debts due by the estate of John Julius Izard Pringle. These two bonds and mortgages were, on the 11th day of August, 1871, assigned to the plaintiffs, James Adger & Co., by James R. Pringle & Son, and were taken by the said plaintiffs at a valuation of $30,000, which was about the amount of the indebtedness of the obligors to James R. Pringle & Son, as appeared from their books of account, and which was ascertained at that time by the plaintiffs, James Adger & Co. The consideration of the assignment was loans and endorsements made by the plaintiffs to and for James R. Pringle & Son. The bonds and mortgages have ever since been held by the plaintiffs.

The said James R. Pringle and James R. Pringle, the younger, continued their business under their firm name of James R. Pringle & Son, until the 8th day of May, 1872, when the partnership was dissolved by the death of James R. Pringle, the younger. At that time the obligors of the said bonds were indebted to the said firm, as follows:

Mrs. Jane Pringle	$ 1,704 10
Est. J. J. Pringle, (Whitehouse)	21,012 82
Keithfield Mills	6,186 80
Keithfield Plantation	15,435 60
	$44,339 32

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*And to the credit of the said obligors, as follows:

John Julius Pringle	$ 9 78	
D. Lynch Pringle	258 28	
Greenfield Plantation	264 83	
		$ 332 89
Leaving a balance due of		$43,806 43

of which amount $4610.66 is chargeable to Madame Mary Izard Des Frances.

James R. Pringle continued business under the firm name of James R. Pringle & Son, and on the 10th of April, 1873, the defendants, Mrs. Jane Pringle, John Julius Pringle, and D. Lynch Pringle, made and delivered to him, doing business under the said firm name of James R. Pringle & Son, their joint and several bond in the sum of $50,000, with the same conditions and covenants as were contained in their bond of date the 31st of March, 1870, to the then firm of James R. Pringle & Son, and as are above set forth; and to secure the performance of the conditions of this bond, made their mortgage of the same property as is described in this first mortgage to the said James R. Pringle & Son, of date 31st of March, 1870, and above set forth. On the same day, to wit, the 10th of April, 1873, Madame Mary Izard Des Frances, (then Mary Izard Pringle,) made and delivered to the said James R. Pringle, doing business under the firm name of James R. Pringle & Son, her bond, in the sum of $8000, with the same conditions and covenants as were contained in her bond of date the 31st of March, 1870, to the then firm of James R. Pringle & Son, as are above set forth, and to secure the performance of the conditions of the said bond, made her mortgage of all her right, title and interest in and to the said Greenfield and Whitehouse plantations. These mortgages were recorded in the proper office, and were immediately upon their execution and delivery assigned to James Adger & Co., the plaintiffs, together with the debts due thereunder, and have ever since been held by them. James R. Pringle continued business under the said firm name of James R. Pringle & Son, until the 1st of September, 1873, when the firm ceased to exist; at which time the obligees of the said bonds were indebted to him as follows:

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*John Julius Pringle	$ 84	58
Est. J. J. I. Pringle	25,465	26
Mrs. Jane Pringle	768	05
Keithfield Mills	14,588	90
Keithfield Plantations	22,450	52
Greenfield Plantation	1,069	01
	$64,426	39
And to the credit of D. Lynch Pringle	131	79
Leaving a balance due of	$64,294	51

Of which the sum of $4,896.50 is due and owing by the defendant, Madame Mary Izard Des Frances.

On the 29th of December, 1870, the defendants, Mrs. Jane Pringle, John Julius Pringle, D. Lynch Pringle, and Madame Mary Izard Des Frances, (then Mary Izard Pringle,) being indebted to James R. Pringle & Son, on the books of the said firm, in the sum of $36,851.18, made their promissory note at six months, for the sum of $6,500, to Jas. R. Pringle, for the purpose of raising money, or of lightening the said account. The note was not credited on the account. On the 13th of April, 1871, this note was, with other securities, delivered by Jas. R. Pringle & Son to the defendant, A. G. Rice, as collateral to secure their note to him for the sum of $28,427.91, at twelve months from said 13th of April, 1871. The defendant, A. G. Rice, did not know of the bonds of indemnity, nor of the mortgages securing the same, nor did he know the consideration or purpose for which the note for $6,500 had been given to James R. Pringle.

Before the commencement of this action, an agreement was made by the counsel for the plaintiffs and the counsel for the defendants, Mrs. Mary A. Lide, B. N. Lide, Mrs. Anna J. Gadsden, A. G. Rice and J. M. Eason & Bro., whereby, among other things, it was agreed that they "the undersigned, creditors, claiming an interest, under or by way of mortgage upon certain plantations in Georgetown county, known as Keithfield mills and plantation and Greenfield and Whitehouse plantation, owned by Mrs. Pringle and her sons and daughter, do con-

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sent and agree, *in view of the failure during the past year to make any payment on our respective debts, that an immediate action for foreclosure and sale of the said property be commenced by Messrs. James Adger & Co., in the Court of Common Pleas for Charleston county, in which we may all be made parties or come before the court, and in which all conflicting claims may be adjudicated. * * * This agreement to be without prejudice to the rights of any party interested." A copy of this agreement, and a copy of the testimony from which the foregoing facts appear, is filed with this report.

The property which is the subject of this action, has been sold under the order of this court, and brought the following sums, to wit:

Keithfield Mills and Plantation	$10,005 00
Greenfield Plantation	4,050 00
Whitehouse	6,900 00
	$20,955 00

The proceeds of which have been applied under the orders of this court as follows:

Sheriff's commissions on Keithfield Mills and Plantation	$ 104	05
Advertising sale of same	27	20
Taxes on same	299	49
Paid B. H. Rutledge, trustee, and Mrs. Sarah Goodrich	9,574	26
	$10,005	00

Sheriff's commissions on Greenfield and Whitehouse	$ 117	00
Advertising sale of same	54	49
Taxes on same	246	83
Recording mortgage	3	25
	$ 421	48

Leaving in the referee's hands the sum of $10,528.52 and interest, from the sale of Greenfield and Whitehouse plantations.

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*The following are the issues of law:

I. The defendant, A. G. Rice, claims that he is entitled to be first paid out of the proceeds of sale of Greenfield and Whitehouse plantations the sum of $6500, with interest from the 29th of June 1871, on the ground that the plaintiffs hold the mortgages as trustees for the payment of the note held by him; the transfer of the note to him by Pringle & Son, carrying with it the equitable assignment of so much of the account due by the Pringles to Pringle & Son, secured by the bonds of indemnity. The whole theory of the claim is based on the supposition that Pringle & Son were the sureties of the Pringle family (the makers of the note,) and that the defendant, Rice, is entitled to any securities which the surety might hold, upon the failure of the principal to pay the debt. The note was given either in payment of so much of the account as stood against the makers on the books of Pringle & Son, or to enable Pringle & Son to raise money. If for the payment of the account, then so much as it represented was extinguished; and if extinguished, there could have been not only no equitable assignment, but no legal assignment of the same. As matters of law, I find that if the note was given as representing any portion of the accounts due by the Pringles to Pringle & Son, it was in payment of the same, made so by the subsequent transfer to the defendant, A. G. Rice; for by this act they put the note out of their possession and beyond their control, and thereby extinguished that portion of the account which it represented. Although the receiving of a note is not payment, unless received as such, yet if the creditor place the note beyond his power and control, so that it cannot be delivered up to be canceled, the note is payment and the original cause of action is extinguished. Townsend & Arnold v. Stevenson & Walker, 4 Rich. 59. And the

same rule was made in the case of Chastain v. Johnson, Adm'r, 2 Bail. 575. So, then, if the note represented any portion of the account then due, the parting with it by Pringle & Son operated as a payment. But if the note was given to James R. Pringle for the purpose of raising money, and not with reference to the account, it was an independent transaction, and in no way connected with the bonds of indemnity now held by the

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plaintiffs; and if not connected, *then there can be no equity by which the defendant, Rice, can maintain his claim that the bonds are held by the plaintiffs as trustees for him.

The conditions and covenants of the bonds are too plain to leave any doubt on this point, for they were solely to save harmless Pringle & Son for any moneys which they might advance to the obligors on their individual accounts, or on account of their planting operations, under neither of which could the note be placed—if an independent transaction between them—and certainly Adger & Co., the assignees, who took these bonds at a valuation obtained from the books of account of Pringle & Son (which were made the standard of value by the obligators), the equity (if any) of the defendant, Rice, cannot prevail.

Besides this, the bonds of indemnity were not given to Pringle & Son as sureties, but as principals, and they dealt with them as such when they transferred them to Adger & Co. for the sum of $30,000, since ascertained, by a sale of the property, to be three times their value. And, in purchasing the bonds and mortgages, Adger & Co. ascertained the sums due thereunder by referring to the accounts of the obligors, in all respects complying with the contract between the parties as contained in the said bonds.

The claim of the defendant, Rice, must therefore be disallowed.

The defendants, J. M. Eason & Bro., Smith & Valk, Bollman Bros., and Edwin Bates & Co. make similar claims. These claims stand on even more untenable grounds than that of the defendant, Rice, for the debts were contracted after the assignment of the bonds and mortgages to Adger & Co., and after the securities had been exhausted by Pringle & Son, and until paid, and they were not a charge by Pringle & Son against the obligors of the bonds. Wright v. Whitney, 40 Barb. 325.

These claims are therefore not allowed.

II. On behalf of the defendants Mrs. Mary A. Lide, B. N. Lide and Mrs. Anna J. Gadsden, it is claimed, that holding debts against the ancestor of the obligors of the bonds (his heirs) they have a statutory lien, which should be satisfied before the bonds of indemnity given by the heirs, and secured by the property descended, are paid.

I have been unable to find any authority

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for the position *taken by these defendants. On the contrary, the statute expressly provides that when the lands are bona fide aliened, set over or transferred by the heir before action brought against him, the descended lands shall not be liable to an execution issued or a judgment obtained against him on account of a debt due by his ancestor, but that the heir shall be liable to the extent of the value of the lands so aliened. This, then, is entirely inconsistent with the idea that the creditor of the ancestor has a lien, statutory or otherwise, upon his lands in or out of the possession of the heir. The creditor can, in a proper suit brought against the heir in possession, or against the executor or administrator, if the heir be out of possession, subject the real estate of the ancestor to the payment of his debt; but beyond this the law gives him no power or lien over or on the lands of his deceased debtor, and if the heir alien, before such suit is brought, the creditor can recover, not from the purchaser, but only from the heir, the value of the lands so aliened. In this case the heirs of John Julius Izard Pringle, bona fide, and for a valuable consideration, mortgaged the lands descended, and this brings us to an issue made, and upon the determination of which the claims of Mrs. Mary A. Lide, B. N. Lide and Mrs. Anna J. Gadsden depend, to wit: Is a mortgage by the heir, before suit brought against him, such an alienation of his ancestors' real estate as would prevent the same being taken on execution, on a judgment recovered against the heir in possession, upon a debt due by his ancestor?

Upon the death of John Julius Izard Pringle, the fee to his real estate passed into his heirs-at-law, his widow, two sons and daughter, and they certainly had the right (until suit brought by a creditor of his) to deal with it as their own. If they had conveyed the property absolutely, for a valuable consideration and bona fide, to Pringle & Son, there could have been no question between the defendants, Mrs. Lide, B. N. Lide and Mrs. Gadsden, and the purchasers. But by the mortgages, though the lands were not absolutely conveyed, the heirs did sell, alien and make over to Pringle & Son certain estate in the lands, which they could not again recover except upon the compliance with certain conditions. For this Pringle & Son have

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given a valu*able consideration, and, so far as that consideration extends, stand on the same footing as if they had absolutely purchased the land. Mortgagees are purchasers pro tanto, and as such are entitled as against the creditors of the ancestor and his legatees. Haynsworth v. Bischoff, 6 S. C. 159; Ex parte L. A. Seabrook, U. S. C. C., Dist. of S. C., April Term, 1871 [not reported]. I therefore find that Adger & Co., the assignees of the mortgagees, are entitled to be

first paid out of the proceeds of the sale of Greenfield and Whitehouse plantations.

The claims of Mrs. Mary A. Lide, B. N. Lide and Mrs. Anna J. Gadsden, having been disallowed, it is unnecessary here to consider the question of jurisdiction made by the defendant, Rice, as to them.

The proceeds of the sale of Greenfield and Whitehouse plantations, and Keithfield mills and plantation, being insufficient to pay the mortgages held by the plaintiffs, the defendants, Marie Yean, Edmond Colas Des Frances, and Mary Izard, his wife, have no interest therein under the marriage settlement as set forth in the complaint in this cause.

I find that the plaintiffs, James Adger & Co., are entitled to the proceeds of sale of Greenfield and Whitehouse plantations, and after the payment of the bonds, with interest at the rate of seven per cent. per annum, held by B. H. Rutledge, trustee, and Mrs. Sarah M. Goodrich, are entitled to the proceeds of Keithfield mills and plantation.

To this report exceptions were taken by the defendant, A. G. Rice, and also by the defendants, Mrs. Lide and Miss Gadsden. The decree of his Honor the Circuit judge is as follows:

After hearing the report of George D. Bryan, Esq., referee herein, and the argument of counsel, it is ordered that the findings of facts by the referee be confirmed.

John Julius Izard Pringle, in his lifetime, executed the two bonds, described in the record as the Gadsden and Lide bonds. These bonds were destroyed by fire after the death of the obligor.

The referee finds, as matters of fact, that for these bonds other bonds were executed by all the heirs of the original obligor, and that these new bonds were in substitution of

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the original bonds, *and were not accepted by the holders in payment of the original bonds.

I concur with the referee in this finding. It follows that the Gadsden and Lide bonds are a charge upon the estate of J. J. I. Pringle. See Drake, Clerk, v. Mitchell, 3 East. 251; McLure v. Askew, 5 Rich. Eq. 166.

The heirs of John Julius Izard Pringle, on the 31st of March, 1870, executed a bond to James R. Pringle & Son, secured by a mortgage of all the real estate that had descended to them as such heirs. Are the Gadsden and Lide bonds postponed, in the order of payment, to this bond and mortgage?

James R. Pringle himself testifies that he knew of the existence of the bonds, both before and after the substitution of the new bonds. He certainly, therefore, cannot bring himself within the rule that protects an innocent purchaser for valuable consideration without notice. Nor is his assignee on a better footing. James R. Pringle says, "I transferred them [the bond and mortgage] to Adger & Co. because I owed them money, and because they had endorsed for me." Adger & Co., therefore, did not take the bond and mortgage for cash paid to Pringle, but to cover an antecedent indebtedness of Pringle to them, and took them, therefore, with the same rights under them that Pringle had, and no more.

I therefore find, as matter of law, that the Gadsden and Lide bonds are not postponed to the bonds and mortgages to James R. Pringle & Son, and assigned by them to James Adger & Co.

The defendant, A. G. Rice, is the holder of a promissory note, made by the same persons who executed the above-mentioned bond and mortgage to James R. Pringle & Son. This note was made payable to James R. Pringle, endorsed by him to James R. Pringle & Son, and endorsed by them to A. G. Rice, on the 13th of April, 1871, as a collateral.

At the time this note was made, the makers were lawfully indebted to James R. Pringle & Son for advances. To secure payment for these advances, the bond and mortgage above referred to had been executed on the 31st of March, 1870. The note was given to enable James R. Pringle & Son "to raise money and lighten the account" of the mak-

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ers. There was no *other consideration for the note. The note therefore represented the account pro tanto, and, while in the hands of James R. Pringle & Son, was protected by the bond and mortgage, as he had his remedy either upon the account or note, as he might elect. When he endorsed the note to Rice, the account pro tanto, in a sense, was extinguished; that is, James R. Pringle & Son no longer had any remedy upon that part of the account represented by the note endorsed to Rice, simply because they had transferred to Rice a remedy to collect an amount of money represented both by the account and note, and as the debtors could be compelled to pay it only once, it would be a fraud upon Rice to allow Pringle to collect the account and leave the note in Rice's hands, valueless. It cannot be said that the account, to the amount of the note, was finally and forever extinguished in the sense of having been paid, for if Pringle & Son had paid the note to Rice, and resumed possession and ownership of it, their remedies upon the account would have instantly revived.

The account, therefore, was not extinguished in the sense of being paid, by the transfer of the note to Rice; and as the note represented a part of the debt secured by the bond and mortgage, the note is still protected by the bond and mortgage, after its endorsement to Rice, and in his hands. Wright v. Eaves, 10 Rich. Eq. 585, and authorities there cited.

Rice's equities are not altered by the subsequent assignment of the bond and mortgage to Adger & Co. The bond and mort-

gage were given to secure the whole account of the Pringle family. The debt to be secured was the account. The amount of the condition of the bond was to be ascertained by the books of Pringle & Son.

Suppose the Pringle family, instead of making a note, had paid James R. Pringle & Son $6000 in cash, and the credit had not been entered on the books of the firm. It will hardly be contended that, as against any assignee of the bond, the obligors would not have been allowed to set up the credit. So if the books mislead an assignee, it is the fault of Pringle & Son, and the assignee takes the bond and mortgage subject to what the books ought to show, and this is more especially so when he takes these securities to cover an antecedent debt and of the assignor.

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*The debt of the Pringles to James R. Pringle & Son, being in effect part of the bond secured by the mortgage, and a part of the debt being endorsed to Rice, and the remainder assigned to Adger & Co., Rice's claim and the claim of Adger & Co. rest on the same plane. Neither has any priority of the other, and must be paid ratably out of any funds remaining after the satisfaction of the Gadsden and Lide bonds.

It is needless to discuss, in this decree, the rights of the other creditors of the Pringle family. The whole fund in court will be exhausted by the claims, the priorities of which have been above discussed. Nor is it necessary to discuss the propriety of dismissing the complaint, as to the holders of the Gadsden and Lide bonds.

They were made parties to the suit originally. The whole estate of John Julius Izard Pringle has been sold by the order of this court and by consent of parties. The fund realized from the sale is, in effect, in court. To dismiss the complaint now as to the holders of these bonds, and to divide the fund in court among the remaining parties, would be to defeat utterly the claims of parties who have the first and highest demand against the estate.

It is therefore ordered, adjudged and decreed that the referee, George D. Bryan, Esq., do pay out of any funds in his hands, realized from the sale of the Whitehouse and Greenfield plantations, sold as the property of the estate of the late John Julius Izard Pringle, the principal and interest due upon the Gadsden and Lide bonds. If there should not be sufficient funds in his hands to fully pay and satisfy said bonds, then they are to be paid ratably and in proportion.

If there should be any part of said funds remaining in his hands after the payment of the bonds aforesaid, then that he do pay such balance to the debt secured by the bonds and mortgages assigned to Adger & Co., that is to say, upon the note held by A. G. Rice, and the balance of the account assigned to James Adger & Co., these two demands to be paid ratably and in proportion.

From this decree the plaintiffs appealed, upon the following grounds:

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*1. Because his Honor the presiding judge has erred in decreeing that the bonds of the testator, John Julius Pringle, once held by the defendants, Ann J. Gadsden and Mary A. Lide, are subsisting debts of his estate.

2. Because his Honor has further erred in decreeing that the said bonds, even if they be subsisting debts of the estate of John Julius Pringle, are entitled to be paid out of the proceeds of sale of the plantations, known as "Whitehouse" and "Greenfield," in priority to the bond and mortgage held by the plaintiff herein.

3. Because his Honor has further erred in decreeing that the note held by the defendant, A. G. Rice, is protected by the bonds and mortgages of the heirs of Pringle, assigned by Pringle & Son to the plaintiffs, and that said note is entitled to be paid ratably with the claim of the plaintiff.

The defendant, A. G. Rice, also appealed upon the following grounds:

1. From the portion of the decree which orders that the findings of fact by the referee be confirmed, because there was no evidence to sustain the finding of the referee that "the bonds held by Mary Alston Lide and Ann J. Gadsden were given in substitution and renewal of the bond of John Julius Izard Pringle, which had been lost or destroyed," and no evidence to sustain the finding of the decree that "the new bonds were not accepted by the holders in payment of the original bonds;" and also because the issue of whether said bonds were so given and accepted was not among the issues made by the pleadings or submitted to the referee by the order of reference.

2. That the conclusion of his Honor, as following from facts so assumed, "that the Gadsden and Lide bonds are a charge upon the estate of J. J. I. Pringle," has no proper basis for a decree upon pleadings and evidence, and is erroneous as a conclusion of law.

3. That James R. Pringle did not testify as a matter of fact, as stated in the decree, "that he knew of the existence of the bonds both before and after the substitution of the new bonds," and that his statement in regard to said bonds does not sustain the finding of the court below, either as matter of fact or conclusion of law.

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*4. That the decree is erroneous, in finding as matter of law that the Gadsden and Lide bonds are not postponed to the bonds and mortgages to James R. Pringle & Son.

5. That the decree is erroneous, in adjudging that the claim of Rice and the claim of Adger & Co., rest on the same plane, and

that the claim of Rice has not priority over that of Adger & Co.

6. That the complaint should have been dismissed as to the defendants, Lide and Gadsden; and the decree is erroneous in holding that such dismissal would put the claims of said defendants in any worse plight than they were in before the sale, or would have been in if no sale had been made.

7. That the decree is erroneous, in ordering the referee to pay the Lide and Gadsden bonds out of the proceeds of the property mortgaged by defendants, who have been in undisputed possession and ownership both prior and subsequently to their alienation of the same.

[For subsequent opinion, see 13 S. C. 33.]

Mr. A. T. Smythe, for plaintiffs.

Messrs. Simonton & Barker, for defendant, Rice.

Mr. T. M. Hanckel, for Miss Gadsden.

Messrs. Lord & Inglesby, for Mrs. Lide.

April 18th, 1879. The opinion of the court was delivered by

McIVER, A. J. The first question which we propose to consider is, whether the objection raised by the appellant, A. G. Rice, to the making of Mrs. Lide and Miss Gadsden parties, can be sustained. This objection, it is to be observed, was not raised by any pleading, but was for the first time, taken in the argument before the referee. It is based upon the ground that the action was brought simply for foreclosure of the several mortgages mentioned in the complaint, and that to such an action these persons, whose only claim is that of creditors of the ancestor of the mortgagors, could not be made parties. We do not consider, however, that this position can be sustained, for the reason upon which it rests is not, in our judgment, well

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founded. *We do not regard the action as brought simply for the foreclosure of the mortgages. The agreement entered into by the several parties, through their attorneys, prior to the commencement of the action, the terms of which were substantially set forth in the complaint, together with the demand for relief, show very clearly that such was not the sole purpose of the action. It is very obvious that the numerous creditors of the Pringles saw that in any attempt to enforce their demands, whether against the ancestor or the heirs, many conflicting claims were likely to arise, which it would be necessary to have determined, and with a view to avoid multiplicity of suits and heavy expenses, they entered into the agreement above referred to. In pursuance of this agreement we find that the complaint states the claims of the various creditors, and prays judgment not merely for a foreclosure of the several mortgages, as in a case brought simply for that purpose, but also that the proceeds of the sales of the mortgaged property, after satisfying the costs and taxes, be applied "to the payment of the amounts of principal and interest due on the bonds and mortgages held by the plaintiffs, and the claims of the parties defendants, according to their relative priorities, and so far as the same may be established before this honorable court." Accordingly an order was granted, by consent of the attorneys of the several parties, for the sale of the mortgaged premises, in which it was provided that the proceeds of the sale, after paying costs and expenses, should be turned over to the referee, "to be distributed by him under the further orders of this court." This order also provided that until such sale should be effected the property should be placed in the hands of certain designated persons, to be planted and managed by them, and, after paying the expenses of such operations and the advances made for cultivating crops, &c., that the net proceeds be held "subject to the orders of this court, and to be distributed among the several parties hereto, as their several rights may appear."

While, therefore, one of the purposes of the action was to obtain judgment of foreclosure and sale, another was to have the various conflicting claims of the creditors adjudicated in this one action; and while these questions were in process of adjudication, the property, which was represented to

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be deteriorating in value *and yielding no returns, was sold by the consent of all parties, and the proceeds representing such property was retained in the hands of the court, to be distributed or applied in accordance with the judgment of the court as to the relative priorities of the several claimants. The action may, therefore, be regarded as more in the nature of a creditor's bill, though not strictly such, rather than as an ordinary action to foreclose a mortgage of real estate, and so regarded all the grounds upon which it is contended that Mrs. Lide and Miss Gadsden were not proper parties, are clearly untenable. We think, therefore, that the objection raised by the appellant, Rice, even were it originally maintainable, comes too late, for we do not regard it as a question of jurisdiction, but rather as a question of pleading and practice, and, as such, consent of parties operates as a waiver of objections, which, otherwise, might be unanswerable.

But, as the counsel for the appellant, Rice, contended so earnestly against the idea that the agreement, above referred to, should be regarded as a consent on his part to the making of improper parties, we will not rest our decision upon the effect of such agreement. We are satisfied that, even in the absence of any such agreement, Mrs. Lide and Miss Gadsden were proper, though not necessary parties to the action. There can be no doubt

that all prior, as well as subsequent encumbrancers, while not necessary are proper parties to an action for the foreclosure of a mortgage of real estate, and in order that the land may produce its full value at the sale sought by such action for foreclosure, it is desirable that such encumbrancers should be made parties, for, if the prior encumbrancers are not made parties, the purchaser takes his title subject to the lien of such encumbrancers; and if the subsequent encumbrancers are not made parties, the purchaser buys subject to the right of such encumbrancers to redeem by paying off the antecedent encumbrances. Now, while a bond creditor of an ancestor cannot be said to have a lien, in the proper sense of that term, upon land in the hands of the heirs, inherited from the ancestor, yet he does have the right, by proper proceedings, to subject such land to the payment of his debt, and this right is called, in Jones v. Wightman, 2 Hill 583, "a constructive lien;" in Richard-

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son v. Chappell, 6 S. C. 155–6, *"a charge;" and in Rogers v. Huggins, 6 S. C. 362, "an encumbrance." The same principle, therefore, upon which it has been held that a prior encumbrancer is a proper party to an action for the foreclosure of a mortgage of real estate, would seem to justify the making of a bond creditor of an ancestor a party to an action for the foreclosure of a mortgage on real estate descended, executed by the heir, the object in both cases being the same—to free the land from any lien or "charge," or "constructive lien," or "encumbrance," so that the purchaser, obtaining a perfectly clear title, may be induced to bid the full value of the land.

It is true that it has been held, in the case of Corning v. Smith, 6 N. Y. 85, "that a person who claims title to the mortgaged premises, paramount to that of the mortgagor, cannot be made a party to an action to foreclose the mortgage in order that the validity of such title may be tried in such action." But whether this decision rested upon the idea which at one time prevailed, that even under the code it would be improper to unite in one action an application for legal relief with one for equitable relief, which, however, has since been repudiated, (see comments on Reuben v. Joel, 13 N. Y. 488; in the subsequent case of New York Ice Company v. Northwest Insurance Company 359, and Pomeroy on Remedies 95, § 76,) it is necessary for us now to inquire, as the persons who are objected to here as improper parties do not claim title to the mortgaged premises adverse to that of the mortgagor, but only claim a right to subject such premises to the payment of their debt, by reason of the fact that it has descended to the mortgagor, subject to a charge for such debt. In other words, they only claim as prior encumbrancers, as it were, by virtue of their constructive lien, as it has been called. We think, therefore, that, aside from any agreement among the parties, Mrs. Lide and Miss Gadsden were proper parties to this action.

The fact that the plaintiffs, after the commencement of the action, announced at one of the references that they "withdrew their claim as against Mrs. Mary A. Lide, B. N. Lide and Miss Anna J. Gadsden," cannot, in our opinion, have the effect contended for, of dismissing complaint as to these parties. This announcement was, doubtless, designed

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as nothing more than an *admission of the validity of the claims of Mrs. Lide and Miss Gadsden, and a declaration that they declined further to contest them, and it can have no other effect, so far as the question we are considering is concerned. What the effect may be, if, as is contended, they are trustees for Rice, so far as their duties and liabilities to their cestui que trust are concerned, we are not now called upon to consider. The plaintiffs certainly could not, of their own motion, at that stage of the case, probably after the land had been sold, dismiss the complaint as to these parties, and thereby imperil, if not defeat, their right to go either upon the land or the proceeds of the sale for the satisfaction of their debts.

The rule in equity is that it is within the discretion of the court to refuse a plaintiff permission to dismiss his bill if the dismissal would work a prejudice to the other parties; and whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the plaintiff or a co-defendant, and the dismissal of the bill would subject him to the expense and trouble of bringing a new suit and making his proofs anew, such dismissal will not be permitted. Bank v. Rose, 1 Rich. Eq. 292; Ancker v. Levy, 3 Strob. Eq. 210.

We propose next to inquire whether the bonds held by Mrs. Lide and Miss Gadsden are mere renewals of the original bonds of the ancestor, or whether such original bonds have been paid or extinguished by the taking of the bonds of the heirs. This, in our judgment, is mainly a question of fact. The rule of law is well established that where a creditor takes an obligation of inferior or equal rank, it does not extinguish, ipso facto, the prior obligation, as that only is payment which is intended and accepted as payment. Hence, when a creditor takes a new bond, "in substitution or renewal" of a bond previously held by him, which has been lost or destroyed, the original debt or obligation is not extinguished unless it is made to appear that the creditor accepted such new bond in payment, and the burden of proof is upon him who asserts the fact that the new bond was taken in payment. This doctrine is so fully supported by the authorities in this state that it is only necessary to refer to a few of the cases: Kelsey v. Rosborough, 2

Rich. 244; Fraser v. Hext, 2 Strob. Eq. 258. These cases are entirely consistent with the

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*subsequent cases of McLure v. Askew, 5 Rich. Eq. 162, and Kirkland v. Cureton, 4 S. C. 122, for, though the substituted securities were, in both of the last-named cases held to have operated as a satisfaction or extinguishment of the original debts, yet in both of them the decision was placed distinctly upon the ground that the evidence showed that the papers substituted were accepted in payment of the original debts. So that so far from weakening, they strengthen the authority of the preceding cases.

The question of fact having been decided by the referee, and his decision having been confirmed by the Circuit judge, their decision must be regarded by us as conclusive, unless it is without any testimony to sustain it, or is manifestly against the weight of the evidence, neither of which is the case in the present instance.

The Lide and Gadsden bonds must, therefore, be regarded as representing the debts of the ancestor, and, as was decided in the recent case of Simons v. Bryce, 10 S. C. 354, are entitled to priority of payment out of the funds now in the hands of the court arising from the sales of the Whitehouse and Greenfield plantations. As it appears, from the report of the referee, that these funds will not be sufficient to pay these bonds in full, it is scarcely necessary to consider the questions raised between the plaintiffs and the defendant, Rice, as they are not now of any practical importance. We may say, however, that we are disposed to agree with the Circuit judge in the view which he has taken of these questions.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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*(Case No. 719.)

ISAAC STANDRIDGE v. ROBERT POWELL and THOMAS POWELL.

(November Term, 1878.)

[*Witnesses* ⇨164.]

In an action by assignee of a sealed note, defendant may prove loss of receipt given him by assignor at the time of trial deceased, but may not testify as to its contents.

[Ed. Note.—Cited in Boozer v. Teague, 27 S. C. 366, 3 S. E. 551; Williams v. Mower, 29 S. C. 333, 340, 7 S. E. 505; Terry v. Husbands, 53 S. C. 71, 30 S. E. 826.

For other cases, see Witnesses, Cent. Dig. § 684; Dec. Dig. ⇨164.]

Before Mackey, J., at Oconee, March, 1878.

The opinion of the court states the whole case.

Mr. J. J. Norton, for appellant.

Messrs. W. C. Keith and S. P. Dendy, for respondent.

April 18th, 1879. The opinion of the court was delivered by

HASKELL, A. J. This was an action on a sealed note assigned to the plaintiff for value. The note was admitted, but payment pleaded, it being alleged in the answer that the original payee, the assignor, had given a receipt in full to one of the defendants, but that the receipt had been lost, mislaid or destroyed. At the trial Robert Powell offered to prove that he had in his "possession a receipt signed by E. Hughes, the payee of the note, who was dead at the time of the trial, in full thereof, but that the receipt was now lost. Plaintiff objected to the competency of the witness to testify in regard to the receipt. The court overruled the objection and plaintiff excepted." That is the case as stated by the appellant. If Robert Powell had in his actual possession, at the time of the trial, a receipt in full from E. Hughes, it cannot be for a moment contemplated that he would have been prevented by Section 415 from putting it in evidence, but he would have been obliged to prove the handwriting by another person, or by other testimony than his own. But the paper, after being proved, would testify in regard to itself. If, however, such receipt had been lost, Section 415 has nothing to do with proof of the loss. Proof of the loss is no evidence of the contents of the paper, and, therefore, cannot be evidence "in

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*regard to any transaction or communication." And, by the law of evidence, as it stood prior to the admission of any parties in interest to testify in their own behalf, a party in interest was generally allowed to prove the loss of an instrument in writing, after due notice, &c., and after proof of its previous existence, because, by the nature of things, he alone could prove such a fact, when, as was usually the case, the loss was out of his own custody. 1 Greenl., § 349. The law is unchanged in this respect by the code. That is to say, it is returned to the condition in which it was prior to the act of 1866, excluding no witness on account of interest. The defendant, therefore, had a right to testify as to the loss of the receipt, but he had no right to be a witness to prove the contents of the receipt. The object of the proof of the loss is to let in secondary evidence of the contents of the paper, which, if in possession of the owner, would speak for itself; such secondary evidence cannot be given by a witness to whom Section 415 of the code will apply, for a receipt is unquestionably a transaction between the parties interested in it, and there would be no difference between proving the contents of such a paper lost, and

amplifying or explaining the contents of such a paper in existence. In fact, the reasons against the former are much stronger than against the latter. In the case before us, however, the exception was taken even to the proof of the loss of the paper, and not solely to the proof of the contents, or, to say the least, the distinction is not clearly drawn, the words being "plaintiff objected to the competency of the witness to testify in regard to the receipt." Certainly the witness was competent to prove several important facts with regard to the paper. The demand was that he should be excluded altogether. If objection had been made to his proving the contents of the paper, (after proof of the loss,) such objection to the witness may have been sustained by the judge. The point, however, was not made. It is possible that after proof of the loss the defendant may have been able, had he been excluded, to produce other and admissible secondary evidence.

Under the circumstances the judgment must be affirmed.

Motion refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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*(Case No. 720.)

ARCHIBALD Q. McDUFFIE v. ROBERT C. McINTYRE et al.

(November Term, 1878.)

[1. *Guardian and Ward* ⇐43.]

A guardian has no power to sell a bond and mortgage belonging to the estate of his ward. Cases reviewed.

[Ed. Note.—Cited in Webb v. Graniteville Mfg. Co., 11 S. C. 408, 32 Am. Rep. 479; Hyatt v. McBurney, 18 S. C. 221; Barnwell v. Marion, 54 S. C. 231, 32 S. E. 313.

For other cases, see Guardian and Ward, Cent. Dig. § 190; Dec. Dig. ⇐43.]

[2. *Guardian and Ward* ⇐108.]

The court will not confirm a sale of a ward's property made by his guardian without authority, which has not proved advantageous to the ward, and where it appears that the purchaser paid in part with a debt due to him by the guardian individually, and there is no evidence to disprove the suspicion reasonably suggested by the attendant circumstances that the whole amount was to be used by the guardian, then largely in debt, for his own purposes.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 369; Dec. Dig. ⇐108.]

[This case is also cited in Hyatt v. McBurney, 18 S. C. 199, and in Barnwell v. Marion, 54 S. C. 223, 32 S. E. 313, and distinguished therefrom.

Before Townsend, J., at Marion, July, 1875.

This was an action by A. Q. McDuffie, as assignee of R. H. Reaves, against R. C. McIntyre, Knight Gibson and his wife, Eliza E., (formerly Eliza E. Black) and H. McClenaghan, administrator of C. H. Black, deceased.

The case is fully stated in the Circuit decree, which is as follows:

This is an action for the foreclosure of a mortgage. The plaintiff in his complaint alleges the execution of the bond and mortgage, certain payments made thereon, the assignment of the bond and mortgage to him, and the breach of the condition of the bond, and prays for a sale of the mortgaged premises. The plaintiff further alleges that he is informed that certain parties claim that the assignment to him of the bond and mortgage was wrongful and should not be sustained, and that they are entitled to the property or the proceeds of the sale. He asserts that the claim is unfounded, and has brought the parties before the court, and asks for an adjudication of their rights.

The defendant, R. C. McIntyre, has made no answer to the complaint.

The answer of Knight Gibson and Eliza E., his wife, by N. S. Gibson, guardian ad litem, admits the execution of the bond and mortgage, the assignment of the same to R. H.

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Reaves as guar*dian, and the death of Charles C. Black, leaving as his heirs-at-law, C. Henry Black and Eliza E., wife of Knight Gibson, and the death of C. Henry Black, and the granting of letters of administration upon his estate to Horatio McClenaghan.

The defendants further say that they have no knowledge respecting the amounts paid on the bond, or whether the assignment to the plaintiff was for full value, and submit, if such arrangement was made, R. H. Reaves, as lawful guardian, had no lawful authority to do so, and deny that the plaintiff is the lawful owner and holder thereof.

They further allege that at and before the date of the alleged assignment, it was known to the plaintiff that R. H. Reaves held the said bond and mortgage as the property of Eliza E. Gibson, and he received the same with full notice of the trust attaching thereto.

They further insist that the property and title of Eliza Gibson and Charles Black in and to the said bond and mortgage was not divested, or any way affected by such transfer and assignment. The defendants do not object to a foreclosure of the mortgage and a sale of the land, but insist that they are entitled to the proceeds.

The answer of Horatio McClenaghan is substantially the same as that of Knight Gibson and his wife, Eliza E.

At the hearing of the cause, a judgment of foreclosure and sale was rendered. The question who will be entitled to the proceeds of sale, was submitted for the decision of the court, and this is the only one remaining for consideration.

Testimony was offered, and argument of counsel heard on the question.

For a proper understanding of the case, the facts as admitted and proved should be stated.

In December, 1856, the bond and mortgage in question were executed by R. C. McIntyre to secure the payment of the purchase money of land sold by the then commissioner in equity, in pursuance of an order of the court, belonging to the defendants Eliza E. Gibson and her brother, Charles C. Black, both of whom were minors. Robert H. Reaves was soon after duly appointed guardian of the

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minors. On the 13th day of February, *1857, an order was made by the court of equity, directing the commissioner in equity to pay over the proceeds of the sale to R. H. Reaves, general guardian of the infants. On the 27th day of March, 1860, after the first installment due on the bond had been paid by R. C. McIntyre, C. D. Evans, commissioner, assigned and transferred the bond and mortgage to R. H. Reaves, in the following words: "For value received, I transfer the following bond and mortgage to R. H. Reaves." On the fifth day of June, 1860, R. H. Reaves assigned and transferred the said bond and mortgage for value received to A. Q. McDuffie. The bond of R. C. McIntyre was dated on ——— day of December, 1856, and payable in four equal annual installments, with interest payable annually from the 5th day of May, 1856. The first installment and interest was paid to C. D. Evans, commissioner, and by him turned over in money to the guardian.

From the testimony heard by the court, the following conclusions of facts have been reached:

1. That the plaintiff, A. Q. McDuffie, had full knowledge, at the time of the purchase of the bond and mortgage by him, and the assignment of the same to R. H. Reaves, that the bond and mortgage were held by him as the property of the minors, of whom he was the guardian.

2. That the plaintiff, McDuffie, paid the full value for the bond and mortgage.

3. That of the consideration paid by him, as much as $700 were paid in a debt due by R. H. Reaves, in his individual capacity, to McDuffie.

4. That at the time of the assignment of the bond and mortgage, R. H. Reaves had abundant means and good credit, and could have easily and conveniently paid the debt of $700 due McDuffie, without using the funds of his wards.

5. That at the time of the transfer of the bond and mortgage, the guardian bond of R. H. Reaves was abundantly good, and R. H. Reaves was universally considered solvent.

6. That R. H. Reaves is now insolvent, and has been for some time, and was rendered so by the late war; and that the guardian bond is worthless.

The defendants, in their answer, first sub-

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mit that R. H. *Reaves, the guardian, had no lawful authority to transfer and assign the bond and mortgage, and deny that the plaintiff is the legal holder thereof. The first question for consideration is, did the guardian have the legal power to sell and assign the bond and mortgage to the plaintiff?

It has been settled in this state by the decisions of the court, that a guardian has no right to sell the chattels of his ward. In the case of Bailey v. Patterson, the court set aside the purchase of a slave from a guardian. It has been held that, in general, guardians cannot change the nature of infants' estates, but they may do that under particular circumstances, and the court will support their conduct, if the court would do it under the same circumstances.

But in the case of Field v. Schieffelin, 7 Johns. Ch. 151, it is decided by Chancellor Kent, "that a guardian has legal control over a bond and mortgage held for his ward, and the right to collect and receive the money due thereon, and a legal right to sell and assign the same in the due exercise of his discretion as guardian. If the bond is not due, and the money is wanting for the purposes of the trust, either for discharging encumbrances, or for making more advantageous investments, or for payment of debts and for the maintenance and education of the ward, or for any purpose whatever connected with the faithful discharge of the trust and beneficial to the infant, the guardian has just right and lawful authority to raise the money by the assignment of the bond and mortgage. The necessity and expediency of the measure rests entirely in the judgment and discretion of the guardian."

This doctrine is sustained in the case of Long v. Cason, 4 Rich. Eq. 64, although it is distinctly stated in the case that it would be hazardous to recognize the doctrine as to the chattels of wards. In this case the court says: "That guardians are entitled to the possession and management of all the property of their wards, and the collection and disbursement of all their income. Their authority extends to bind the infants by all such acts as appear to be for their advantage. I apprehend that a guardian has plenary right to receive moneys coming to his ward, and to prosecute, compound and acquit any debt or

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liability to the ward. *But a stranger dealing with the guardian as to the choses of the ward, may rightfully presume that he is acting for the benefit of the infant, and in absence of any evidence of collusion does not partake of the guardian's responsibility. It appears to me highly important to the interests of infants and to the repose of the community, that guardians should have such power over the rights and credits of their wards."

In this same case the doctrine laid down in Field v. Schieffelin, as to the sale of bond and mortgage by the guardian, is recognized in the opinion of the court. It is said that "the views above stated have strong support from authority," and the words are quoted

in Field v. Schieffelin, "the sale and assignment by a guardian to a stranger, of bond and mortgage belonging to an infant, were held valid."

The case of Long v. Cason draws a distinction between the sale of a chattel, such as a slave, and the collection of a debt or the sale and assignment of a bond and mortgage, or a chose of the ward, and seems to recognize the legal power of the guardian to sell and transfer a bond and mortgage belonging to an infant, and considers the guardian as always acting under responsibility to his ward for the faithful and judicious performance of his trust, and liable for any fraud, gross negligence, or other breach of trust. The bond in this case was due, or at least two installments of it, and the last nearly so, at the time of the assignment, and if the obligor had tendered payment, the guardian would have been bound to accept it. He clearly had a legal right to do this. This bond and mortgage were not intended by the court as an investment of the funds of the minors, for the proceeds of the sale were ordered to be turned over to the guardian, and the commissioner in equity turned over the first installment of it in money, and transferred the bond to R. H. Reaves, and not to R. H. Reaves as guardian. The form of the assignment would look as if the parties intended it as a payment of so much money as the bond represented to R. H. Reaves. The court seemed to have contemplated that money should go into the hands of the guardian, which should be securely invested by him. For aught that is known by the court, the proceeds of such sale were invested, after the sale of the bond and mort-

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gage, by the *guardian. Under the authorities on this point and the points in this case, I conclude the guardian, R. H. Reaves, had the right and the legal power to sell and assign the bond and mortgage in question to the plaintiff.

Suppose I am mistaken in this view of the law, and the guardian had no legal power to sell the bond and mortgage, still it has been held that he may change the nature of the infant's estate, under particular circumstances, and the court will support him in the act, if the court would have directed the change under the same circumstances. Would the court have authorized the sale of this bond and mortgage under all the circumstances? I think so. The guardian, R. H. Reaves, had a good bond, was a man of means, and the bond was almost due as to all the installments. The plaintiff was offering the face of the bond and all the interest due on it. The court had ordered a change of the property of the minors from real estate into money. By authorizing a sale of the bond and mortgage for money by the guardian, it would have accomplished this object instantly. The order of the court, directing the payment of proceeds of sale to the guardian by the commissioners in equity, would seem to be authority in itself for the guardian to have converted the bond and mortgage into money, after the transfer to him. Under this order the commissioner paid to the guardian the first installment of the bond in money collected by him. This case thus resolves itself into the question, whether the guardian committed a breach of trust in the assignment of the bond and mortgage; and whether the plaintiff was a party to that breach of trust. If there was any fraud or collusion between the guardian and the plaintiff, the transaction will be vitiated and the sale invalidated. Any concert between the parties by which the bond and mortgage were obtained at a nominal price, or at a fraudulent undervalue, or any arrangement by which a violation of trust was committed, would amount to fraud. But on this point there is evidence to show that full value was paid for the bond and mortgage, and that there was no collusion. At the hearing it was distinctly stated that no such charges were made, or that such a ground was relied upon.

But if there was no fraud or collusion,

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and the plaintiff knew, *or was sufficiently informed, when he accepted of the bond and mortgage, that the guardian had in contemplation a breach of trust and intended to misapply the moneys, then the plaintiff must be deemed to have taken the bond and mortgage in trust for the infants. Field v. Schieffelin, 7 Johns. Ch. 153. "In general, a purchaser of personal property from an executor, administrator or guardian, in good faith, and having no knowledge of any intended breach of trust, is not responsible for a misapplication of proceeds." Hill on Trustees 166, note.

In Long v. Cason, 4 Rich. 67, it is held "that a stranger, dealing with the guardian as to the choses of the ward, may rightfully presume that he is acting for the benefit of the infant, and in the absence of any evidence of collusion, does not partake of the guardian's responsibility." Was there any breach of trust committed by the guardian, R. H. Reaves? It appears that a fair and valuable consideration was paid for the bond and mortgage. There is no evidence that the guardian has misapplied or wasted the money of the infants. The fact of the present insolvency of the guardian appears, but there is no proof that the money received by him was not duly invested in other property, and was left untouched amidst the destruction of his own property. It will not do to assume a breach of trust from the mere circumstance of the sale of the bond and mortgage, or to conclude there was one from a presumption to arise from the present insolvency of the guardian. But it may be said that the use of several hundred dollars of the proceeds of the bond and mortgage in

the extinguishment of his own private debt, amounted to a violation of his trust. At the time, the proof is that he was solvent, in good credit, and had ready means. If such was the case, and the payment of his private debt out of the proceeds of the bond and mortgage, was merely to avoid the form of paying over money of his own and immediately receiving it back, then this transaction would not be a breach of trust. Sanders v. Rogers, 1 S. C. 460. There is no proof to show that this amount of money was not converted by him with the remainder received by the plaintiff. The amount used in extinguishment of his own debt was small when compared with the entire amount for which the bond and mortgage were sold. But

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if the pre*sumption of a devastavit is to be admitted, or the misapplication of the fund at the time amounted to a breach of trust, there is no evidence that the guardian had any abuse of trust in contemplation at the time; or if such was his intention, there is no sufficient proof that the plaintiff knew or had information of that intention, or of any purpose inconsistent with his duty.

The plaintiff had every reason to believe that the guardian was acting fairly and faithfully in discharging his trust. The guardian was a substantial and prosperous man, was abundantly solvent, and had given a good bond, and had command of ready money at all times. The bond of McIntyre was due in part, and he knew it could be enforced and collected by the guardian. He knew of the payment to guardian of the money collected by the commissioner, under the order of the court. There was nothing to cause even a suspicion on the part of the guardian intended to misapply the proceeds of the bond, with the exception of the payment of his individual debt, to the extent of $700, apparently out of the proceeds. Was this sufficient to make the plaintiff a participant in the violation of a trust by the guardian, or to furnish grounds for a knowledge of a design on the part of the guardian to misapply the money? The doctrine is, that a purchaser buys at his peril, when he knows that the proceeds are applied by the guardian to the payment of his own debts. But this applies when he uses the whole in extinguishment of his own debts, and there is no proof of his means to replenish or acquire an equal sum from other sources.

In this case, the proof is, the guardian had ready ability to pay the debt of $700 to the plaintiff; and the payment of this sum amounted, in effect, to the same thing as if he had first paid his debt to the plaintiff, and then received from him the same money in part payment of the bond and mortgage. I see nothing to warrant the conclusion that the plaintiff had any knowledge or information that the guardian was misapplying the funds at the time of the purchase, or had any such design. There is no ground for an inference of fraud. There was nothing in the transaction that rendered it the duty of the plaintiff to make inquiry. The plaintiff, therefore, had a right to presume, from all the facts before him, and the circumstances

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attending the *transaction, that the guardian was acting for the benefit of the infants. The plaintiff, in my judgment, acted in good faith, and is not responsible for a misapplication of proceeds.

It is adjudged, ordered and decreed, that the plaintiff is the lawful owner of the bond and mortgage in question, and is entitled to receive the proceeds arising from the sale of the mortgaged premises, and to any balance that may be due on the bond, after the application of said proceeds, as a credit thereon.

It is further adjudged, ordered, and decreed that the sheriff do pay over the proceeds of said sale to the plaintiff, after deducting therefrom the costs and disbursements of this action.

From this decree the defendants, Gibson and wife, and H. McClenaghan, administrator, appealed, upon the grounds that the appellants were entitled to the proceeds of the sale of the mortgaged premises, or, at least, to so much thereof as had been used by the guardian in the payment of his own debt.

Messrs. W. J. Kerall, A. L. Evans and C. A. Woods, for appellants.

Mr. W. W. Sellers, for respondent.

April 19th, 1879. The opinion of the court was delivered by

HASKELL, A. J. The facts of the case are simple. Real estate belonging to infants was sold under an order of the court, and a bond and mortgage taken by the commissioner in equity to secure the payment of so much of the purchase money. A guardian was subsequently appointed, and the commissioner turning over to him, under an order of the court, the proceeds of the said sale, assigned to him the said bond and mortgage. The guardian sold and assigned the bond and mortgage, on which there was a balance still unpaid, to the plaintiff in this action. The purchaser paid the larger portion in money, but to the extent of about $700 he paid by a debt due to himself by the guardian personally. He (the purchaser) has now brought an action to foreclose the mortgage, and the question has arisen whether he or the infants are the legal owners of the bond and mortgage. The infants claim that they are legally

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entitled. The foreclos*ure has been had, and the money is now in the hands of the court awaiting decision upon the point. The guardian has entirely failed to account, and is now insolvent, as are his sureties also. The Circuit judge has decided, first, that the guardian had the legal right to sell the bond and

mortgage as if it had been his own; and, secondly, that even if he had not the legal right, the sale would have been made by the court under the circumstances, and should now be confirmed.

The first conclusion of law is regarded by this court as entirely erroneous, and the second as based upon a presumption of facts which the evidence in no wise sustains. The cases of Bailey v. Patterson, 3 Rich. Eq. 156, and Moore v. Hood, 9 Rich. Eq. 311 [70 Am. Dec. 210], are conclusive on the point that a guardian has no legal title to the personal property of his ward, and that a sale by him is voidable, at the option of the infant, when he comes of age. In the former the purchaser was made to deliver up the property, while in the latter case the court said: "It is not intended to be intimated that the purchaser in this case could not have been successfully pursued if he and the slaves had been found within the jurisdiction." Page 327. The appellants only ask against the purchaser the proceeds of the judgment of foreclosure. They are entitled to that relief. The bond and mortgage have been held by the purchaser in trust for them, and must now be turned over to them as the legal owners. The remedy for the purchaser, if he has any, is against the guardian. This case is stronger, if anything, than that of Moore v. Hood, where the sale was made under an order of a court, but in a proceeding to which the ward was not a party. The Circuit judge, however, seems to rely on the case of Long v. Cason, 4 Rich. Eq. 60, and claims that the decision in that case "draws a distinction between the sale of a chattel, such as a slave, and the collection of a debt, or the sale and assignment of a bond and mortgage and chose of the ward, and seems to recognize the legal power of a guardian to sell and transfer a bond and mortgage belonging to an infant." We can find nothing in the case or elsewhere to justify such an inference, but, on the contrary, the whole tendency of the discussion in that case is the other way. What the case really does decide is thus plainly stated by

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the court in its con*cluding words: "It is not necessary, in this case, to determine what may be the operation of the statute [of limitation] against an infant with guardian as to legal demands standing in the name of the infant. Our judgment is limited to the case presented. We hold that as to a chose of the infant not assignable at law, and peculiarly within the power and duty of the guardian, the laches of the guardian, in the absence of collusion, by operation of the statute of limitations, bars the infant as to strangers, and leaves him to his remedy against the guardian." The court does discuss what is "within the power and duty of the guardian," and in so doing distinctly recognizes the authority of Bailey v. Patterson, and disavows any recognition of the doctrine intimated in Field v. Schieffelin, 7 Johns. Ch. 150, and held in Bank of Virginia v. Craig, 6 Leigh 399, "that guardians have the same title to the personal estate of their wards as executors have to the personal assets of their testators." The decision of Long v. Cason was concurred in by the Chancellor, whose decree was adopted by the court in Bailey v. Patterson, and although another Chancellor (Dargan) dissented, it was upon grounds totally different.

Examination of both opinions will show that the whole court assented to the proposition of law that "the guardian is not possessed of any legal estate in his ward's chattels or choses." This fact in law is the very difficulty which the dissenting Chancellor cannot surmount; for, to his mind, the statute could only run against the guardian if the legal title was in him; while, to a majority of the court, it appeared that the possession of the right of action, with the power to receive and acquit, was sufficient. That such is the meaning is put beyond doubt by remarks in Moore v. Hood, by Chancellor Wardlaw, who delivered the opinion in both cases. In discussing "the rule requiring beneficiaries to be parties, * * * although the trustees have the legal title," and, a fortiori, where they have not the legal title, as in the case of guardians, he says, "It was adjudged in Bailey v. Patterson, 3 Rich. Eq. 156, and recognized in Long v. Cason, 4 Rich. Eq. 60, that a guardian has not the legal title of his ward's chattels, and that his sale of them is voidable at the option of the ward. Long ago it was decided, in Inwood v. Twyne,

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*Amb. 419, 2 Eden 148, that a guardian could not change the character of his ward's estate without the authority or sanction of the court, and this doctrine was recognized in Capehart v. Huey, 1 Hill Ch. 409." The authorities upon the point are conclusive, and the judgment of the Circuit Court that the guardian had the right and the legal power to sell the bond and mortgage in question must be reversed.

But the Circuit judge goes further, and comes to the same conclusion, in the results at least, upon the additional ground that such sale was a mere "change of the nature of the infant's estate," which would have been directed by the court under the circumstances, and which the court should afterwards confirm. The doctrine upon that subject is thus well expressed in Long v. Cason: "In general, guardians cannot change the nature of infant's estates, but they may even do that, as is said by Lord Hardwicke in Inwood v. Twyne, Amb. 419, 2 Eden 148, under particular circumstances, and the court will support their conduct if the court would do it under the same circumstances. They are entitled, however, to the possession and management of all the property of their wards, and to the collection and disbursement of all the income, profits and credits arising therefrom. Their authority extends to bind the infants by all such acts as appear

to be for the advantage of the infants, and for which the guardians are liable to account. I apprehend that a guardian has plenary right to receive moneys coming to his ward, and to prosecute, compound and acquit any debt or liability to the ward. He always acts under responsibility to his ward for the faithful and judicious performance of his trust, and is liable for any fraud, gross negligence or other breach of trust. But a stranger dealing with him as to the choses of the ward may rightfully presume that he is acting for the benefit of the infant, and in the absence of any evidence of collusion, does not partake of the guardian's responsibility." What is meant by "possession and management of all the property of their wards" is thus defined and limited in Moore v. Hood, supra: "Management of an estate implies its administration in its existing state, but the order here affected the corpus of the estate and changed its nature." It will be seen

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that such was the effect of the "man*agement" in the present case. The Circuit judge relies on the opening and concluding sentences of the portion above quoted, and omits to take any notice of the intervening expressions. The remarks with regard to strangers dealing with guardians are in no sense connected with the sentence of Lord Hardwicke. That part refers to transactions which are in their nature voidable at the option of the ward, but confirmable by the court if, under the circumstances, they seemed really wise and proper, though the guardian had not the legal power; while the latter portion, in speaking of strangers dealing with guardians, relates only to those transactions which flow out of the exercise of the properly legal powers of guardians, for which, while the guardians are responsible, strangers are not liable where there was no collusion. For instance, if the mortgagor had satisfied the bond and mortgage by paying the money to the guardian, and the guardian wasted the money, the mortgagor would not be liable because of the waste. But if, on the other hand, the payment had been made by means of a debt due by the guardian personally to the mortgagor, or the money had been paid with the understanding that it would be loaned back to the mortgagor without security, or for other purposes of misapplication, there would be fraud or collusion on the part of the stranger, and he would be liable. That a stranger is not protected, either at law or in equity, in the purchase of property to which the vendor has neither legal title nor power of sale, is too obviously a general proposition to need authority, and that is just the case where a guardian sells the property of his ward without authority from the court. The only grounds upon which such sale can be confirmed are those which would have induced the court at the time to order the act to be done, together with the other, that it has turned out to the advantage of the ward. The evidence produced in the case will not permit such a conclusion. The sale of the bond and mortgage was for, in part, money, and in part a debt owed by the guardian personally to the purchaser. It cannot for a moment be said that the court would have ordered such a proceeding. The change of the nature of the estate was practically from a bond secured by real estate into a loan to the trustee without any security. It was, in law, a fraud

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on the part of the *trustee, and the mode of payment was notice to the purchaser, for it was, per se, a misappropriation of the ward's money, and gave him full warning that he was proceeding entirely at his own risk, relying upon the guardian and his sureties to account to the ward. The evidence is conclusive that the character in which the guardian held the bond and mortgage was known to the purchaser, for it was upon the instruments themselves. The part payment by debt past due, and owed by another than the guardian as guardian, was in itself a misapplication, and the circumstantial evidence that the whole amount was to be put by the guardian to his own use, and that the purchaser ought to have suspected it, (if he did not know it,) is very strong. Such being the case, the burthen of proof is entirely upon the purchaser. Neither he nor the guardian have produced a tittle of proof that the whole amount was not misapplied, nor anything to justify such use of the property of the ward. It was, in substance, a loan without security to a party against whom there were at the time judgments to large amounts unsatisfied, and his circumstances at best embarrassing. And, as has been so well said in Spear v. Spear, 9 Rich. Eq. 184, by way of comment upon the case of Sweet v. Sweet, Speers Eq. 309, the guardian's bond is not to be regarded as the security required by law for investments of money belonging to the estate. "It is proper," says the court, "for the security of his [the guardian's] beneficiaries and his own sureties, and for the avoidance of litigation of a particularly disturbing character, that the trust estate should be secured doubly: first, by stock or bonds, in which it may be invested, and then by his own bonds." Thus, a trustee who gives his bond for the faithful performance of his duties, is bound to treat the trust funds exactly as a trustee who has not given such a bond, to act with the same diligence and to obtain the same security on his investments. The conclusion of the court is, therefore, that the sale was without authority of law: that the evidence shows no grounds which would justify the court in confirming the sale: that, on the contrary, the circumstances are such as would have rendered the purchaser liable, (Rhame v. Lewis, 13 Rich. Eq. 269,) if the legal title in the vendor had been proved, and only the breach of trust with collusion on

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the part of the *purchaser had been the ques-

tion; that therefore the sale is void as against the wards, and they are legally entitled to the benefit of the proceedings in foreclosure to which they have been made parties.

The case is remanded, that such proceedings as may be necessary may be had, in conformity with the views herein expressed.

Motion granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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11 S. C. 565

(Case No. 721.)

JAMES A. LANIER, Trustee, et al., v. JAMES B. GRIFFIN, Guardian, et al.

(November Term, 1878.)

[1. *Guardian and Ward* ⇐146.]

A suit for foreclosure of a mortgage, given by guardian, as additional security for the use of his ward, is no bar to an action for an accounting against the guardian and the sureties on his bond.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 490; Dec. Dig. ⇐146.]

[2. *Limitation of Actions* ⇐28.]

The demand of a creditor of testator against the legatee, who has received his legacy, leaving a debt of the testator unpaid without available assets for its payment, is, in equity, in the nature of an action for money had and received, and the statute of limitations is applied in the same manner as to simple contract debts.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 134; Dec. Dig. ⇐28.]

[3. *Limitation of Actions* ⇐72.]

The estate of a deceased surety on a guardianship bond was duly settled up in 1858, without knowledge by executors or others in interest of this liability. The ward married in 1866, and by ante-nuptial settlement her property was assigned to a trustee; in 1867 she attained her majority; in 1868, an action was commenced by the trustee and herself, against executors, legatees and devisees of the surety, demanding payment by them of her claim. *Held*, that the action was not barred as against any of them by the statute of limitations. Cases reviewed.

[Ed. Note.—Cited in Brock v. Kirkpatrick, 60 S. C. 342, 343, 347, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Limitation of Actions, Cent. Dig. § 391; Dec. Dig. ⇐72.]

[4. *Wills* ⇐830.]

Held further, that the legatees and devisees were liable to the ward to the extent of assets received, but that no personal liability attached to the executors.

[Ed. Note.—Cited in Ariail v. Ariail, 29 S. C. 95, 7 S. E. 35; Brock v. Kirkpatrick, 60 S. C. 348, 38 S. E. 779, 85 Am. St. Rep. 847.

For other cases, see Wills, Cent. Dig. §§ 2139, 2150; Dec. Dig. ⇐830.]

[5. *Executors and Administrators* ⇐282; *Wills* ⇐832, 836, 848.]

Held further, that the legacies were liable to respond before the lands specifically devised could be applied, and that the decree should have established the liability of all the legatees and devisees inter sese to contribution.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1116; Dec. Dig. ⇐282; Wills, Cent. Dig. §§ 2145, 2153; Dec. Dig. ⇐832, 836, 848.]

[6. *Appeal and Error* ⇐1034.]

A decree will not be reversed for defects purely technical; as where a defendant executor is held liable as legatee under facts charged and admitted, although not named as a party in his individual character.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4064; Dec. Dig. ⇐1034.]

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[7. *Wills* ⇐843.]

*Lands bona fide alienated by devisee before suit brought, cannot be recovered by creditor of testator, but an unpaid balance of the purchase money due to devisee is an asset, which may be reached, after the remedy against the legatees is exhausted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2156; Dec. Dig. ⇐843.]

[8. *Wills* ⇐845.]

The lands so alienated are not liable to the creditor for such unpaid balance of the purchase money, when under no specific lien therefor to the devisee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2158; Dec. Dig. ⇐845.]

[9. *Dower* ⇐84.]

Where a widow consents to an order for sale of land of which her husband died seized, the amount of the sale will be the measure of her dower.

[Ed. Note.—Cited in Jefferies v. Allen, 33 S. C. 272, 11 S. E. 764.

For other cases, see Dower, Cent. Dig. § 322; Dec. Dig. ⇐84.]

[This case is also cited in Lanier v. Brunson, 21 S. C. 50, as to facts, and in Crane, Boylston & Co. v. Moses, 13 S. C. 578, as to the plea of plene administravit.]

Before Carpenter, J., at Edgefield, August, 1876.

This action was commenced by bill in the court of equity for Edgefield district, in April, 1868, by James A. Lanier, trustee under marriage settlement, Margaret Cornelia Brunson (formerly Hollingsworth) and Robert D. Brunson, her husband, against James B. Griffin, her guardian, Julius Day, a surety on the guardianship bond, John H. Hollingsworth and John H. Walker, executors of Diomede F. Hollingsworth, deceased, who was also a surety on the bond, and also against the legatees and devisees of said D. F. Hollingsworth, and the alienees of the devisees.

It will be unnecessary to state any facts, as they are fully set out in the Circuit decree; except that it is deemed proper to report all of the testimony which bears upon the mortgage given by the guardian for the use of his ward, in 1865.

Z. W. Carlisle.—Witness was the former commissioner in equity for Edgefield district. * * * [A mortgage was shown witness]—It was given December 26th, 1865; it was given at the instance of James B. Griffin himself; he gave it to secure that much

of his property for the benefit of his ward; so far as witness knows, none of the plaintiffs in this action had any agency in procuring the mortgage; the land was sold under a decree of foreclosure. * * * The lands sold under decree of foreclosure brought $3800.

John H. Hollingsworth.—Witness had no agency in procuring the mortgage; before James B. Griffin left this country, witness told him that he ought to make some arrangement to secure his ward's estate; witness was prompted to do so, by the interest he felt in the ward of James B. Griffin.

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*There was also testimony to show that the executors of D. F. Hollingsworth made public advertisement, calling upon all creditors of their testator's estate to present and establish their demands. That the claim of Mrs. Brunson, then Cornelia Hollingsworth, was not presented, and that the executors had no knowledge that their testator was a surety on the bond of James B. Griffin, as guardian, until 1868. This testimony was not contradicted.

The Circuit decree is as follows:

John Hollingsworth, Diomede F. Hollingsworth and Mansfield E. Hollingsworth, were brothers, living near the village of Edgefield, each the owner of considerable property. Eliza Ann Walker, a sister, had children—John H. Walker, Caroline E. W. Freeman, A. Spann Walker, Herbert W. Walker, Oliphant P. Walker and Milton S. Walker.

Mansfield E. Hollingsworth died in the year of our Lord 1853, intestate, and Diomede F. Hollingsworth became the administrator of his estate.

Cornelia Hollingsworth, daughter of M. E. Hollingsworth, was an heir-at-law and distributee. Upon the settlement of M. E. Hollingsworth's estate, James B. Griffin, a defendant, whose sister D. F. Hollingsworth had married, became the guardian of M. C. Hollingsworth. He gave the usual guardianship bond, bearing date the 24th day of November, A. D. 1854, executed by himself, D. F. Hollingsworth and Julius Day, to A. Simpkins, commissioner in equity, and his successors, in the penalty of $20,000. James B. Griffin received in A. D. 1854, a small part of his ward's estate, the greater part in 1855, after payment of his ward's expenses, which were comparatively small. The money received, with accumulation of interest, amounted, on the 1st of January, A. D. 1875, to the sum of $22,173.31. There seems to be no question as to the amount of indebtedness. M. C. Hollingsworth (now Brunson) the plaintiff in interest, was born on the 20th day of August, A. D. 1846, and after the second marriage of her mother lived with her step-father at Abbeville. As a fact she knew nothing of the management of her estate, and for many years never saw her guardian. On the 10th day of August, A. D. 1866, she was married to Robert D. Brunson, of Edge-

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*field. An ante-nuptial settlement of her property was executed, of which her step-father, Thomas Thomson, was the trustee after the marriage, under a power contained in the settlement. The office or duty of the trustee was transferred to James A. Lanier. Suit was commenced on the 17th day of April, A. D. 1868, by the trustee, James A. Lanier, R. D. Brunson and his wife, M. Cornelia, for an account of her estate, for settlement and relief. Two of the obligators to the guardianship bond are living—the guardian, who is now in Texas, and Julius Day, in Edgefield county. The question as to their liability is free from difficulty. The points of chief litigation arise from the death of D. F. Hollingsworth, and the disposition made of his estate. D. F. Hollingsworth died in February, A. D. 1857, leaving a will, of which he appointed his brother, John H. Hollingsworth, and nephew, John H. Walker, the executors. The testator gave to his wife, Eliza Ann, the homestead tract of land, the carriage and horses, the household and kitchen furniture, over and above one-half of his estate. This devise and these specific legacies were not appraised, and as devisee and legatee, she received the property under the will. The proof was that when the widow, Eliza Ann, received the carriage and horses they were worth $1000; the household and kitchen furniture was worth $2000; that she sold a part of the homestead to E. Mims for $800; after her intermarriage with William H. Harrington she sold to P. A. Eichelberger, on the 8th day of January, A. D. 1860, the remainder of the homestead for the sum of $6000. The amount of these sums is $9800. The executors proceeded to convert the estate of their testator into money. They sold the tract of land on waters of Horns creek to John C. Porter, for the sum of $17,450, and made a deed to him of the same, bearing date the 18th day of December, A. D. 1857; John C. Porter, in A. D. 1867, sold the land to E. J. Miller and W. H. H. Butler, and these vendees are made defendants in this suit.

The value of the estate of D. F. Hollingsworth (omitting the value received by his wife as above) was, on the 15th day of December, A. D. 1858, the sum of $63,057.14. Of this sum the widow received in money and personal property taken at appraisement one-half, namely, the sum of $31,528.57; the

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other half, *$31,528.57, was divided—one-fourth to John H. Hollingsworth, namely, the sum of $7882.14, which, as executor, he retained in his hands; the three-fourths of the one-half, namely, the sum of $23,646.43, was divided among the six children of Mrs. Eliza Ann Walker above named, giving to each the sum of $3941.07.

Oliphant P. Walker died during the war,

and after payment had been made by the executors to the legatees or their guardians, his heirs and distributees, (his mother being one of the number,) have become or are entitled to his part as above.

James B. Griffin, in A. D. 1866, made preparations to remove to Texas, and before his removal he gave a mortgage of certain lands to Z. W. Carwile, then commissioner in equity, for the plaintiff, M. C. Brunson's, use. These lands were afterwards sold, under decree of foreclosure, for the sum of $3800. The proceeds of this sale should be applied as a credit on the amount reported by the referee as due the plaintiff. The guardian and Julius Day both filed answers, insisting that the taking of the mortgage discharged them from liability.

The court could not take this view of the transaction, and is of opinion that judgment must go against these obligators for the whole amount due the plaintiff, M. C. Brunson.

The devisees and legatees under the will of D. F. Hollingsworth are liable to plaintiff for the amount that each received from the estate of D. F. Hollingsworth, testator.

Eliza Ann Harrington received, in property and cash, the sum of $41,328, and, as against her, the plaintiff should have a decree for the whole sum due her, less the credit of the foreclosure sale against John H. Hollingsworth. There should be a decree for the sum of $7883.04, with interest on this sum from the 17th day of April, A. D. 1868, the time of the commencement of this suit.

Against three of the legatees, children of Mrs. Walker, viz., John H. Walker, Caroline E. W. Freeman (now Williams) and A. Spann Walker, there should be a decree for the sum received by them respectively, namely, the sum of $3941, with interest from the 17th day of April, A. D. 1868.

It appears, from the report of the referee, that the sums to which three of the children

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of Mrs. Walker were entitled as *legatees were paid to their guardians. How much in fact was realized by those who were minors does not appear; the sums with which they should be charged may depend on facts not disclosed to the court.

It appears, from the pleadings and testimony, that Eliza A. Harrington received payment in full for the parcel of homestead sold to E. Mims. She received payment in part for the balance of homestead sold P. A. Eichelberger. Payment was arrested on the part of Eichelberger by the notice of the plaintiffs' claim. Said Eichelberger made answer, and died pending suit, leaving a widow and child, who, being parties, have adopted his answer in substance.

The referee reported the testimony of Mrs. M. Eichelberger as to a conversation or agreement which P. A. Eichelberger said he had with W. H. Harrington; from that it appears that the sum $1800 was to be paid in full of balance due on land. The statement is brief and not minute. P. A. Eichelberger when living, and since his death his heirs-at-law, have had the use and occupation of the premises. The vendee and his heirs have been undisturbed, and their title and rights of possession not disputed. It would be no more than equitable that interest should be allowed on the balance due, at least from the commencement of the suit.

It appears, however, that the estate of P. A. Eichelberger is insolvent, and that M. Eichelberger's right of dower has accrued in the premises. She is therefore entitled thereto as provided by law. Subject to this right of dower, the court is of the opinion that the unpaid purchase money should be applied to plaintiffs' debt. The plaintiffs' claim reaches what can be identified as once pertaining to the estate of D. F. Hollingsworth. His widow took as a volunteer, and her equity must yield to the plaintiffs' superior and older right.

The sale of land by the executors of D. F. Hollingsworth to John C. Porter did not exceed the power vested in them, nor was the vendee in such case bound to see to the application of purchase money.

The court finds the following facts:

1st. That James B. Griffin as guardian,

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Diomede F. Hollings*worth and Julius Day, executed to A. Simpkins, commissioner in equity, a bond for the guardianship of M. C. Hollingsworth, a minor, as set forth in the proceedings, in the penalty of $20,000.

2. That said James B. Griffin received as such guardian, during the minor's infancy and at an early period of time, large sums of money, which with interest, amounted on the 1st day of January, A. D. 1875, to the sum of $22,173.31.

3. That the sum of $3800 was realized in A. D. 186 , from the sale of mortgage premises to Z. W. Carwile, for the use of M. C. Hollingsworth.

4. That except the above there have been no payments or credits allowed on said bond.

5. That Diomede F. Hollingsworth, one of the obligators to said bond, departed this life in February, A. D. 1857, leaving in force his last will and testament, and thereby disposing of a large estate.

6. That he devised and bequeathed to his wife, Eliza A., a large property, of which the value was, on the 15th day of December, A. D. 1858, the sum of $41,328, all of which she received.

7. That the testator bequeathed to John H. Hollingsworth, one-fourth of one-half of his estate (less certain bequests and devises to his wife,) the value of which on the 15th of December, A. D. 1858, was the sum of $7882.-04, which the said John H. Hollingsworth received and retained in his hands.

8. That said testator gave and bequeathed to John H. Walker, Caroline E. W. Freeman,

A. Spann Walker, Herbert W. Walker, Oliphant P. Walker and Milton S. Walker, children of his sister, Eliza A. Walker, in like manner as above, three-fourths of one-half of his estate, which, divided among them, would give to each one the sum of $3941.07, on the 10th day of December, A. D. 1858.

9. That John H. Walker, Caroline E. W. Freeman and A. Spann Walker, each received the sum of $3941.07 on the 15th day of December, A. D. 1858.

10. That John F. Burns, guardian of Milton Walker, received the said share of his ward on the 19th day of October, A. D. 1858; and that Charles Hammond, the guardian

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of Herbert W. Walker *and Oliphant P. Walker, received the like share for each of his wards at the same time.

11. That the sums of money which were actually received by said wards of their bequests are unknown to the court.

12. That the executors of the will of D. F. Hollingsworth did sell the land on the waters of Horns creek to John C. Porter, and that he sold the same to E. J. Miller and W. H. H. Butler.

13. That Eliza A. Hollingsworth (widow) sold a parcel of the homestead to E. Mims, and that E. Mims sold the same to J. F. Kenney.

14. That she (Mrs. E. A. Harrington) sold the balance of the homestead to P. A. Eichelberger in 1860; that part of the purchase money was paid by P. A. Eichelberger, and the balance, to wit, $1800, remains unpaid, with interest.

15. That P. A. Eichelberger has died pending this suit, leaving his widow, Margaret Eichelberger.

The court finds the following conclusions of law:

1. That Margaret C. Brunson is entitled to recover against the defendants, James B. Griffin and Julius Day, the whole sum due her, namely, the sum of $22,173.31, with interest on $10,297, less the sum of $3800, which will be the sum of $18,373.31, with interest on $10,297.67 from January 1st, 1875.

2. That said plaintiff is entitled to recover against the defendant, Eliza A. Harrington, the like sum of $18,373.31, with interest on $10,297.67 from the 1st day of January, 1875.

3. That said plaintiff is entitled to recover judgment against John H. Hollingsworth for the sum of $7882.14, with interest thereon from the 17th day of April, A. D. 1868.

4. That the plaintiff is entitled to recover judgment against John H. Walker for the sum of $3941.07, with interest thereon from the 17th of April, 1868.

5. That the plaintiff is entitled to a like recovery for the sum of money and interest against Caroline E. W. Freeman (now Williams.)

6. That the plaintiff is entitled to the same recovery against A. Spann Walker.

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*7. That the plaintiff is entitled to recover against the heirs-at-law and personal representatives of P. A. Eichelberger, deceased, the sum of $1800, with interest thereon from the 17th day of April, 1868, and have payment of the same from the sale of the homestead.

8. That Margaret Eichelberger is entitled to have her dower admeasured in the homestead.

9. That the bill or complaint should be dismissed as to John C. Porter, E. J. Miller and W. H. H. Butler, the vendees of the land on Horns creek; also as to John F. Kenney, the vendee of E. Mims, purchaser from the devisee.

It is therefore ordered, adjudged and decreed, That Margaret Cornelia Brunson, the plaintiff, do recover and have judgment against James B. Griffin for the sum of $18,373.31, with interest on the sum of $10,297.67 from the 1st day of January, A. D. 1875, and have leave to enter and docket her judgment therefor; and that the plaintiff recover the same sum and like interest against Julius Day, and have leave to enter and docket judgment therefor.

It is also ordered, adjudged and decreed, That plaintiff, M. C. Brunson, do recover and have judgment against Eliza A. Harrington for the like sum of $18,373.31, with interest on the sum of $10,297.67 from the 1st day of January, 1875. That said plaintiff recover and have her judgment against John H. Hollingsworth for the sum of $7882.04, with interest on said sum from the 17th day of April, 1868. That said plaintiff do recover and have judgment against John H. Walker, Caroline E. W. Williams and A. Spann Walker, each for the sum of $3941.07, with interest on these sums respectively from the 17th of April, 1868.

Also ordered and decreed, That the plaintiff recover and have her costs and disbursements against the said James B. Griffin, Julius Day, Eliza A. Harrington, John H. Hollingsworth, John H. Walker, Caroline E. W. Williams and A. Spann Walker.

It is ordered and decreed, That the plaintiffs bill or complaint be dismissed, with costs, against John C. Porter, E. J. Miller, W. H. H. Butler and J. F. Kenney.

Also ordered and decreed, That a writ for the admeasurement of dower to the widow of

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P. A. Eichelberger, viz., Margaret *Eichelberger, be issued by the clerk of the court according to law, and her dower laid off and admeasured, if the same can be done according to law without injury or injustice to one or more of the parties having an interest in the premises; and if said dower be actually admeasured and meted out to M. Eichelberger in realty, then the sheriff of Edgefield county is hereby ordered and directed to sell, at Edgefield C. H., on sale-day in December next, or on some convenient sale-day there-

after, at public outcry, after notice of such sale, according to law, of at least twenty-one days, to the highest bidder, the remainder after the estate assigned to the dowress for life, and all the residue of the land not embraced in the admeasurement of dower. The sale shall be one-half cash and one-half credit of twelve months from day of sale, interest at seven per cent., credit portion secured by bond and mortgage of the premises sold. If dower shall not be actually admeasured, the sheriff shall proceed to sell the whole of the homestead upon the terms and in the manner above ordered, and shall, within ten days after such sale, made in either way as above, return all the papers and money (his own costs excepted) to the clerk of the court, who shall pay one-sixth of the purchase money, when received and collected, to M. Eichelberger for her dower, and the sum of $1800, with interest from the 17th day of April, A. D. 1868.

The case came before the Supreme Court upon exceptions to this decree, taken by several of the defendants, as follows:

The defendants, Julius Day and John H. Hollingsworth, except—

1. To the decision and decree of his Honor R. B. Carpenter, judge of the fifth judicial circuit, herein, and especially to that portion of the decree which says that the question of the liability of Julius Day is free from difficulty, and that judgment must go against him for the whole amount due plaintiff, M. C. Brunson.

2. To that portion of the decree which says that the devisees and legatees under the will of D. F. Hollingsworth are liable to the plaintiff for the amount that was recovered from the estate of D. F. Hollingsworth, testator.

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*3. To so much of the conclusions of law as finds Margaret C. Brunson is entitled to recover against Julius Day.

4. To the third conclusion of law, that the plaintiff is entitled to recover against John H. Hollingsworth the sum of $7882.14, with interest from the 1st day of April, A. D. 1868, or any sum whatsoever.

5. To so much of said decree as orders, adjudges and decrees that Margaret Cornelia Brunson recover and have judgment against Julius Day for $18,373.31, with interest on $10,297.67 from the 1st day of January, A. D. 1875, and have leave to enter and docket her judgment therefor.

6. To so much of said decree as orders, adjudges and decrees that said plaintiff recover and have her judgment against John H. Hollingsworth for the sum of $7818.14, with interest from the 17th day of April, A. D. 1868.

7. To so much of said decree as orders and decrees that plaintiff have her costs and disbursements against Julius Day and John H. Hollingsworth.

8. That the decree is erroneous in charging John H. Hollingsworth individually with any liability whatever, he never having been made a party or been charged or any relief sought against him individually, but only made a party, charged and relief sought against him as executor; and in this, that said decree fails to find that John H. Hollingsworth, as executor of D. F. Hollingsworth, made a final settlement on the estate of his testator and received his legacy on the 19th day of October, A. D. 1858, from which time the statute of limitation, and the lapse of time in analogy thereto, ran in his favor, thereby barring all relief as against him.

Exceptions of Eliza A. Harrington, one of the defendants, to the judgment of his Honor R. B. Carpenter, the presiding judge, pronounced herein:

1. The said defendant excepts to so much of said judgment as holds the said defendant liable to any extent for the debts or liabilities of her testator, Diomede F. Hollingsworth, because his estate was duly and legal-

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ly disposed of by final settlement *thereof, in the office of Ordinary for Edgefield county, when all the parties in interest were represented.

2. The said defendant excepts to so much of said judgment for the debts or liabilities of her said testator, because the said defendant's liabilities were barred by the statute of limitations.

3. The defendant excepts to so much of the said judgment as holds the lands of P. A. Eichelberger liable for the debts of the said testator, thereby denying the liability of the land of an alienee of a devisee for the debts of the testator.

4. That the said judgment is erroneous and incomplete, because there is no adjudication of the defendants' liability among themselves, and should be re-committed without prejudice for that purpose.

Please take notice that J. L. Addison, administrator de bonis non of the personal estate of Philip A. Eichelberger, deceased, and Margaret A. Eichelberger, widow of the said deceased, appeal from the judgment entered herein, September, 1876, on the grounds following:

1. That his Honor R. B. Carpenter erred in holding that the special devise of the tract of land to Mrs. Eliza A. Harrington, under the will of Diomede Hollingsworth, is liable to the payment of the claim of plaintiffs.

2. That he erred in not holding that all the legacies and remaining devises under said will should be exhausted before resort had to said special devise.

3. That he erred in finding as a fact in Paragraph 14 of his decree that the sum of $1800, and interest, or any other sum, by the estate of the said Philip A. Eichelberger as balance due on homestead of Mrs. Eliza A. Harrington—the testimony of Mrs. Margaret A. Eichelberger being too slight and general, as altogether inadmissible and illegal.

4. That he erred in Paragraph 7 of his conclusions of law in holding "that the plaintiffs are entitled to recover against the heirs-at-law and personal representatives of P. A. Eichelberger, deceased, the sum of $1800, with interest thereon from the 17th day of April, 1868, and have payment of the same from the sale of the homestead."

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*5. That he erred in giving priority of lien on balance due on said homestead to plaintiffs, to the injury of the rights of the creditors of the said P. A. Eichelberger.

6. That he erred in directing the clerk to pay one-sixth of the proceeds of the sale of the said homestead to Margaret A. Eichelberger for dower, instead of one-sixth of the assessed value of said homestead at the time of the death of the said Philip A. Eichelberger.

I adopt the above grounds for my client.

M. L. Bonham,
Attorney for Walter Eichelberger.

Mr. J. A. Sheppard, for J. H. Hollingsworth.

The executors having made due advertisement and then made settlement of their accounts, without knowledge of this liability, are discharged. 5 Stat. 106, § 27; Gen. Stat. 457, §§ 1, 2; Bail. Eq. 439; 2 Bail. 105; Rice Eq. 110; 5 Sm. & M. 651; 3 Yerg. 1; 3 Hill 165. And the executors being absolved from liability, the legatees are also. Bail. Eq. 439. Where there are provisos and saving clause in a statute, all persons not excepted are affected by the provisions of the statute. Hence, this statute affects minors, particularly when represented by guardian. 12 Wheat. 438; 12 Johns. 290; 15 Johns. 391. When creditors fail to present their demands, executors are justified in paying legacies. Rich. Eq. 347; Rice Eq. Cas. 130.

This bond was payable to the commissioner, who is the administrative officer of the court, and, as such, a supervisor of guardians. 11 Stat. 112. The bond is payable to him, and the sureties are liable only on the bond. This is a legal claim; and is none the less so because action thereon may be brought in the court of equity. 1 Story's Eq. 425, 432, 438, 442. The commissioner alone may sue on the bond (11 Stat. 112), and, as a creditor, is affected by act of 1789. If executor is protected by failure of the creditor to present his demand, so is the legatee. Rich. Eq. Cas. 347; 2 Hill Ch. 466–7. The executors are protected by statute of limitations, running from time they made settlement of the estate. Bail. Eq. 198; 4 Strob. Eq. 196, 203; Speers Eq. 382; 2 Hill 522;

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2 Hill Ch. 457, 496; 1 McC. Ch. *176; Bail. Eq. 437; Rice Eq. 385; 4 Rich. Eq. 101; 7 Rich. Eq. 411.

That the minor is barred, see 4 Rich. Eq. 61. That a guardian has the right to receive for his ward, results from principle decided in 2 Hill Ch. 284. See, too, 2 Hill Ch. 490; 3 Pr. Wil. 309; 12 B. & B. 75; 1 Cox 145; Lewin on Trusts 604.

The remedy against the executor, as such, is lost. See Gen. Stat. 457, and Circuit decree. The remedy on the bond, as such, has also been lost, especially against the legatees. See 10 Rich. Eq. 438. By parity of reasoning, the statute of limitations must be regarded quoad the executor and not quoad the creditor, and hence infancy of creditor is not to be considered.

A legatee, if liable at all, is only liable for his proportion of the claim, and is not to make good the insolvency of his co-legatees. 3 Rus. 130; 1 Roper on Leg. *459; 1 Desaus. 112; Dud. Eq. 173. At any rate, there should be no interest. 2 Hill Ch. *356, *457; 1 Hill Ch. 101; 3 Ves. 32; 2 Williams on Ex'rs 1309; 2 Atk. 107; 3 Atk. 244.

Mr. L. F. Youmans, attorney-general, for J. H. Hollingsworth and Julius Day.

In addition to the points and authorities of Mr. Sheppard, the attorney-general contended that the foreclosure was a bar to this action. 5 Coke 61, a; 8 Conn. 71; 5 Robinson's Prac. 36–48; Story Eq. Pl. 736–743; 2 Dan. Ch. Pr. 721–727. Executors represent creditors who present their demands. 2 Rich. Eq. 154; Rich. Eq. Cas. 347; 1 McC. Ch. 43; 2 Brev. 312. Legatees are protected by statute of limitations. Speers Eq. 375; 10 Rich. Eq. 435. Even against infants. 3 Strob. Eq. 192; 10 Rich. Eq. 518. There is no privity between surety and ward. Formerly surety could not be made party to an action for accounting. 2 McC. Ch. 209. Now he can. McM. Eq. 445 and 488; but this is for the benefit of the surety. Rich. Eq. 127. The right to follow property in hands of legatee is a mere equity, and should not be inequitably enforced. 5 Rich. Eq. 169; laches often defeats remedies in less time than statute of limitations. 7 Rich. Eq. 260; 11 Rich. Eq. 31–39. Hollingsworth being released, the other surety, Day, becomes thereby released

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also. Co. Litt. *232; 6 Ves. 146; 1 Atk. 294; 2 Salk. 574; 4 Ad. & El. 675. Whether release be by deed or operation of law. 1 Bos. & Pul. 634. Hollingsworth is sued only as executor.

Mr. H. W. Addison, for Mrs. Eichelberger.

Mr. M. L. Bonham, for Walter Eichelberger.

Mr. J. M. Baxter, for Mrs. Harrington.

Plaintiffs must first establish liability of executors and then their insolvency. 1 McC. Ch. 325; 2 McC. Ch. 416; Bail. Eq. 439. Personalty is the primary fund for the payment of debts. Bail Eq. 406. The bar of the statute as to the personalty will prevent resort to the devisees for the land. Rich. Eq. 240; 13 Rich. Eq. 99. And the land itself, having been alienated, is not liable. 6 S. C. 146.

Messrs. M. W. Gary and Samuel McGowan, for respondents.

April 19th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The facts of the case are sufficiently stated in the Circuit decree in order to understand the bearing of the exceptions to that decree. J. Day was one of the sureties for the guardian, J. B. Griffin, and J. H. Hollingsworth is the executor of the other surety, D. F. Hollingsworth. They except to so much of the decree as holds Day answerable as surety with D. F. Hollingsworth, and awards judgment for the whole amount found due from his principal to the trustee of the ward. The judgment against Day, as surviving surety, was properly allowed, unless there is force in the objection that such judgment is precluded by a former recovery in a previous suit brought by the plaintiffs to foreclose the mortgage given by the guardian as security, in part, for the amount of his indebtedness to his ward at the time he left the state. It is contended that that fact bars the present action against Day as surety on the bond. We do not see any ground for holding such foreclosure proceeding a bar to the present action. It was founded on the

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mortgage given by Griffin, and *not upon the guardian's bond or his general accountability, an entirely different cause of action. It does not appear that a general accounting by the guardian was had under it. How that judgment could be reached without an accounting by the guardian is a question that could only become important with reference to the validity of that judgment, which is not in question here. Its effect is determined by the fact that a general accounting was neither sought nor had. Day, as guardian's surety, was interested to have as much as possible realized from the Griffin mortgage, and the suit in that case was in harmony with the equities in the present suit, and, therefore, the sureties have no cause of complaint, and, certainly, no technical bar. Whether Day was a necessary or proper party to that suit cannot be questioned here. This exception should be overruled.

The next exception is to the finding of the decree that the devisees and legatees under the will of D. F. Hollingsworth are liable to the plaintiff for the amount that was received by them as such from the estate of their testator, one of the sureties on the guardian's bond. This exception is also raised by the appeal of Mrs. Harrington. J. H. Hollingsworth and Mrs. Harrington are the only persons standing in the relation of legatees who appeal from the decree as charging the plaintiff's debt against the assets of the estate of D. F. Hollingsworth in the hands of his legatees. Mrs. Harrington stands in the case in the additional character of specific devisee of realty; but the questions growing out of that fact will be considered under the objections raised by her appeal. The question that will be now examined relates to the liability of the legatees of D. F. Hollingsworth to respond to the amount of assets received by them in payment of their legacies. It is contended that the executors of D. F. Hollingsworth having settled the estate of their testator many years prior to the commencement of this suit, the statute of limitations, as applied to simple contract debts, is a bar to any suit against them by a creditor neglecting to present his demands in due time, and that this circumstance affords a reason why the plaintiffs should be held to be barred as against the legatees. It is true, that in the present case no ground appears for a decree against the executors of D. F. Hollingsworth. Had the plaintiffs sued

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them on *their legal liability as personal representatives of the testator, a plea of plene administravit could have been established by showing that they had paid out all the assets of the estate in due course of administration, by satisfying all creditors who came in and proved their debt on the usual notice, and distributing the balance. Walker v. Gill, 2 Bail. 105. In such an action, if the executor relied on the statute of limitations, he would have to show such a bar as would be appropriate to the nature of the plaintiff's demand, for the object of the bar would be to destroy the right of the plaintiffs to establish their debt as against the assets of their debtor, and not merely to shield the executor from personal liability. If, however, the executor is directly pursued for his personal wrong, as in the case of a devastavit, he can interpose a bar personal to himself, such as the lapse of the ordinary time for barring actions on simple contract debts after final accounting and distribution. But an action at law on the guardian's bond against the personal representatives is not subject to the statute bar. Mobley v. Cureton, 2 S. C. 140. Equity applies the statute of limitations to strictly legal rights brought within its jurisdiction in the same manner as the courts of law apply it. Van Rhyn v. Vincent, 1 McC. Eq. 310. The demand of the creditor of the testator against a legatee, who has received his legacy, leaving debts of the testator unpaid, without available assets for its payment, is, in equity, in the nature of an action for money had and received, and the statute of limitations is applied in the same manner as to simple contract debts. Brewster & Dickson v. Gillison, 10 Rich. Eq. 435; Buchan v. James, Speers Eq. 375. In applying the bar the court looks to the time when the cause of action accrued to the plaintiff, and counts the statute time accordingly, allowing the same effect to disabilities that prevail at law. In McMullin v. Brown, 2 Hill Eq. 457, the legatees had been

in possession of their legacies from 1816 to 1817, and the bill which was brought by the creditor of the testator against the legatees was not filed until 1829. It was held that the suit had been brought in due time, as the cause of action did not arise until judgment had been recovered against the executor, and a deficiency of assets established, so as to enable the legacies to be followed. In that case the question whether the creditor

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was *barred as against the legatee was considered independently of the question whether such a suit by the executor would have been so barred. It is doubtless true that the equity of the creditor to go against the legatee is through the executor, who primarily has the right to call in assets commensurate with the rights of creditors to have such assets applied to their debts; and it would seem a natural inference that a bar that would affect the executor would equally affect the creditor who pursues his rights through the executor. But the executor may lose his recourse to the legatee by delay to prosecute or some act of wrong committed by him, without destroying the right of the creditor to pursue the legatees. In Fripp v. Talbird, 1 Hill Eq. 142, it is said "there is no doubt about the general rules that if an executor or administrator proves insolvent, creditors may follow the assets in the hands of a legatee or distributee, and compel them to refund, even although the executor may have retained sufficient assets to pay the debt, and wasted them." In such a case, if the executor was compelled to pay, he clearly could not go against the legatees to make good the assets wasted by him. Although the creditor has no original equity against the legatee, as standing in his own right, and holds only an equity derived from that of the executor, yet, under the authorities, it is necessary to conclude that it is an independent equity, for otherwise the creditor would be barred wherever the executor is barred, which, as we have seen, is not the case. Though derivative in its origin, yet that it is direct in its character, as between the creditor and the legatee, is clearly to be implied from the view presented in Brewster & Dickson v. Gillison, 10 Rich. Eq. 435, defining it as in the nature of an action by the creditor against the legatee for money had and received to his use. Without an equitable priority between the creditor and the legatee, whether original or derived through some other equity, no foundation for the application of the principles of indebitatus assumpsit would exist. If the executor has assets, or their deficiency has been occasioned by his wrong, the creditor must go against him in the first instance, and exhaust his remedy, before he can go against the legatee, as was held in McMullin v. Brown. This shows that the creditor's right against the legatee does not depend on the co-operation

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of the executor, but that it is inde*pendent even of any misconduct that the latter may have committed. If, then, the executor has improperly lost the right to recall legacies, by delay or otherwise, the creditor is not prejudiced thereby. In the present case, the complainant was enabled to go against the legatee with the executors, because it appeared that no assets existed in the hands of the executors, and no ground appeared for charging the executor personally with the debt, as in case of devastavit. We must, therefore, look to the plaintiff's cause of action to see whether this action was commenced in due time. The plaintiff, M. C. Brunson, who was the ward of Griffin, did not arrive at majority until 1867. She married in 1866, and the trust deed under which the plaintiff, Lanier, as trustee, claims, was executed in the last-named year. The action, the primary object of which was an accounting by or in behalf of the guardian, was brought in 1868, within four years after the execution of the trust deed and the appointment of a trustee, and within one year after the plaintiff, M. C. Brunson, attained majority. It is therefore clear that the action was commenced in due time after the statute commenced running on the removal of the disability of minority as it regards the ward and as it regards the title of the trustee within four years next after the cause of action accrued. The plaintiffs have established a bond debt against the personal representative of D. F. Hollingsworth, and have shown that there are no assets in the hands of such personal representative for the satisfaction of such debt, and no remedy available against the personal representative; also, that the legatees have received their legacies, thus entitling them to a decree calling upon the legatees to refund their legacies. Newman v. Bartin, 2 Vern, 205; Miller v. Mitchell, Bail, Eq. 437; Fripp v. Talbird, 1 Hill Eq. 142.

It is contended that the bill makes J. H. Hollingsworth a party defendant only as executor of D. F. Hollingsworth, and, therefore, so much of the decree as charges the said J. H. Hollingsworth as legatee is erroneous. The bill charges the fact that J. H. Hollingsworth was a legatee as well as executor, and prays an account on the part of the legatees of the estate of D. F. Hollingsworth. The defendant, J H. Hollingsworth, in his answer, admits the fact of distribution accord-

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ing to the terms of the will, *and the decree is in accordance with these admissions. The objection is of a purely technical character, and does not appear to have been urged in objection to the proofs establishing the liability of J. H. Hollingsworth. It is, therefore, too late for advantage to be taken of such objection, if it ever had any force. Independent of the provisions of the code of

procedure, objections that may be cured by amendment should be taken before decree. But the provisions of the code are applicable to the decree which was pronounced in 1876 (Section 465), and the decree cannot be reversed for any such technical defect. Section 197. It is not material to inquire whether any such alleged defect existed in the bill as originally filed, or in the amendment; J. H. Hollingsworth is in the same situation as the other legatees as it regards the bar of the statute of limitations. As executor he is not brought into liability by the decrees.

The appeal of Mrs. Harrington, will be next considered. The first and second exceptions taken by her have been disposed of so far as they relate to her rights as a legatee receiving her legacy, leaving unpaid debts of testator outstanding. Mrs. Harrington was, in addition to being a legatee, a specific devisee of certain lands of the testator. As it regards the realty specifically devised, the statute of limitations is inapplicable. The action against the devisee by the creditor of the testator is under the statute of 3 and 4 W. and M., and is upon the bonds of the ancestor, with which the devisee has privity by reason of assets devised. Mobley v. Cureton, 2 S. C. 140. The plaintiff might have sued Mrs. Harrington at law as devisee without joining the executor, and could have recovered to the extent of assets devised and actually received by her. Vernon v. Valk, 2 Hill Eq. 257. In equity the executor or administrator is a necessary party when assets can be reached that should be applied to the relief of the devisee, and the reason assigned is "that full justice may be done without resort to a second suit." Vernon v. Valk. In Alexander v. Williams, 2 Hill 522, it is held that in the case of a creditor seeking to subject legacies after assent by the executors, the remedy is in equity as against all the legatees for contribution. It is clear, therefore, that the decree is erroneous in not having adjusted the recovery so as to

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reach, in the first instance, assets *primarily applicable to the payment of the plaintiff's demand. Legacies are liable to respond before lands specifically devised can be applied. Duncan v. Tobin, Dud. Eq. 161. The decree, however, establishes an absolute liability against Mrs. Harrington to the extent of assets devised by her both as legatee and as devisee. This was clearly erroneous, as it permits the plaintiffs to go at once against her to the full extent of her possible ultimate liability without exhausting the remedy against legatees.

For the foregoing reasons the fourth exception of Mrs. Harrington, to the effect that this decree is erroneous and incomplete because there is no adjudication of the defendants' liability among themselves, is well taken. The decree does not pursue the legacies in the lands of all the legatees within the reach of the court in accordance with the bill, and in this respect fails to give the full measure of justice due as between the defendants. It appears by the decree that the guardians of three infant legatees received the shares of their wards, and that the sums that were actually received by said wards of their bequests are unknown to the court; no decree is made for contribution on account of such infants' legacies, although Milton and Herbert Walker, two of such infant legatees, are made parties to the bill, the remaining infant, Oliphant, appearing to have died before the suit was commenced. It is necessary, if not already done, that there should be a representation of the estates of these infants, and such proceedings had as to bring such estates into contribution pro rata with the other legatees.

It appears that part of the premises specifically devised were alienated by Mrs. Harrington to P. A. Eichelberger, and that the sum of $1800 and interest remained due on account of the purchase money in such alienation. The decree holds the personal representatives of Eichelberger, who is deceased, liable for the sum of $1800 and interest, and orders the sale of the lands specifically devised and thus alienated for its payment, making provision for the allowance to the widow of Eichelberger of dower out of said lands. The bona fides of the alienation is not impeached. Such alienation reduced the demand of the creditor of the testator to a money demand against the devisee for the value of the devised assets.

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No legal or equitable right to follow *the lands exists under the statute. The question then arises whether the claim for the purchase money due from the estate of Eichelberger can be regarded as assets of the estate of D. F. Hollingsworth, so as to be reached in the hands of Mrs. Harrington and enforced against the personal representatives of Eichelberger.

D'Urphey v. Nelson, 4 McC. 129, note. In this case it was held that, under the 5th Statute of George II., Chapter VII., "lands of the debtor are made liable for all his debts, and are made assets for satisfying the same in like manner as such estates are liable in England," and that "they are liable though devised by the debtor," and when alienated by the devisee or heir, he is answerable for their value. It is also held that "the lands of the debtor are made liable for all his debts, and are made assets for satisfying the same, in like manner as such estates are liable in England by specialty," and that "they are liable though devised by the debtor," and when alienated by the devisee or heir he is answerable for their value. It is also held that "the lands of the debtor are made subject to like remedies for seizing and disposing thereof for his debts, in like manner as personal estates in the plantations are seized and dis-

posed of for satisfaction of debts, that is to say they are made liable to be taken by a writ of fi. fa. in all cases when chattels are so liable and sold, &c., or to whatever other remedies chattels are liable to in the respective colonies of America. Being made liable in like manner as personal estates, the act cannot be construed to make any distinction between lands and personal chattels, but they must be construed as equally liable for satisfaction of debts and to be assets for that purpose in the hands of the personal representative of the debtor." The question in that case was whether such lands could be seized and sold under execution against the personal representatives of the debtor as against the heir entitled to them by descent, and it was held that they could be so seized and sold. Much discussion has arisen as to the limits of the doctrine of this case, but it has been conceded that the case must stand as a sound exposition of 5th George II., and, also, that it does not apply to the lands descended or devised where they have been bona fide alienated before suit brought by the heir or

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*devisee. The features of that case that are still open for discussion have no bearing on the present question. Martin v. Latta, 4 McC. 28; Vernon v. Valk, 2 Hill Eq. 257; Jones v. Wightman, 2 Hill 579; Bird v. Houze, Speers Eq. 250; Gilliland & Howell v. Caldwell, 1 S. C. 194. It is clear that the doctrine of that case includes the proposition that such assets may be followed in equity in like cases in which personal assets could be followed, and subject to the same rules as it regards the remedy for such assets when they have become converted into some form different from that they originally possessed, but can be traced in such new form. It must be contended that while the lands were in the hands of the devisee they were to be regarded as assets capable of being reached as such, in equity by the personal representatives or by creditors of the testator. There can be no doubt but that when the lands are alienated by the heir or devisee, the proceeds of their sales can be pursued in the hands of the heir or devisee as assets. It would follow from familiar principles that a chose in action or an obligation held by the heir or devisee for the recovery of the purchase money of the lands devised and alienated, might, at the election of the creditor or personal representative of the testator, as the case might be, be held to represent the assets of the testator's estate, and be specifically pursued as such. That is the present case, for the plaintiffs seek to reach, specifically, the right of action possessed by Mrs. Harrington for the unpaid purchase money. It is true, as already held, that such claim for the purchase money of the lands specifically devised takes the place of the lands themselves, and, as such, cannot be reached until the remedy against the legatees is exhausted. The plaintiffs, therefore, cannot have an absolute decree as against the devisee, Mrs. Harrington, as to the demand for such purchase money remaining unpaid, but a contingent right for that purpose depending on the insufficiency of the funds derived from the legacies. In this respect the decree is erroneous, and must be modified accordingly. But in the event that it is necessary to go against the lands specifically devised, a decree against Mrs. Harrington, as it regards the unpaid balance of purchase money, would be ineffectual to obtain full relief, and would necessitate subsequent proceedings against the estate of Eichelberger. As an asset of the estate, the

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claim for the unpaid balance purchase *money can be enforced in this suit as against the personal representative of Eichelberger by a proper accounting, should that course become necessary for the satisfaction of the plaintiff's debt, the representatives of Eichelberger being a party. That enforcement must be dependent on the insufficiency of the assets primarily liable for such purpose, and the decree must be modified accordingly.

The remaining question is as to the right of the plaintiffs to have the devised lands in the hands of the persons claiming under Eichelberger sold for payment of the amount of purchase money due. It does not appear that Mrs. Harrington holds any special lien on the land sold to Eichelberger by way of mortgage or otherwise that is capable of being enforced in her right. If the lands are general assets for the payment of Eichelberger's debts, they must be applied in a course of administration according to all legal priorities. If such a remedy can be had in this case, it can only be obtained through an accounting of Eichelberger's personal representatives and due proceedings thereunder, to which the creditors of Eichelberger should be made parties, and for this purpose application may be made to the Circuit Court in the event that it should become necessary for the plaintiffs to resort to the specific devises. As no appeal has been taken from the order assigning dower it must stand as between the present parties.

The appeal of Mrs. Eichelberger must be denied as it regards the mode of assigning dower. It appears that the land has been sold by consent under an order of the court, and it must be assumed that the intent of such consent was that the amount for which it should be sold should be the test of the extent of dower. All other questions growing out of the actual sale of the land must be reserved for further consideration by the Circuit Court, on the due ascertainment of the rights of the various parties in respect thereof.

The decree must be modified in accordance with the foregoing conclusions, and set aside where inconsistent herewith, and the cause

remanded to the Circuit Court for further proceedings in conformity herewith.

Decree modified.

McIVER, and HASKELL, A. J.'s, concurred.

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*(Case No. 723.)

JOHN G. STEELE v. THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

(November Term, 1878.)

[*Appeal and Error* ⟸1004, 1005.]

Where a motion for new trial, upon the grounds that the verdict is contrary to the legal preponderance of the testimony and that the damages are excessive, is refused by the Circuit judge, his decision is final and cannot be reviewed by this court.

[Ed. Note.—Cited in Bowen v. Atlantic & F. B. V. R. Co., 17 S. C. 581; Wood v. Atlanta & Charlotte Air Line Ry. Co., 19 S. C. 580, 582; Altee v. South Carolina Ry. Co., 21 S. C. 558; Hyrne v. Erwin, 23 S. C. 231, 55 Am. Rep. 15; Petrie v. Columbia & G. R. R. Co., 29 S. C. 324, 7 S. E. 515; Dobson v. Cothran, 34 S. C. 533, 13 S. E. 679; Jones & Williams v. Fitzpatrick, 47 S. C. 58, 24 S. E. 1030; Gillman v. Florida Central & P. R. Co., 53 S. C. 215, 31 S. E. 224.

For other cases, see Appeal and Error, Cent. Dig. §§ 3872, 3944; Dec. Dig. ⟸1004, 1005.]

Before Aldrich, J., at York, September, 1878.

Plaintiff was a passenger upon defendant's train in November, 1877. While the train was crossing the south fork of Fishing creek, the trestle gave way, and the coach in which plaintiff sat was precipitated into the stream below. Plaintiff jumped through one of the windows, and his leg was broken, and he was otherwise bruised and injured. He brought this action against the defendant for these injuries laying his damages at $15,000. There was much testimony on both sides, but it is not material to the question decided by this court. The jury found a verdict in favor of plaintiff for $10,000. Defendants moved upon the minutes for a new trial:

1. Because the verdict was contrary to the legal preponderance of the testimony.

2. Because the damages are excessive.

The motion was refused, and an exception noted; and from such refusal an appeal was taken to this court.

[For subsequent opinion, see Steele v. C., C. & A. R. Co., 14 S. C. 324.]

Mr. J. H. Rion, for appellant.

We are met on the threshold of this appeal by the decision of this court, published since the trial of this case, in Brickman v. South Carolina R. R. Co., 8 S. C. 173. Unless the court will reverse that ruling, this appeal is nugatory.

I maintain that the Supreme Court has power in a case like this. Compare Article IV., Section 4, of the constitution, with Section 11, Subdivision 2, of the code. No pro-

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vision of the code *excepts from the jurisdiction of this court, a case like this. On the contrary, there is Section 288, Subdivision 4. This court has the power, and therefore the duty of exercising it co-exists.

But can this court refuse to interfere with "the discretion" of the Circuit judge? If so, then it is a Court of Appeals not contemplated by the constitution or laws.

The error, which I respectfully submit was made in the decision of Brickman v. South Carolina R. R. Co., arose from not bearing in mind that the code of South Carolina vests in the Supreme Court all the powers vested by the New York code in the "Court of Appeals" and "the General Term of the Supreme Court." In New York an order "involving any question of discretion" can not be reviewed in the appeal court. Section 11, Subdivision 4, N. Y. Code. In South Carolina there is no such restriction on this court. If, then, our appeal could be heard at a "General Term of the Supreme Court" of New York, this court has the power to hear this appeal.

Could our appeal be heard at a general term of the Supreme Court in New York? I will cite simply one case, as it is a late one, and illustrates the working of the restriction above mentioned upon the appeal court of New York, which is not copied in our code. It is Peck v. N. Y. Central and Hudson River R. R. Co., as it is successively reported in 4 Hun 236, 8 Hun 286, and 70 N. Y. 592. The position of the New York appeal court is justified by the words of the statute denying the power; while in South Carolina our statute expressly gives the Supreme Court the power; our Supreme Court having all the appellate powers of both the New York appellate courts. (Remainder of argument is upon the merits of the case.)

Mr. W. B. Wilson, for respondent.

Cited, 1 S. C. 3; 1 S. C. 115; 2 S. C. 235; 3 S. C. 254; 5 S. C. 473; 2 S. C. 338; 3 S. C. 72; 3 S. C. 580; 8 S. C. 199.

April 23d, 1879. The opinion of the court was delivered by

HASKELL, A. J. The appeal is from the refusal by the Circuit judge to set aside a verdict and grant a new trial. The motion was upon the following grounds:

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*1. Because the verdict was contrary to the legal preponderance of the testimony.

2. Because the damages are excessive.

The Circuit judge states no reasons for the refusal. The presumption is, however, unavoidable, that he refused the motion because, in his opinion, the verdict was not contrary to the legal preponderance of the

evidence, and the damages not excessive. On each of the points his conclusion is final and cannot be reviewed by this court. Const., Art. IV., § 4; Brickman v. South Carolina R. R. Co., 8 S. C. 173; Earle & Co. v. Hutchinson, MS., filed January 28th, 1879.

The court renders this opinion with reluctance and from necessity, in view of the limit of its jurisdiction. It appears to the court that to apply the measure of damages adopted in this case to the numerous cases that are liable to occur, will lead to injustice and tend to impair the usefulness of an important industry intimately affecting the public convenience. But, as already decided, the relief in such cases can only be had in the Circuit Court.

The appeal must be dismissed.

Appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

APPENDIX

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*At the request of several members of the bar, the following case is published. It was heard and decided by the Court of Appeals, at May Term, 1867.

JOSEPH J. NORTON v. SAMUEL REID and JOHN B. SITTON.

(May Term, 1867.)

[1. *Principal and Surety* ⟸179.]

A court of equity, upon the application of a surety who apprehends injury from further delay, may compel the principal debtor to discharge his debt past due, although the surety has not been sued, and has not paid the debt.

[Ed. Note.—Cited in Hellams v. Abercrombie, 15 S. C. 110, 115, 40 Am. Rep. 684; Watson v. Barr, 37 S. C. 467, 16 S. E. 188; Allen v. Cooley, 53 S. C. 443, 31 S. E. 634.

For other cases, see Principal and Surety Cent. Dig. § 512; Dec. Dig. ⟸179.]

[2. *Principal and Surety* ⟸190.]

[Cited in Hellams v. Abercrombie, 15 S. C. 116, 40 Am. Rep. 684, to the point that a court of equity will afford the only relief in an action by the surety against debtor, before the former has paid the debt.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 549, 568–577; Dec. Dig. ⟸190.]

[3. *Principal and Surety* ⟸190.]

[Cited in Allen v. Cooley, 53 S. C. 444, 31 S. E. 634, to the point that in such proceeding it is unnecessary to allege insolvency of defendants.]

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. ⟸549, 568–577; Dec. Dig. ⟸190.]

Before Johnson, C., at Pickens, July, 1866.

This was a bill quia timet, filed in the court of equity for Pickens district, in the year 1866. The bill was taken pro confesso against the defendant, Sitton. The other matters of pleading and evidence are sufficiently stated in the Circuit decree, which is as follows:

On the 17th day of July, 1863, Samuel Reid, as principal, and Joseph J. Norton, as surety, executed their joint and several single-bill for $3073.05, payable on demand to John B. Sitton or bearer, "with interest compounded from the 27th day of July, 1863," and delivered the same to the said Sitton.

On the 21st day of May, 1866, the complainant filed his bill against the principal to the said single-bill and the payee of the same, alleging that, when it was executed, the defendant, Samuel Reid, was in affluent circumstances, but that he now fears that so much of his fortune was swept away by the disastrous termination of the late war that he will not be able to pay his debts; and that he has paid no part of the single-bill on which he is surety, although he has often requested him to pay the same, and thereby discharge him from all liability on the same.

The prayer of the bill is, "that the said

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Samuel Reid may be *required to perform, specifically, his contract, and be decreed to pay to the said John B. Sitton the said sum of money in the said single-bill specified, according to the tenor and effect thereof," with a prayer for general relief.

Samuel Reid, in his answer, pleads to the jurisdiction of the court, on the ground that the complainant has a plain and adequate remedy at law; and further answering, admits that his losses have been very heavy, but insists that, if he is not unnecessarily annoyed by over-anxious creditors, he will be able to pay all debts in a short time. From the evidence there is no great danger of the complainant's having to pay any portion of the single-bill, but his fears on that subject cannot be regarded as groundless.

The practice in this state, in similar cases, has been for the surety to pay the debt to the payee, and then proceed against the principal in the law courts, and there is no reason assigned in the pleadings for not pursuing that course. But Chancellor Harper, in delivering the opinion of the court in the case of Pride v. Boyce, Rice Eq. 275 [33 Am. Dec. 78], recognizes the doctrine that it is not necessary for the surety first to pay off the debt to entitle him to a remedy against his principal; and, further, "that a surety may, in equity, compel the creditor to sue, proffering an indemnity against costs and expenses." In the case of Hayes v. Ward et al., 4 Johns. Ch. 562, Chancellor Kent remarks: "It is now considered a settled rule that a surety may resort to chancery if he apprehends danger from the creditor's delay, and compel the creditor to sue the principal debtor, though, probably, he must indemnify the creditor against the consequences of risk, delay and expense."

It is stated in many of the elementary books, in the most general language, that a surety has the right to come into the court of equity for the purpose of compelling the creditor to sue the principal; but, upon an examination of the cases referred to as authority on the subject, it is found that the point was not properly involved in their decision. 2 Amer. Lead. Cas. 1301. Had the bill, however, been filed for the purpose of forcing the defendant, John B.

Sitton, to proceed at law against the principal, from the numerous dicta of the most

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eminent judges, I would *not have felt myself at liberty to refuse the relief, but I can find no authority whatever in our laws that would justify me in making the decree prayed for in the bill, though there are authorities supporting the practice. Story's Eq. 850; Brown's Eq. 581, and note 5. There are similar cases in which there are equities that can be properly protected only in this court, but it would be productive of much litigation for the court to give decrees for the payment of money where there are no other or stronger equities than there are in this case. It is ordered and decreed that the bill be dismissed, with costs.

Wm. D. Johnson.

November 19th, 1866.

From this decree the complainants appealed on the following grounds, to wit:

1. Because the surety is not bound first to pay off the debt to entitle himself to a remedy against his principal. Tankersley v. Anderson, 4 Desaus. 44; Taylor v. Heriot, 4 Desaus. 227; Ramsay v. Gervais, 2 Bay 145 [1 Am. Dec. 635].

2. Because the surety, although he has not been sued by his creditor, may apply to a court of equity and compel the principal to relieve him of his liability by paying off the debt. Story's Eq., § 327; Mitf. Ch. Pl. 148; Pride v. Boyce, Rice Eq. 275.

3. Because, it is respectfully submitted, the decree of the presiding Chancellor is contrary to the law, the equity and the evidence in the case. Story's Eq., §§ 730, 849; Ranelaugh v. Hayes, 1 Vern. 189.

Mr. James H. Whitner, for appellant.

Messrs. McGowan & Adams, contra.

May, 1867. The opinion of the court was delivered by

DUNKIN, C. J. In Antrobus v. Davidson, 3 Mer. 577, Sir Samuel Romilly remarks: "It is nothing to say that such a bill as the present may have been seldom filed, or that no instance can be produced of such a decree as is prayed by it, if it can be shown by analogy to decided cases, that it is according to

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princi*ples upon which the court usually acts, and which are completely established."

Grave doubts were for a long time entertained as to the right of the surety to require the creditor to prosecute his demand against the principal debtor. The difficulties are considered by Lord Eldon, in Wright v. Simpson, 6 Ves. 714. It is an interference with the legal rights of the creditor and may disturb his arrangements. He may have looked more to the surety than to the principal debtor. "He may have had so good an opinion, (says he) of Sir James Wright's personal responsibility, that he would take a personal contract," &c., (p. 732,) and again, "But the surety is a guarantor; and it is his business to see whether the principal pays, and not that of the creditor," (p. 734.) But he admits that, in the late cases, and on the weight of authority, "provided there was no risk, delay or expense, the surety has a right to call upon the creditor to do the most he can for his benefit." Chancellor Kent, in Ward v. Hayes, 4 Johns. Ch. 132, traces this right of the surety to the civil law. By the Justinian code, "sureties were allowed to require that before they were sued, the principal debtors should, at their expense, be prosecuted to judgment and execution." But he says he cannot find any sufficient authority in the equity jurisprudence of England to lay down any such general rule, although special circumstances would justify the application of it. Mr. Justice Story (2 Eq. Jur., § 849,) comments on these cases without adopting any positive conclusion. In Wright v. Simpson, he says Lord Eldon admitted the right under some circumstances. "But, then, in such case the surety is compellable to deposit the money in court for the payment of the creditor." So that, in fact, it is but an indirect subrogation to the right of the creditor upon a virtual payment of the debt by such deposit.

It is now well settled, that upon payment of the debt by the surety, he may have his action against the principal without the aid of this court. [Fraser v. Goode] 3 Rich. 199: [Stinson v. Brennan] Cheves 15. Such aid is only necessary when he seeks to be subrogated to the rights of the creditor whose debt he has satisfied—to stand in his place, or avail himself of his securities.

But the surety, as is said in Hayes v.

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Ward, guarantees the *performance of the contract by his principal—"it is his business to see whether the principal pays." From a very early day the right of the surety to invoke the aid of this court has been sanctioned, without challenge, by the masters in the law. In 1683 Lord Keeper North speaks thus familiarly of the principle and the reason of it: "He compared the case before him to the case of a counter-bond, where, although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this court will decree the principal to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him." Runelaugh v. Hayes, 1 Vern. 189. So, in Nesbil v. Smith, 2 H. Bl. 579, the principal debtor and the surety had joined in the same bond, but the evidence showed that the plaintiff was merely surety for the principal debtor (Maynard.) "What is the equity," said Lord Thurlow, "in respect of the surety in the bond? That a surety, generally speaking, may come into this court, and apply for the purpose of compel-

ling the principal debtor, for whom he is surety, to pay in the money and deliver him from the obligation. But this case differs from the common case, which forces the surety into this court to be so relieved," &c.

In Lee v. Rook, Moseley 318, Sir Joseph Jekyll, Master of the Rolls, is reported to say: "If I borrow money on a mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him."

The cause of action in the principal case is a sealed instrument for the payment of a sum certain on demand, and the character of the plaintiff as surety appears on the face of the instrument. In Antrobus v. Smith, 3 Mer. 569, Sir William Grant, Master of the Rolls, says: "It is true that a surety may come to compel the principal to relieve him of his liability by paying off the debt." But he declined to apply the rule to the case before him, (which was that of a bond of indemnity,) "because there was no evidence that any sum of money in particular was, at that time, actually due by the principals." In Pride v. Boyce, Rice Eq. 386 [33 Am. Dec. 78], Chancellor Harper, speaking for the Court of Appeals, says: "It is sufficiently

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settled that to entitle himself to a *remedy against his principal, the surety is not bound first to pay off the debt." He refers to the foregoing opinion of Sir William Grant as stating accurately the principle, to wit, that the surety may compel the principal to relieve him by paying off the debt. "The complainant," proceeds Chancellor Harper, "comes for this purpose in the present case, and his right to do so is not questioned." Looking to these authorities, the principle is thus announced by Mr. Justice Story, Section 849: "Another case of the application of the remedial justice of courts of equity by a bill quia timet, is in cases of sureties of debtors and others. If a surety, after the debt has become due, has any apprehension of loss or injury from the delay of the creditor to enforce the debt against the principal debtor, he may file a bill of this sort to compel the debtor to discharge the debt or other obligation for which the surety is responsible."

It is not enough to say that, in case of danger, the creditor would be sufficiently vigilant for his own sake. He may rest satisfied with the security, or he may have interests antagonistic to those of the surety, and may not be unwilling to indulge the principal creditor, if those interests can be subserved. But, whatever may be the reasons, the principle, as declared by the court in Pride v. Boyce, is "sufficiently settled."

This court is therefore of opinion that there was error in the decree of the Circuit Court dismissing the plaintiff's bill, and the same is reversed, and the cause remanded to the Circuit Court.

Decree reversed.

WARDLAW and INGLIS, A. J.'s, concurred.

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[End of Volume 11 S. Car.]

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XII

FROM NOVEMBER, 1878, TO NOVEMBER, 1879, INCLUSIVE

BY ROBERT W. SHAND

STATE REPORTER

JERSEY CITY, N. J.
FREDERICK D. LINN & CO., LAW PUBLISHERS AND BOOKSELLERS
1880

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1916

Entered according to act of Congress, in the year 1880, by
FREDERICK D. LINN & CO.,
In the Office of the Librarian of Congress, at Washington.

(12 S.CAR.)

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. A. J. WILLARD.

ASSOCIATE JUSTICES.

HON. HENRY McIVER. HON. A. C. HASKELL.†

CIRCUIT JUDGES.

FIRST CIRCUIT,	HON.	B. C. PRESSLEY.
SECOND "	"	A. P. ALDRICH.
THIRD "	"	T. B. FRASER. ††
FOURTH "	"	J. H. HUDSON.
FIFTH "	"	J. B. KERSHAW.
SIXTH "	"	T. J. MACKEY.
SEVENTH "	"	W. H. WALLACE.
EIGHTH "	"	THOMAS THOMSON.

ATTORNEY-GENERAL.

HON. LEROY F. YOUMANS.

SOLICITORS.

1*st Circuit*—W. ST. J. JERVEY.	5*th Circuit*—JOHN R. ABNEY.
2*d Circuit*—F. H. GANTT.	6*th Circuit*—T. C. GASTON.
3*d Circuit*—M. J. HIRSCH.	7*th Circuit*—B. W. BALL.
4*th Circuit*—W. W. SELLERS.	8*th Circuit*—J. S. COTHRAN.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

† Resigned December 5th, 1879.
†† Elected December 3d, 1878, as successor to Hon. A. J. Shaw, deceased.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. A. J. WILLARD, CHIEF JUSTICE.
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. A. C. HASKELL, ASSOCIATE JUSTICE.

*(Case No. 724.)

JANE CHILDERS v. VERNER & STRIBLING and ELIZA A. EARLE.

(November Term, 1878.)

[1. *Pleading* ⊂⊃34.]

The rule that pleading must be construed strongly against the pleader, is inconsistent with Section 182 of the code of procedure.

[Ed. Note.—Cited in Zimmerman v. McMakin, 22 S. C. 375, 53 Am. Rep. 720; Park v. Brooks, 38 S. C. 304, 17 S. E. 22; Parks v. Laurens Cotton Mills, 70 S. C. 277, 49 S. E. 871.

For other cases, see Pleading, Cent. Dig. § 66; Dec. Dig. ⊂⊃34.]

[2. *Landlord and Tenant* ⊂⊃133.]

Complaint alleged that plaintiff was a laborer on land leased by M. from E., and also admitted possession and ownership to be in E., and alleged further, in a separate paragraph, that defendants improperly and illegally entered the premises rented to plaintiff by M., and gathered and hauled therefrom certain specified quantities of the crop. *Held*, on demurrer, to state facts sufficient to constitute a cause of action. McIver, A. J., dissenting.

[Ed. Note.—Cited in Graveley v. Graveley, 20 S. C. 105; Flenniken v. Buchanan, 21 S. C. 434; Ross v. Charleston, McClellanville & Santee Transp. Co., 42 S. C. 453, 20 S. E. 285.

For other cases, see Landlord and Tenant, Cent. Dig. § 465; Dec. Dig. ⊂⊃133.]

[3. *Pleading* ⊂⊃52.]

[Cited in Hammond v. Port Royal & A. Ry. Co., 15 S. C. 28; Latimer v. Sullivan, 30 S. C. 114, 8 S. E. 639; Iseman v. McMillan, 36 S. C. 36, 15 S. E. 336, to the point that, while plaintiff may combine in one complaint several causes of action, they must be stated separately.]

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 113; Dec. Dig. ⊂⊃52.]

[4. *Pleading* ⊂⊃367.]

[Cited in Ex parte Williams, 18 S. C. 313; Burr v. Brantley, 40 S. C. 543, 19 S. E. 199; Boist v. Melchers, 44 S. C. 64, 21 S. E. 449; Jerkowski v. Marco & Lewenthal, 56 S. C. 246, 34 S. E. 386, to the point that, where facts are pleaded in an insufficient or informal manner, the remedy is by motion to make the faulty pleading more definite and certain.]

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173–1193; Dec. Dig. ⊂⊃367.]

[This case is also cited in Scott v. Seaboard Air Line Ry., 67 S. C. 146, 45 S. E. 129, without specific application.]

Before Mackey, J., at Oconee, March, 1878.

The complaint is as follows:

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*The plaintiff, complaining against the defendants, John D. Verner and William J. Stribling, doing business as merchants in the towns of Walhalla and Westminster, in the state and county aforesaid, under the name, firm, and style of Verner & Stribling, and Eliza A. Earle, shows to the court as follows:

1. That on or about the day of , 1876, one John C. McFall and James W. Earle, agent of Eliza A. Earle, entered into a written contract of lease or rent, by which McFall obliged himself to cultivate a portion of Mrs. Earle's farm, situate in the county and state aforesaid, and lying on Changer creek, waters of Tugaloo river; and thereupon entered upon the execution of his said contract.

2. That on the 10th day of February, 1876, the said John C. McFall entered into a written contract with plaintiff and her family to work the land leased or rented from Mr. Earle, in words and figures following, to wit:

"An agreement between John C. McFall, on the one part, and Jane Childers on the other: I, John C. McFall, agree to give the said Jane Childers one-third of every part of the crop they may raise, after the rent is paid.

The said McFall agrees to be at all expense for mule, tools, &c. Also, if necessary, to advance some for the said Jane Childers. Jane agrees to do the said McFall's cooking and washing extra of wages. The said Jane Childers agrees to pay for one-third of fertilizers used in making the crop. Witness our hands and seals, this February 10th, 1876.

"John C. McFall, [L. S.]

her

"Jane X Childers, [L. S.]

mark

"Witness: J. W. Earle."

3. That on the day of June, 1876, McFall abandoned the place he had leased or rented, and thereby imposed the burden of working the crop on plaintiff and her family.

4. That on the day of , 1876, James W. Earle, as agent of Eliza A. Earle, after the abandonment of the crop by McFall, agreed verbally to and with plaintiff to give her, in addition to her contract with McFall,

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a sufficiency of the crop to *make her share of the same one-half of the whole amount grown on the said premises. And plaintiff alleges that as a laborer she has a prior lien on the entire crop made on the land rented by McFall to secure her one-half thereof, as provided by the "Revised Statutes of the State of South Carolina," page 491.

5. That on the day of , 1876, defendants, Verner & Stribling, secured from McFall a lien for supplies to make his crop, and advanced to him more or less thereon—the amount and particulars of which are unknown to plaintiff.

6. That on the 10th day of October, A. D. 1876, defendants, Verner & Stribling, improperly and illegally entered the premises rented to her by McFall, gathered and hauled therefrom about one hundred bushels of corn, worth $75, and two thousand pounds of seed cotton, worth $60, making altogether $125; and to her damage beside the sum of $300.

Wherefore, plaintiff demands judgment against Verner & Stribling for the sum of $125, with interest from the 10th day of October, A. D. 1876, the value of the crop illegally taken away by them; and $300 damages sustained by her in the improper and illegal removal of the crop as aforesaid, and for the costs of this action.

The defendants, Verner & Stribling, demurred, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The defendant, Earle, answered. The demurrer was sustained, and plaintiffs appealed to this court.

Messrs. McGowan & Thompson, for appellant.

Facts stated are sufficient. 8 S. C. 103; 7 S. C. 290. Having no warrant from the clerk, Verner & Stribling were mere trespassers. Gen. Stat. 539. But even with warrant, they could not seize crop of sub-tenant upon which their supplies were not expended. And if they could take crop of McFall's sub-tenant, they could not take crop of one who had no connection with McFall, but held original lease from the land-owner. It is of no concern to defendants, mere outsiders, whether plaintiff's contract was verbal, or in writing. 6 S. C. 297; 8 S. C. 68. Plaintiff, under any view, had lien for one-third of the crop.

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*Messrs. J. J. Norton and J. S. Verner, for respondents.

1. Having no privity of contract with plaintiff, these defendants could not be, and are not, sued in assumpsit, but are sued in tort, as we suppose trespass on real estate, the severing, taking and carrying away of the crop, showing merely the amount of actual damage sustained, the ungathered crop being part of the freehold. If so, then being merely a laborer, hired to work on the premises, she cannot maintain this action. She does not even allege possession. Chit. Pl. *170, 175.

2. Nor can she maintain trespass against us in reference to the crop, if personalty. Its ownership was in defendant, Earle. 2 Bail. 581; 1 Hill 364. Plaintiff does not even allege, and the law will not imply, that she was in possession as bailee. Stephens N. P. 2637.

3. Plaintiff has no lien. She has abandoned the McFall contract. The contract with defendant, Earle, was not in writing. 8 S. C. 63.

4. If she has a lien, her remedy is not personal against the persons who may at some time have been in possession of the crop, but on the crop itself. Bail. 237; Rev. Stat. 491.

5. Plaintiff does not allege that defendant, Earle, has not paid her, and as she asks no judgment against that defendant, it is fair to presume that she has been paid, and this view is further strengthened by the answer of Earle, alleging that plaintiff is indebted to her.

April 23d, 1879. The opinion of the court was delivered by

HASKELL, A. J. The defendants, Verner & Stribling, demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the Circuit Judge, and from that order the appeal is taken. The complaint is defective, but the question is whether the defect is substantial. The objection that the complaint does not state facts sufficient to constitute a cause of action like that to the jurisdiction of the court, may be taken at any time. Code, § 171; Rev. Stat. 605. The defect, therefore, must be of a kind that cannot be cured except by allegations in the answer, which, together with the complaint,

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may serve to make up a cause of *action. It is argued that the rule is that pleadings must be construed strongly against the pleader. Such a rule is expressly forbidden by

Section 182 of the code, (Rev. Stat. 608,) which directs that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties."

The generally adopted rule is thus stated: "The true doctrine to be gathered from all the cases is that if the substantial facts which constitute a cause of action, are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and complete by amendment. * * * Thus, if instead of alleging the issuable facts, the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclusions of law in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by a motion and not by demurrer." Pom. on Rem. 592–4.

The sixth paragraph of the complaint in this case is as follows: "That on the 10th day of October, A. D. 1876, defendants, Verner & Stribling, improperly and illegally entered the premises rented to her (the plaintiff) by McFall, gathered and hauled therefrom about one hundred bushels of corn, worth seventy-five dollars, and two thousand pounds of seed cotton, worth sixty dollars, making altogether one hundred and twenty-five dollars, and to her damage beside the sum of three hundred dollars." This is followed by the usual demand for judgment as against Verner & Stribling, there being no demand for judgment against the other defendant, E. A. Earle. If the sixth paragraph had been all, except the first or introductory portion of the complaint and prayer for judgment, the cause of action could have hardly been questioned. The complaint would have

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been to the effect that *the defendant unlawfully entered upon the plaintiff's premises and took therefrom, or rather "gathered" and removed therefrom, so much of the crop of corn and cotton, worth so much, and to the damage of the plaintiff. Those facts, certainly, constitute a cause of action. If it should be objected by the defendant that the description of the premises is not sufficiently particular, that must be done by motion, and the plaintiff be requested to amend. Code, § 183; Rev. Stat. 608. But the defendants argue that the plaintiff cannot claim to be the tenant in possession of the premises mentioned in the sixth paragraph, for the reason that in the preceding paragraphs she has described the land as the property of E. A. Earle, and that it was leased to McFall, and that she sets up no lease from McFall to herself; that the contract between her and McFall (made part of Paragraph 2) gives her no right in the land, and that in Paragraphs 3 and 4 the ownership and possession are both admitted to be in E. A. Earle. All that might be so, but it is not alleged in Paragraph 6 that the premises therein mentioned are the same lands as those before described, and when parties make technical objections they may be technically met. But such is not the spirit of the new mode of procedure. Pleadings are not to be technically or rigorously construed, but with a view of substantial justice between the parties. The plaintiff, in this case, has stated facts in the sixth paragraph which constitute a sufficient cause of action. She has further, in other paragraphs, made recitals which are entirely unnecessary, but which lay open her case fully to the defendants. The demurrer seems to have been allowed upon the ground that the allegations in these other paragraphs negative the allegations in the sixth paragraph. But that proposition cannot be sustained. As evidence, those paragraphs may not be sufficient to establish the sixth; that, however, is no evidence that the plaintiff has no other proof. But it is proper to consider those paragraphs in the light of allegations of facts to constitute causes of action, and they constitute imperfect statements of several different grounds. The plaintiff claims judgment on any of the grounds that she may establish, either as part owner of the crop, under her

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contract with McFall, or as laborer *in the employ of Earle, or as a bailee, or as a tenant of the premises and owner of the crop.

The defendants might have demanded separate and more distinct statements, but their demurrer cannot be allowed.

Judgment reversed. Motion granted.

WILLARD, C. J., concurred.

McIVER, A. J. As I am unable to concur in the conclusion which has been reached by a majority of the court, I will proceed to state, briefly, the reasons for my dissent.

I do not regard the objection raised by the demurrer as a technical but rather as a substantial objection. It seems to me that giving to the various allegations of the complaint the most liberal construction, as is required by the provisions of the code, it is impossible to conclude that sufficient facts are stated to give the plaintiff a cause of action. On the contrary, the facts stated show not only that the plaintiff has no cause of action, but that, assuming those facts to be true, the right of action is in the defendant, Mrs. Earle, or in McFall, if he has not abandoned his lease. If the action be regarded as an action for damages done to real estate, there

is no allegation that the plaintiff had title to or possession of such real estate. So if the action be regarded as an action for damages for taking the personal property mentioned in the complaint, there is a like absence of any allegation that the plaintiff had possession of or was entitled to such personal property. On the contrary, the allegations in the complaint show clearly that the real estate and personal property referred to was the property of Mrs. Earle or of McFall, and if any wrong was done by the defendants, Verner & Stribling, it was done to Mrs. Earle or McFall, and not to the plaintiff. By the express terms of the written agreement between the plaintiff and McFall, set out in the complaint, which was afterwards adopted by Mrs. Earle, the only change being an increase in the amount to be given plaintiff, the plaintiff was a mere hireling for wages, the amount of which was fixed, not in money, but in a certain proportion of the crop, and she had no interest in or authority over the land or the crop, but only a

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right to claim a certain pro*portion of the crop, or its value, as a compensation for her labor. The land, as well as the crop, was Mrs. Earle's or McFall's, and for any trespass committed upon either, the right of action was in Mrs. Earle or McFall, and not in the plaintiff. Rogers v. Collier, 2 Bail. 581 [23 Am. Dec. 153]; State v. Gay, 1 Hill 364; Holcombe v. Townsend, 1 Hill 399.

The subsequent case of Burgess v. Carpenter, 2 S. C. 7 [16 Am. Rep. 643] is not in conflict with these cases, because, although the Circuit judge, in that case, did rest his decision upon the ground that "the contract to pay Henry Burgess a share in the crop made him a copartner and not a servant," the Supreme Court does not place its decision upon any such ground, but upon the ground that the common law gives no right of action to the master for any injury done to the servant, except where the servant is a menial one; and that as Henry Burgess was "exclusively concerned in the cultivation of the soil and the products arising therefrom, and there being no domestic caste in the nature of his service, (which, it had been argued, was the test of menial service,) he does not fall within the class to which the term 'servant' can in any sense be applied." The case does not touch the question as to whether a person employed to cultivate a crop under a contract that his services shall be compensated by giving him a certain portion of the crop instead of a specific amount of money, is a partner or a mere employé.

I do not think the allegations contained in the sixth paragraph of the complaint, can be regarded as stating a separate cause of action. The rule is, that while a plaintiff may combine in one complaint several distinct causes of action, under certain restrictions, not necessary to be adverted to here, yet these different causes of action must be stated separately, in order that the defendant may plead to them separately, if necessary or desirable. Indeed, I do not suppose that the plaintiff intended the statement in that paragraph as an allegation of a separate cause of action, or as an allegation of facts at all, but rather as a statement of the legal conclusion which the plaintiff drew from the facts previously stated than a statement of independent facts.

I think, therefore, that the demurrer was properly sustained, and that the judgment of the Circuit Court should be affirmed.

Judgment reversed.

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12 S. C. *9

*(Case No. 725.)

JOHN D. WARREN v. HENRY H. RAYMOND et al.

(November Term, 1878.)

1. Richardson v. Chappell, 6 S. C. 146, and Haynsworth v. Bischoff, 6 S. C. 159, explained.

[2. *Descent and Distribution* ⟸134.]

A mortgage by the heir-at-law of land inherited is not such an alienation within the meaning of 3 and 4 W. & M., 2 Stat. 533, as will defeat the claims of the decedent's creditors, so long as the mortgagor retains the possession. See Simons v. Bryce, 10 S. C. 354.

[Ed. Note.—Cited in Smith v. Grant, 15 S. C. 152; Bacot v. Lowndes, 24 S. C. 394; Navassa Guano Co. v. Richardson, 26 S. C. 405, 2 S. E. 307; Galloway v. Galloway, 76 S. C. 526, 57 S. E. 528.

For other cases, see Descent and Distribution, Cent. Dig. § 491; Dec. Dig. ⟸134.]

[3. *Descent and Distribution* ⟸134.]

But where, upon condition broken, the mortgagee takes possession of the land, under a power given in the mortgage, the mortgage thereupon operates as an alienation.

[Ed. Note.—Cited in Carolina Savings Bank v. McMahon, 37 S. C. 317, 16 S. E. 31.

For other cases, see Descent and Distribution, Cent. Dig. § 491; Dec. Dig. ⟸134.]

[4. *Descent and Distribution* ⟸134.]

A power of sale, in case of default, contained in such mortgage, but unexercised, would not be an alienation; but a sale under decree of foreclosure would be.

[Ed. Note.—Cited in Team v. Baum, 47 S. C. 415, 25 S. E. 275, 58 Am. St. Rep. 893.

For other cases, see Descent and Distribution, Cent. Dig. § 491; Dec. Dig. ⟸134.]

[5. *Descent and Distribution* ⟸134.]

A surrender of possession by mortgagor to mortgagee would constitute an alienation, but a mere assignment of the rents of the mortgaged premises would not be so regarded.

[Ed. Note.—Cited in Hardin v. Hardin, 34 S. C. 82, 12 S. E. 936, 27 Am. St. Rep. 786.

For other cases, see Descent and Distribution, Cent. Dig. § 491; Dec. Dig. ⟸134.]

[6. *Mortgages* ⟸497.]

A decree, from which no appeal was taken, directed a foreclosure and sale at a future day, unless a specified sum was previously paid, with the privilege to plaintiff, in case of deficiency, to enroll his decree and issue execution for

balance due; a money decree was instantly enrolled and execution issued for the whole sum specified. *Held*, that the debt was liquidated by the decree, but that the enrollment and execution were erroneous, and created no lien on the defendant's property. Distinction drawn between this case and Blake v. Heyward, Bail. Eq. 208. Haskell, A. J., dissenting.

[Ed. Note.—Cited in Dial v. Gary & Tappan, 27 S. C. 177, 3 S. E. 84; Hull v. Young, 29 S. C. 71, 6 S. E. 938; Parr v. Lindler, 40 S. C. 200, 18 S. E. 636; Cook v. Jennings, 40 S. C. 210, 216, 18 S. E. 640; Stewart v. Blalock, 45 S. C. 68, 22 S. E. 774; Barnwell v. Marion, 54 S. C. 229, 32 S. E. 313.

For other cases, see Mortgages, Cent. Dig. § 1471; Dec. Dig. ⊂⊃497.]

[This case is also cited in Freer v. Tupper, 21 S. C. 75, and distinguished therefrom.]

Before Wallace, J., at Charleston, March, 1878.

This was an action commenced in January, 1876, by the plaintiff, a bond creditor of Mary Raymond, deceased, against H. H. Raymond, her son and sole heir, defendant, and to which action several other parties were made defendants, some being creditors of Mary Raymond, and others holding mortgages executed by H. H. Raymond, after his mother's death, upon lands descended. The complaint prayed judgment for plaintiff's debt, a marshaling of Mary Raymond's assets, sale of property, application of the proceeds, first, to Mary Raymond's debts, and

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remainder to H. *H. Raymond's debts, and the appointment of a receiver. All of the defendants answered.

The plaintiff held three bonds, made and executed to him by Mary Raymond and H. H. Raymond, in 1852, 1854 and 1855, respectively. B. J. Whaley, trustee under marriage settlement of H. H. Raymond and wife, held a joint and several bond of H. H. Raymond and Mary Raymond, dated in 1859, which was in the possession of H. H. Raymond from 1864 to 1875, placed there by the trustee for safe keeping. The executors of Charles Astor Bristed held bond of Mary Raymond and H. H. Raymond for $10,000, secured by mortgage of Mary Raymond, duly recorded, on two lots of land in Charleston. These lots were sold under proper proceedings subsequent to death of Mary Raymond. These two lots of land are not affected by this action, and this claim was not made the subject of exception to the referee's report or to the Circuit decree. The only other claim proven against Mary Raymond is the judgment in favor of W. M. Thomas—all the facts connected with which are fully reported in Thomas v. Raymond, 4 S. C. 347, affirmed by the Supreme Court of the United States, in 1 Otto 712. Upon the rendition of Chancellor Carroll's decree in that case, and before the time for sale as therein ordered, Thomas enrolled a money decree in Greenville district for the whole amount found by the decree to be due him, and upon such enrolled decree issued his execution and lodged it in the sheriff's office in Greenville, January 9th, 1868, and in the sheriff's office in Charleston, December 14th, 1868.

In February, 1869, Mary Raymond died intestate, possessed of several valuable improved lots of land in the city of Charleston, and leaving her son, H. H. Raymond, her sole heir-at-law. She left very little personal property, and no administration has been had on her estate. After the death of Mary Raymond, the said H. H. Raymond entered into the possession of all his mother's real estate, and enjoyed the rents and profits of the same.

From June, 1870, to July, 1875, H. H. Raymond executed several mortgages upon this descended real property, to secure debts due by himself, individually, some of them being

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second *mortgages. At the time these mortgages were given, none of the mortgagees had any knowledge or notice of the existence of the debts due to plaintiff and to Whaley, trustee, and none of them, except Rice and Gayer, had any knowledge of the judgment or claim of W. M. Thomas.

Some of the mortgages contained a power of sale in case of default, and some were foreclosed under order of court before this action was brought. In the mortgage to A. G. Rice there was a covenant that in case of failure to pay principal or interest of the bond secured by this mortgage, or to pay bonds secured by prior outstanding mortgages upon the same property executed by H. H. Raymond, or to pay taxes, that the mortgagee might "peaceably enter into, have, hold, use, occupy, possess and enjoy the said premises above mentioned, and collect all rents, issues and profits of the same, and of every part thereof, and apply the money arising therefrom to the payment," &c. Under this power Rice entered and took possession of the premises in January, 1876.

The tenants of the property mortgaged to W. J. Gayer were required by H. H. Raymond to pay over the rents thereof to Gayer.

Judgments entered up against H. H. Raymond, and unsecured debts due by him, were also presented and proven in this cause. Mary Raymond having died before confirmation of sale of the land mortgaged to W. M. Thomas, the action was renewed against H. H. Raymond as one having in possession the estate of Mary Raymond. He appeared and resisted the confirmation; but the sale was confirmed by order of Judge Orr, and judgment given against H. H. Raymond for balance due, after crediting the net proceeds of sale. A transcript of this judgment was lodged in Charleston, and it is one of the judgments proven in this cause.

The issues of law and fact were referred to G. D. Bryan, Esq., as special referee. After setting out fully the facts, his report concludes as follows:

The following are the issues of law. It is claimed by the plaintiff, John D. Warren, by B. J. Whaley, trustee, and Wm. M. Thomas, that holding claims against Mary Ray-

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mond they *are entitled to be paid out of the property owned by her at the time of her death, before the mortgages made by her heir, Henry H. Raymond, can be paid. So far as John D. Warren and B. J. Whaley are concerned, they had no lien on the property descended, and if the mortgages by Henry H. Raymond to the several mortgagees above named are such alienations of the property as is required by the statute, then they, the said John D. Warren and B. J. Whaley, trustee, cannot take precedence of the said mortgagees. This question is settled by the recent decisions of the Supreme Court of this state, in one of which (Richardson v. Chappell, 6 S. C. 146,) it is held that under the Stat. 3 and 4 W. & M., and 5 Geo. II., ch. VII., lands purchased from a devisee are not liable for the debts of the devisor when the purchase was bona fide for valuable consideration and without notice; and in the other (Haynsworth v. Bischoff, 6 S. C. 159), it is held that a mortgagee of lands is a purchaser within the meaning of the statute which protects a purchaser for valuable consideration without notice. I therefore find as matter of law, that John D. Warren and B. J. Whaley, trustee, are not entitled to be paid as against the mortgagees. The judgment of W. M. Thomas, as against Mary Raymond, stands on a different footing. The real estate of Mary Raymond descended to Henry H. Raymond, bound by the lien of the execution against her lodged in the sheriff's office for Charleston county in December, 1868, and any subsequent alienations by Henry H. Raymond could not divest the lien of this execution. It has been urged by the counsel for the mortgagees, that the decree upon which this execution was issued was improperly and irregularly enrolled.

This may be true as a matter of fact, but it cannot be questioned or set aside in this collateral action, and until set aside by the court in which it was obtained and entered, is binding upon the estate of Mary Raymond, and is entitled to be paid in preference to the mortgages made by Henry H. Raymond, beginning with those last given by him.

The defendant, Wm. M. Thomas, also claims that his judgment of the November, 1873, should take precedence of the mortgages of A. G. Rice and Wm. J. Gayer, and the claims of Warren and of Whaley, trus-

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tee. This judgment is against H. *H. Raymond individually, and the only question is, does such a judgment constitute an alienation which would defeat the claims of creditors of the ancestor? There is no precedent by which to be governed or guided, but it seems to me that something more is required to divest the heir of the estate by inheritance to defeat the claims of the ancestor's creditors—and though Thomas is entitled to recover under his judgment against Mary Raymond, he must be, under this judgment, postponed to the claims of Warren and Whaley, trustee, who were the creditors of the ancestors, and the same rule should be applied to the other judgments set forth above. As the judgment of Thomas v. Mary Raymond will absorb the entire proceeds of sale of the premises covered by the mortgage to Wm. J. Gayer, it is unnecessary to consider the question between him, the said Wm. J. Gayer, and the other judgment creditors.

The judgment held by Samuel Lord, Jr., assignee, and the People's Bank of South Carolina, having been released in favor of A. G. Rice, they have nothing upon which to operate, as all of the property, with the exception of that mortgaged to Wm. J. Gayer, was mortgaged before the entry of the said judgments.

Having found that the afore-mentioned mortgagees are purchasers bona fide for a valuable consideration, and without notice of any claim except that held by Wm. M. Thomas, of the estate received by Henry H. Raymond from Mary Raymond, the proceeds of the sale of the said estate should be applied as follows, to wit: * * *

The mortgages held by Maria S. Hopkins, Douglas Nisbit and the executors of Bristed having been foreclosed and the property sold thereunder, should not be disturbed, as they stand on the same footing with the other mortgages; and further, even if the claims of Warren and Whaley, trustee, had been allowed, would not be affected thereby.

I have already stated as matter of fact, that the judgment held by Thomas is claimed by his assignee in bankruptcy, A. Blythe, Esq., and as the question between them is pending in another and proper tribunal, I have not thought it proper to report upon this matter in this proceeding.

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*The mortgagees of H. H. Raymond excepted to the findings of fact and law upon the judgment claim of W. M. Thomas. The plaintiff and Whaley, trustee, also excepted, upon the ground that there was error in postponing debts due by Mary Raymond to the mortgages executed by her heir after her death.

The decree of the Circuit judge is as follows:

On hearing the report of the referee herein and the argument of counsel, it is ordered—

1. That so much of the report as states matters of fact be confirmed.

2. That so much of the report as finds as matters of law that the claims of John D. Warren and B. J. Whaley, trustee, are post-

poned to the claims of lien creditors of Mary Raymond and mortgage creditors of H. H. Raymond, is confirmed and ordered to stand as the judgment of the court.

3. That so much of said report as finds that the judgment creditors of H. H. Raymond are postponed to the creditors of the estate of Mary Raymond, so far as funds realized from that part of the estate of Mary Raymond that went into the hands of H. H. Raymond are concerned, is confirmed.

In the year 1863, Mary Raymond purchased from William M. Thomas a house and lot in the town of Greenville, and executed her note, secured by a mortgage of the premises, for the purchase money.

In 1866, Thomas filed his bill in the Court of Equity for Greenville county, for foreclosure of the mortgage and the enforcement of the payment of the note.

Some proceedings were had in the cause before Chancellor Johnson, which are reported in the case of Thomas v. Raymond, 4 S. C. 347.

In the month of January, 1868, the cause came on to be heard before Chancellor Carroll. On the 16th of that month the commissioner of the court reported that there was due upon the note on the 16th January, 1868, the sum of $3371.24, including costs. On the 22d of the same month Chancellor Carroll signed a decree, confirming the report of the commissioner, directing the mortgaged property to be sold on sales-day in March ensuing, and the equity of redemption

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to be barred and *foreclosed, unless the mortgaged debt was paid before that time, and directing the distribution of the proceeds of the sale, and granting leave to issue execution for the balance of the debt, if the proceeds of the sale should prove insufficient to pay and discharge it.

Did Thomas have the right to enroll this decree and issue execution upon it? The A. A. 1840, (11 Stat. at Large 116, 23,) * * "Provided, nevertheless, that any party in whose favor a decree or order for the payment of money, may be made, may cause such order or decree to be enrolled at any time within a year and a day after making the same;" and the proviso goes on to prescribe the way in which this shall be done. Then if this was a money decree, Thomas had the right to enroll it.

Was it a money decree?

In Blake v. Heyward, Bail. Eq. 208, Judge O'Neall, with the concurrence of Judges Johnson and Harper, says: "The decree in the case before us establishes a sum of money to be due by the defendants in the original bill, and not only subjects the land in dispute to the payment of it, but also directs that the balance, if any, after the sale of the land, shall be paid out of the estate of their testator. It is, therefore, a decree for the payment of money, and has a lien from the time it was pronounced, on all his real estate."

This is exactly what Chancellor Carroll's decree did. It is therefore, a money decree, and could be properly enrolled under the A. A. 1840.

The decree in Blake v. Heyward, was pronounced in 1831. The act of 1840 made enrolling necessary to bind third parties by the lien of a money decree.

The Chancellor having pronounced a money decree, had no power to suspend Thomas' right to enroll it, when to enroll it was necessary to give to it the virtue of a lien upon the estate of the defendant, and when his right to enroll was derived from a statute of the state. The purport of the decree amounted to this, that if Thomas chose to delay enrolling his decree until after the sale, then he might require the commissioner to issue execution for a sum different from that ad-

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judged due by the *court and ascertained by deducting the amount realized by the sale from the amount fixed by the decree.

To say that the effect of the decree was to prevent Thomas from enrolling his decree until after the sale, is to say that the Chancellor could suspend a statutory right, and thus by allowing other rights to intervene, defeat Thomas' lien upon the balance of defendant's estate.

Thomas, then, could properly enroll his decree immediately upon its being signed.

Did he enroll it?

There is in evidence a paper purporting to be a copy of the decree of Chancellor Carroll. The paper also contains an abstract of the decree signed by Messrs. Perry & Perry, Solicitors for Thomas.

Upon the copy of the abstract are written the words, "Abstract of decree to be enrolled." "Filed 30th January, 1868, J. P. Moore, C. E. G. D." There is also the certificate of the clerk of the court for Greenville county, that the paper is a correct copy of original, on file in his office. It therefore appears that an abstract of the decree was filed in the proper office, and it is to be presumed that all the steps necessary after the filing, to make the paper an enrolled decree, were regularly and properly taken and done until the contrary is made to appear.

"And no order or decree for the payment of money shall, as to third persons, without express notice, have any effect as a lien on the estate, real or personal, of any person or estate intended to be bound thereby, but from the day when the said abstract shall have been delivered or lodged with the said register or commissioner as aforesaid," &c. See A. A. 1840, 11 Stat. at Large 116.

The decree having been enrolled became a lien upon all the property of defendant, from the 30th day of January, 1868, in Greenville county. Blake v. Heyward, Bail. Eq. 213; Woddrop v. Price, 3 Desaus. 203.

Decrees for the payment of money bind land in the same manner as judgments at law. They have a lien from the date of enrollment upon all the real estate of defendant in the county where enrolled.

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*Now that an enrolled decree constitutes a lien on land, because the party in whose favor it was pronounced has the right to enforce it by execution, is too well settled to be discussed now. If he did not have the right to issue execution upon it, it would not be a lien. Decrees of the nature of the one under discussion are money decrees; when enrolled execution may issue. Therefore, the enrolled decree is a lien. Now, Thomas having a lien upon the property of defendant in Greenville, desired to establish his lien against her property, in Charleston. Under the A. A. 1789, he could have given to his decree a lien all over the state by filing his decree in the clerk's office at Charleston, and issuing and lodging his execution there. He did not do that, but issued and lodged there an execution upon his decree enrolled in Greenville.

Did this execution bind the defendant's real estate in Charleston county?

The A. A. 1849, (11 Stat. 582), enacts "That from and after the passage of this act, no judgment nor any execution issued thereon shall, as against any creditor or creditors of the party or parties against whom such judgment shall have been obtained by confession or otherwise, or against any purchaser or purchasers for valuable consideration, have any lien on the property or any part thereof of any such party, except in the district where the judgment is first entered and execution lodged, until an execution issued thereon be lodged in the proper office in the district wherein such party usually resides at the time when such judgment was obtained," &c.

At the time this act was passed executions lodged in the proper office in any district in the state bound personal property in all the districts of the state, and judgments obtained in any district and filed in the proper office in Charleston bound the real estate of the defendant in any district in the state. This state of the law was productive of manifest inconvenience, and rendered easy the practice of fraud and imposition by the creation of liens in other districts than that in which the defendant resided, that bound his property in the district where he did reside, and of which the parties with whom he would probably mostly deal were ignorant.

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*In my opinion, the act of 1849 was passed to remedy this patent evil, and provided that liens should be extended from any district to the district in which the defendant resided, by lodging execution in the latter district, and only by that means, and that the lien of a judgment, as well as the lien of an execution, could be extended by simply lodging the execution, and the execution, when lodged, bound both real and personal estate. It therefore follows that the execution lodged by Thomas in Charleston, in 1868, was a lien upon the real property of Mary Raymond, in that county.

Whether the execution lodged by Thomas in Charleston, in 1868, was, if not a lien, at least such notice to the subsequent alienees of Mary Raymond and H. H. Raymond, as to defeat the defence of innocent purchasers without notice, need not in this decree be discussed.

Subsequent to the lodgment of execution by Thomas, in 1868, Mary Raymond executed to Charles Astor Bristed a mortgage of certain real estate to secure a bond payable to him, and bearing even date with the mortgage, to wit, January 1st, 1869. To this mortgage the lien of Thomas', execution is postponed. Bank v. Howard & Garmany, 1 Strob. Eq. 174.

Mrs. Mary Raymond died in February, 1869. Her estate was cast upon her only son and heir, H. H. Raymond. All the subsequent encumbrances upon what had been the property of Mary Raymond were created by him. To none of these is Thomas' lien postponed. For, at her death, Thomas' lien covered all her estate, and mortgagees took their lien subject to that. At the moment of her death the rank and status of her debts were fixed by law, and will be paid by this court, according to their priorities, nor can the rules of administration be varied by the acts of the heir, to the extent of allowing a preference to liens created by him to liens upon the property existing when the property came into his hands.

The proceedings in the cause of Thomas v. Raymond, subsequent to the final decree of Chancellor Carroll, all grew out of the peculiar condition of affairs in this state at that time. These proceedings it is not necessary to discuss in this decree, the cause having been disembarrassed of them by the recent decree of the Supreme Court of the United

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States, in the cause of Raymond *v. Thomas, further than to say that the confirmation of the report of sale by Judge Orr, was not necessary to authorize Thomas to issue execution, and that the order of Judge Orr that Thomas should have judgment for the balance of the amount of his debt after the sale gave Thomas no rights or remedies that he did not already have under the decree of Chancellor Carroll. It is therefore ordered, adjudged and decreed—

1. That out of the proceeds of the property sold by order of the court in this cause, and out of the property mortgaged to Maria S. Hopkins and Douglas Nesbit, the amount due upon the execution in the case of W. M. Thomas v. Mary Raymond be paid, by each piece of property, or the amount that it

brought at the sale ratably and in proportion.

2. That the sum, so to be paid, be paid to the person to whom it shall finally be adjudged to belong under the proceedings to that end now pending in the United States Court for the district of South Carolina.

3. That such person, when ascertained, have leave to levy said execution upon the property mortgaged, as aforesaid to the said Maria Hopkins and Douglas Nesbit, guardian, for its proportionate part of said execution.

4. That next after the Thomas execution of 1868, above referred to, is paid and satisfied, or a sum sufficient to pay and satisfy the same, is in the hands of George S. Bryan, referee herein, then the mortgagees of H. H. Raymond are entitled to receive the balance of the proceeds of the sale of the property for which they had mortgages respectively, and in those cases where there are two or more mortgages on the same piece of property, that the proceeds of the sale thereof be applied to such mortgages, according to their priorities.

5. That next after the mortgagees of Henry Raymond, that the creditors of Mrs. Raymond be paid according to the rank and priorities of their debts.

6. That next after the creditors of Mrs. Mary Raymond, the creditors of H. H. Raymond be paid according to the rank and priorities of their debts.

7. That it be referred to W. D. Porter, master, to inquire and report to this court, according to the scheme of this decree, the amount of the execution in Thomas v. Ray-

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mond, the ratable *and proportionate amount to be contributed to the payment of the sum out of the sums realized by the different pieces of property upon which it is herein deemed to be a first lien, and that he do report the debts of Mary Raymond and H. H. Raymond, according to their rank and priorities, under this decree.

8. That the costs of this action be first paid.

The plaintiff and Whaley, trustee, appealed to this court upon the ground:

Because his Honor the presiding judge has erred in decreeing that the mortgages executed by the defendant, Henry H. Raymond, during his lifetime, were such alienations of the real property of his ancestor, Mary Raymond, as entitled the holders thereof to priority in payment out of the proceeds of the sales of such property made herein, over the bonds of such ancestor held by these appellants.

The mortgagees appealed—

1. Because his Honor erred in holding that a money decree was properly entered up by Thomas, in Greenville, and that the same created a lien as against the mortgagees.

2. Because, if the same had created a lien, the lien of the same was destroyed when Thomas elected to proceed in the second suit, and under the second suit by Thomas there was created no lien as against this defendant.

3. Because, even if the first judgment was a lien, his Honor erred in holding that the earlier mortgages should contribute with the later towards paying the amount of the said judgment, the rule being fixed since Sir William Herbert's case, 3 Coke, 11 b, that as the defendant is entitled against the mortgagor to throw the mortgagor on the unmortgaged premises, he must necessarily have the same right as against all parties, whose claims under or against the debtor are subsequent to his own, which said rule has been sustained by an unbroken series of decisions, and to which rule, as reported by the referee in his report, no exception was taken.

[For subsequent opinions, see 17 S. C. 163; 19 S. C. 605.]

Mr. A. T. Smyth, for plaintiff.

Messrs. Campbell & Whaley, for Whaley, trustee.

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*Messrs. W. M. Thomas and Buist & Buist, for Thomas.

Messrs. Simonton & Barker, W. H. Brawley, I. B. Cohen, A. D. Cohen, De Saussure & Son and W. J. Gayer, for mortgagees.

April 25th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The plaintiff, Warren, a bond creditor of Mary Raymond, deceased, brought this action against H. H. Raymond, her heir-at-law, to whom her lands descended, claiming such lands as assets descended in the hands of the heir of the obligor, liable to the payment of her debt. He has made various parties defendants with the heir, alleging that they make various claims to the land either under the ancestor, Mary Raymond, or under H. H. Raymond, his heir-at-law. His prayer for judgment is that his debt may be paid, that the creditors of Mary Raymond and of H. H. Raymond be enjoined from attempting to enforce their demands against property derived from the ancestor, Mary Raymond, and that the assets of the estate of Mary Raymond be marshaled and the creditors called in to prove their claims, and that all rights and equities be herein adjudicated, and for the appointment of a receiver, and that the property be sold and the proceeds applied, first to the costs of these proceedings, next to the debts of Mary Raymond, and finally to debts of H. H. Raymond. It appears that administration has not been had on the estate of Mary Raymond, nor is that estate represented for the purpose of marshaling its assets. Neither does it appear that the complaint was in the nature of a creditor's bill against H. H. Ray-

mond for the purpose of converting his estate into assets for the purpose of distribution in equity, inasmuch as it does not appear that judgment had been recovered against H. H. Raymond and execution returned nulla bona. Ragsdale v. Holmes, 1 S. C. 91. Primarily the action would have to be regarded as simply that of one brought by the creditors of an intestate against his heir in possession of lands descended for the satisfaction of his debt, the other defendants being joined as individual parties merely. The Circuit decree takes a larger scope than this would seem to indicate, but so far as it is not appealed from

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or necessarily affected by matters *brought here by appeal, it will not be disturbed as between the present parties. The fundamental proposition on which the Circuit decree rests is at variance with the recent decision of this court in Simons v. Bryce, 10 S. C. 354. The conclusion of the referee, sustained by the decree, was that the mere fact that the heir had mortgaged the lands descended to him, independently of the fact that the mortgagor remained in possession of the descended lands so mortgaged, was sufficient to establish an alienation in the sense of the statute of 3 and 4 W. & M., 2 Stat. 533. We held, in Simons v. Bryce, that while the mortgagor was in possession, the statute of 1791 (Gen. Stat. 536) prevented the mortgage from operating as an alienation. In Richardson v. Chappell, 6 S. C. 146, this court held that bona fide alienation by the devisee defeated the claims of the creditor of the testator against the lands devised; but the referee is inaccurate in stating that case as deciding that the alienee must show that the alienation was for a valuable consideration, and without notice, in order to come within the terms of the statute of 3 and 4 W. & M. In that case the equitable defence of purchaser for a valuable consideration without notice was set up in a suit, in one aspect, in the nature of a bill framed upon the equity of 5 Geo. II. One of the facts in the case was that Simpkins, the purchaser from the devisee, had paid part of the purchase money after notice of the plaintiff's claim, and that in equity he should be made chargeable with the amount thus paid in disregard of the plaintiff's equity. The equitable defence of purchaser for a valuable consideration without notice included all that was necessary to decide the legal as well as the equitable questions involved, and was appropriately considered for that purpose. What was said in that case was not intended as an exposition of the meaning of the phrase bona fide alienation, as used in 3 and 4 W. & M. In Haynsworth v. Bischoff, 6 S. C. 159, the question arose on a plea of purchaser for a valuable consideration without notice interposed to a claim to charge lands of which the title stood in an alienor individually, and not as administrator, as assets of his intestate's estate. The lands were mortgaged to the defendant, who set up the plea of purchaser for a valuable consideration without notice. No ques-

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tion of alienation through a mortgage *was presented in that case. It was held to be immaterial whether any estate passed under the mortgage. In equity the mortgagee was regarded as possessing a right to go upon the land for the payment of the mortgage debt, and this right was subject to protection under the plea of purchaser for a valuable consideration without notice, and that the equitable right was unaffected by the statute that had adopted the views that the court of equity had always held as to the nature of a mortgage. This was far from involving the question of the effect of the legal defence of alienation under the statute of 3 and 4 W. & M., nor does it preclude the court of equity from giving the same construction to that defence as a court of law would give, where arising before it, from the provisions of the statute. The Circuit decree is erroneous to the extent that it rests upon the proposition just considered.

In consequence of the conclusion of the referee and the Circuit judge just referred to, it became unnecessary for them to decide whether the mortgages, set up by way of defence to sustain the plea of bona fide alienation as against the rights of the creditor of the ancestor, commenced to operate by way of transferring the legal title of the mortgagor to the mortgagees by reason of the mortgagor being out of possession, at any time prior to the commencement of this action. There are, therefore, no such findings of fact and conclusions of law on that point as to bring the case before us for a final decree. Indeed, the brief, although exceedingly voluminous, appears to be framed to present the bearing of the facts of the case upon the points actually decided, rather than to present the whole state of facts to this court so that a final decree could be made variant from that appealed from. We can, therefore, do no more than to lay down the principles that should govern such findings, so far as we are enabled to state them from the facts before us.

As it regards the claim under the mortgage of H. H. Raymond to A. G. Rice, the findings of fact of the referee appear sufficiently full to present the question whether such mortgage in virtue of the proceedings had under it operated as an alienation of the lands descended under the statute of 3 and 4 W. & M. These findings do not appear to have been ex-

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cepted to, and must *stand as final. It appears that the mortgage contained a clause that in case of certain contingencies, among others that of default in the payment of principal or interest on the bond which such mortgage was given to secure, the mortgagee, Rice, "shall and may peaceably enter into,

have, hold, use, occupy, possess and enjoy the said premises above mentioned and collect all rents, issues and profits of the same, and every part thereof." Directions were then given as to the application of the money arising therefrom, among other purposes to that of the payment of the principal and interest due on the said bond and mortgage. It appears by the finds of the referee, that under this power the mortgagee, A. G. Rice, entered and took possession of the mortgaged premises on the 14th day of January, 1876, prior to the commencement of this suit, as upon condition broken. It is clear that the mortgagor was out of possession as it regarded such mortgaged premises at the time of the commencement of the present suit. Under such circumstances the decision in the case of Simons v. Bryce is inapplicable, as it regarded the lands so mortgaged and out of the possession of the mortgagor.

The statute of 1791 (5 Stat. 178, Gen. Stat. 536,) only operates to prevent the mortgage from having its due effect at common law while the mortgagor is in possession. The moment that possession passes out of him, in the sense of the statute, title passes through the mortgage under the operation of the statute, and the mortgagor occupies the same position he would have occupied had the statute never been passed. Under such circumstances this mortgage would be competent to work an alienation under the statute of 3 and 4 W. & M. It is claimed here that in order to establish possession out of the mortgagor, it is necessary to show that he has conveyed the mortgaged premises by an absolute deed to a third person, who is in possession under such deed. We have been referred to several cases in this state as supporting such proposition. None of the cases cited, either directly or indirectly, sanction such a conclusion. In Laffan v. Kennedy, 15 Rich. 246, it was held that the mortgagor was not to be considered out of possession so long as the premises were in the possession of a tenant holding under him. This case rests on the familiar principle that the possession

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of the tenant is the *possession of the landlord in law. Where the mortgage contains authority for the mortgagee to enter upon condition broken and take and hold possession, with the rents and profits, and, after condition broken, is let into such possession by the mortgagor, the latter is clearly out of possession through his own act and deed in the sense of the statute. In that case the mortgage has the force and effect of a mortgage at common law and constitutes an alienation of the mortgaged premises under the statute of 3 and 4 W. & M. As to such alienated premises, the plaintiff cannot follow the land.

There can be no doubt that when property descended is mortgaged by the heir and such mortgage is foreclosed and the property sold under a decree of foreclosure, it is an alienation. The fact that the mortgage contains a power of sale in case of default is unimportant; it must appear that such power of sale has been effectually exercised in order to produce that result.

It appears that, in order to secure a mortgage given by H. H. Raymond to W. J. Gayer, the mortgagor required the tenants of the property covered by the said mortgage to pay over the rents thereof to the said W. J. Gayer. In order to determine whether that transaction was of such a nature as to amount to a surrender of the possession by the mortgagor to the mortgagee, there should have been a finding of fact whether such was the act and intent of the parties. If the mortgagor merely assigned to the mortgagee the interest to grow due from time to time on an outstanding lease, without parting with the reversion, so that he would retain the right to enforce any covenants on the lease, or to make a new lease on the determination thereof, then the mortgagor must be considered as remaining in possession of the mortgaged premises, and the mortgage does not constitute an alienation by the heir. If, on the other hand, the mortgagor surrendered possession of the mortgaged premises to the mortgagee, then the mortgage must be regarded as an alienation. As the true issues were not presented under the view taken by the referee and the Circuit Court, it appears advisable that this question of fact should be passed upon by the Circuit Court under the view presented herein. The same question

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is raised as to other defendants, *and is subject to the same observation, and should be disposed of in like manner.

W. M. Thomas, in 1868, obtained a decree for the foreclosure of a mortgage made by Mary Raymond, and enrolled such decree as a money decree, and issued executions thereon, in Charleston, during that year, and during the lifetime of Mary Raymond. The Circuit decree holds that the decree in question was a money decree, and was properly enrolled, and that lodging the execution issued thereunder, in Charleston, gave a lien on the lands of Mary Raymond in Charleston. The decree of foreclosure was made by Chancellor Carroll, Jan. 22d, 1868, and contains the provision "that unless the defendant, Mary Raymond, do pay the complainant, William M. Thomas, the sum of three thousand two hundred and sixty-five dollars and sixty-two cents, with interest on the original sum of twenty-five hundred dollars, from the 16th of January, 1868, and the costs of this suit, on or before the sale-day in March next, the commissioner shall proceed to sell the house and lot on that sale-day, or some other convenient sale-day thereafter, at public auction," &c. It further adds: "It is further ordered, that unless the payment is made as above directed, that the defendant's equity of redemption in the

mortgaged premises be forever foreclosed." Direction is then given for the disposition of the proceeds of the sale, after which follow these words: "But in case there should not be enough of the purchase money after satisfying the costs to pay the plaintiff the sum reported to be due him, then he shall be allowed to enroll his decree and issue execution against the defendant for the balance." The Circuit judge holds that the decree was properly enrolled on the 30th of January, 1868, by the filing of an abstract of the decree in the proper office on that day. The question then arises whether the filing of an abstract of that decree on the 30th day of January, 1868, was the enrolling of a money decree, competent to create a lien on real estate.

The Circuit decree holds that the decree of Chancellor Carroll was a money decree within the meaning of the following language, cited from Blake v. Heyward, Bail. Eq. 208, viz.: "The decree in the case before us estab-

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lishes a sum of money to be *due by the defendants in the original bill, and not only subjects the land in dispute to the payment of it, but also directs that the balance, if any, after the sale of the land, shall be paid out of the estate of their testator. It is, therefore, a decree for the payment of money and has a lien, from the time it was pronounced, on all his real estate." This case was decided prior to the act of 1840 requiring enrollment, and is, as the Circuit judge claims, good authority on the point. The decree of Chancellor Carroll differs materially from such a decree as that contemplated in the language from Blake v. Heyward. That case clearly contemplated a decree adjudging a certain sum of money to be personally due from one party to the other, although containing further provisions for enforcing it out of a particular fund, with recourse to a general execution if that fund should be found insufficient. The decree of Chancellor Carroll did not adjudge any amount as presently due. It no doubt implied the existence of a debt, but did not establish it as a present debt, and I know of no authority for issuing an execution to enforce that which is merely implied by a judgment or decree. It gave a certain time after the day on which it was pronounced to the defendant to pay an ascertained sum for the benefit of the complainant, namely, until sale-day in March, 1868, and declared that if such sum was not paid at that time the commissioner should proceed to sell the property. Had a present indebtedness been adjudged these words might have been referred to the delay of the sale merely, but in the absence of such a direct adjudication, and in view of the concluding language of the order, that will presently be considered, the conclusion cannot be resisted that the Chancellor intended for the defendant what was equivalent to a credit on interest until the sale-day in March. The decree also ordered "that unless payment is made as above directed" the defendant's equity of redemption should be barred.

The whole effect of the decree, therefore, if the language and provisions are to speak for themselves, is to impose a duty on the defendant to pay a certain amount at a future day, or, failing to do so, that the mortgaged property should be sold and her equity of redemption barred. Before that day arrived on which the defendant was bound to

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make such payment, the decree was *attempted to be enrolled and execution issued to the sheriff of Greenville. This was clearly inconsistent with the intention of the decree, which, to place the matter beyond all dispute, concludes with these words: "But in case there should not be enough of the purchase money, after satisfying the costs, to pay the complainant the sum reported to be due him, then he shall be allowed to enroll his decree and issue execution against the defendant for the balance." The whole decree is consistent with itself. It clearly intended to give the defendant until the sale-day in March to pay the money, and for that purpose fixes the proper time for enrolling the decree and issuing execution by the word "then," having relation to the time when the proceeds of the sale should be found insufficient to pay complainant's mortgage debt. To enroll the decree before that time, and seek to enforce immediate payment by execution, was not to enforce, but to disregard, the decree of the court of equity. We are precluded from declaring a decree of a court of general jurisdiction void or erroneous unless duly appealed from, and surely the parties to a decree cannot be permitted to disregard its provisions. No appeal appears to have been taken from Chancellor Carroll's decree, and all parties are bound by it. The Circuit judge was clearly in error in holding that as the right to enroll was a statute right, it could not be affected by the provisions of the decree. The court before whom a cause is pending, especially when of general jurisdiction, is, subject to appeal, the only judge of what are the rights of parties as it regards the use of its process and means of enforcing its judgments. If it judges erroneously as to any such rights, the proper remedy is by appeal; but to assert that parties may disregard the provisions of its decrees, as it regards the mode of enforcement, introduces a dangerous innovation in our ideas as to what is due the authority of the courts.

At all events, the decree of Chancellor Carroll must be regarded as liquidating the debt in favor of W. M. Thomas against Mary Raymond during her lifetime. The proceedings upon Chancellor Carroll's decree, after the death of Mary Raymond, must be regarded as a new proceeding against H. H. Raymond as heir to Mary Raymond, and not as re-

vived against her personal representative, as
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administration was not then had on her *estate so as to enable it to be revived. These proceedings cannot be regarded as affecting the decree of Chancellor Carroll. They grew out of an attempt to destroy the force and effect of the decree by military authority, and did not involve any question of error in the decree itself, and must be regarded as extensive to the decree.

In view of the foregoing conclusions, it is not practicable at the present time to ascertain the various priorities of the parties plaintiff and defendant, but there should be an inquiry as to the various matters of fact opened hereby, and the decree modified to conform to the principles already laid down. The decree of the Circuit Court should be set aside where inconsistent herewith, and opened in other respects to the extent necessary to modify it in accordance with the foregoing.

I concur. HENRY McIVER, A. J.

I concur, except on the point touching the priority of lien in the case of Thomas v. Mary Raymond, and as to that I adopt the conclusion reached by the Circuit judge.
A. C. HASKELL, A. J.

Decree modified.

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12 S. C. 29

(Case No. 726.)

ISAAC GRANT v. HANNAH GRANT.

(April Term, 1879.)

[1. *Divorce* ⇐4.]
The act of 1878, repealing all divorce laws in South Carolina, deprived the courts of this state of jurisdiction of actions for divorce a vinculo matrimonii, even though pending at the passage of the act.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 5; Dec. Dig. ⇐4.]

[2. *Divorce* ⇐13.]
[Const. art. 4, § 15, declaring that courts of common pleas shall have jurisdiction in all cases of divorce, does not authorize the granting of a divorce by the court apart from all legislation on the subject; article 14, § 5, providing that divorces shall not be allowed but by the judgment of a court as shall be prescribed by law.]

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 23; Dec. Dig. ⇐13.]

[3. *Courts* ⇐52.]
[Cited in Riddle v. Reese, 53 S. C. 202, 31 S. E. 222, to the point that the lawmaking power may change the jurisdiction of courts, provided constitutional limitations are not transgressed.]

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 184–192; Dec. Dig. ⇐52.]

Before Thomson, J., at Kershaw, February, 1879.

This was an action for divorce from the
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bonds of matrimony, *upon the ground of defendant's adultery. It was commenced December 12th, 1878, eight days before the approval of the act of December 20th, 1878, (16 Stat. 719), repealing all laws of this state relating to the granting of divorces. The defendant failed to appear or answer. The parties were married January 4th, 1869. His Honor the Circuit judge dismissed the action, holding that the court could not hear testimony or render judgment under a repealed statute. The plaintiff appealed.

Mr. D. A. Straker, for appellant.

April 25th, 1879. The opinion of the court was delivered by

WILLARD, C. J. This action was for a divorce a vinculo, on the ground of adultery. The complaint was dismissed on the ground that no such remedy existed by the laws of this state. The constitution (Article IV., Section 15,) declares "that the Courts of Common Pleas shall have exclusive jurisdiction in all cases of divorce." By the act of 1872 (15 Stat. 30,) a divorce from the bonds of matrimony was allowed on the ground of adultery, but that act was repealed by the act of 1878. 16 Stat. 719. It is contended, however, that the statute of 1878 is void, as tending to impair the obligation of the marriage contract alleged in the complaint, and, also, that the remedy in question is completely granted by the constitutional provision already recited. The marriage was solemnized in 1869, prior to the statute which has been thus repealed, and by such repeal the law now stands in the same position in which it stood at the time of the contracting of the marriage, so that if the general proposition advanced as to the effect of the constitutional inhibition of laws tending to impair the obligation of contracts was sound, still it would be inapplicable to the present case. The general proposition cannot, however, be maintained, as the constitution has regard to questions of property and not of matrimonial status. As this proposition is inapplicable it need not be developed in the present case. As it regards the second proposition, namely, that the remedy exists in an available form under the constitution apart from all legislation on the subject, it must be borne in mind that prior to the adoption of the constitution no
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such remedy existed *in this state. Mattison v. Mattison, 1 Strob. Eq. 387 [47 Am. Dec. 541]. It was argued that the inference from the authorities is that the defect was one of jurisdiction alone and not of legal right, notwithstanding the fact that no court had been rendered competent to entertain such a remedy; that as the abstract right to have such a remedy existed

by law, such remedy could be had at the moment such a jurisdiction was called into existence, and that such competency was created in the Court of Common Pleas by the constitution. It is clear that Mattison v. Mattison will not bear the construction thus sought to be put upon it, but must be regarded as determining that such a remedy was excluded by the policy of the law. It was held by this court in State v. County Treasurer, 4 S. C. 524, that a mere grant of judicial power in the constitution did not remove from the legislature authority to determine to what class of cases such judicial power should extend. State v. Gaillard, 11 S. C. 309. No remedy is complete without a definition of the cases to which it shall extend, and the constitution is wholly silent on this subject. There is, therefore, nothing in the constitution tending to deprive the legislature of full power of granting or withholding such remedy which the legislature primarily possesses. The act of 1872 was an exercise of this power, and its repeal in 1878 an equally effective exercise of the power of withholding such remedy. But Article XIV., Section 5, of the constitution sets this question at rest. That section provides "that divorces shall not be allowed but by the judgment of a court, as shall be prescribed by law." In the absence of a law authorizing such a judgment none can be pronounced having the effect allowed by this section.

The appeal must be dismissed.

Appeal dismissed.

McIVER, A. J., and HASKELL, A. J., concurred.

12 S. C. *32

*(Case No. 727.)

JOHN A. and ASHBEL G. BRICE, as Administrators, v. S. P. HAMILTON and W. A. WALKER.

(April Term, 1879.)

[1. *Appeal and Error* ⇐284.]

Exceptions, which raise questions purely legal, may be reviewed, on appeal, by this court, although no motion was made before the Circuit judge for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1669; Dec. Dig. ⇐284.]

[2. *Payment* ⇐71.]

A naked intent in the mind of a debtor, not disclosed or communicated to his creditor, as to the application to be made of moneys paid to such creditor, may not be proven.

[Ed. Note.—Cited in Bolt v. Dawkins, 16 S. C. 210.

For other cases, see Payment, Cent. Dig. § 219; Dec. Dig. ⇐71.]

[3. *Witnesses* ⇐175.]

Section 415 of the code renders a party in interest incompetent to testify as to transactions or communications had by him with a person deceased, in certain cases, and such incompetency is not removed by the introduction of testimony other than that of the representative of the deceased as to the same matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 715; Dec. Dig. ⇐175.]

[4. *Evidence* ⇐271.]

A memorandum in the handwriting of the deceased, found after his death among his papers, is not admissible in evidence, in behalf of his representatives.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068–1079, 1081–1104; Dec. Dig. ⇐271.]

[5. *Payment* ⇐71.]

The jury were charged that the intention and purpose of the debtor when he made the payment, were to be taken by them as evidence of the application. *Held*, erroneous.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 219; Dec. Dig. ⇐71.]

[6. *Payment* ⇐39.]

When the debtor directs no application at the time of payment, the rule is that the creditor may make the application at any time before judgment or verdict. Heilbron v. Bissell, Bail. Eq. 430, approved, and Jones v. Kilgore, 2 Rich. Eq. 63, limited.

[Ed. Note.—Cited in Wiesenfeld, Stern & Co. v. Byrd, 17 S. C. 114; Bell v. Bell, 20 S. C. 46; Thatcher & Co. v. Massey, 20 S. C. 548; Hooper v. Hopper, 61 S. C. 137, 39 S. E. 366; William Mulherin Sons & Co. v. Stansell, 70 S. C. 570, 50 S. E. 497.

For other cases, see Payment, Cent. Dig. § 113; Dec. Dig. ⇐39.]

[7. *Evidence* ⇐408.]

A receipt may be open to explanation, notwithstanding the death of the party to whom it was given.

[Ed. Note.—Cited in Robinson v. Robinson, 20 S. C. 572.

For other cases, see Evidence, Cent. Dig. § 1829; Dec. Dig. ⇐408.]

Before Aldrich, J., at Chester, November, 1878.

This was an action on a sealed note, given by defendant, Hamilton, as principal, and Walker as surety, to C. S. Brice, the intestate of the plaintiffs. The answer admitted the execution of the note but plead payment, and set out the payment of several sums of money at various dates, by Hamilton to C. S. Brice, and the same payments were also set up by Hamilton as a counterclaim, for money had and received. The plaintiff, in reply, not admitting the counterclaim, alleged that Hamilton was largely indebted to their intestate upon other claims,

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and that moneys *received from Hamilton had been applied by their intestate to such other claims. At the trial the defendant proved by witnesses the receipt by C. S. Brice, of an amount collected on judgment against J. G. Gaffney, and of other moneys belonging to Hamilton. The plaintiff proved that C. S. Brice held other claims against Hamilton besides the notes sued on—a Carter judgment and a due-bill. Hamilton was asked by his counsel as to these several payments and receipts, "what was your intention and purpose, when you allowed C. S.

Brice to keep this" money? The questions were objected to, but the court admitted them, and exceptions were taken. The plaintiffs offered in evidence a memorandum found among the papers of their intestate, signed by him and proved to be in his handwriting, which was a statement of amount collected on a certain claim, with a balance stated to be "due Hamilton, to be credited on Carter judgment." Defendants objected, the objection was sustained and plaintiffs excepted. Plaintiffs proved, by a witness, a receipt from Hamilton to their intestate in full of moneys collected on a judgment of S. P. Hamilton v. J. G. Gaffney. Defendants, in reply, introduced Hamilton to prove that out of the moneys so receipted for, $100 were retained by Brice. Objection by plaintiffs to this testimony was overruled and exception taken.

The plaintiffs then asked the court to charge the jury, that as there was no evidence of application by either the debtor or the creditor of any of the payments proved, the law would then apply all the payments to the satisfaction of the judgment, and the due-bill held by C. S. Brice against S. P. Hamilton, because these debts were unsecured, while the note in suit was secured by a surety. The court refused so to charge, to which the plaintiffs excepted. The plaintiffs further asked the court to charge that a receipt, after the death of the party to whom it was given, was conclusive evidence of settlement in full of the matters therein referred to, unless fraud or mistake were proved, and, therefore, that the receipt set forth above must be taken as a settlement in full, between C. S. Brice and S. P. Hamilton, of the money received from the Gaffneys. The court refused so to charge, to which the plaintiffs excepted.

The court charged the jury that the in-

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tentions and purposes of *the debtor, when he made the payments, were to be taken by them as evidence of application. To which the plaintiffs excepted.

The court further charged the jury that if there has been no application of the payments proved, then they must apply them, as Hamilton intended they should be applied —to the Walker note. To which the plaintiffs excepted.

The jury thereupon found a verdict for the defendants, and for the defendant, S. P. Hamilton, the sum of $37.55.

No motion was made for a new trial before the Circuit judge. The plaintiffs appealed and moved this court for a new trial, upon the ground that there was error in the several rulings and charges to which exceptions had been taken by them.

Mr. A. G. Brice, for appellant.

Messrs. J. & J. Hemphill and J. H. Rion, for respondent.

April 28th, 1879. The opinion of the court was delivered by

WILLARD, C. J. This action was by the administrators of C. S. Brice upon a sealed note, the property of their intestate, and the defence consisted of various payments and counter-claims. The evidence disclosed various pecuniary transactions between the defendant, S. P. Hamilton, and the intestate, involving the receipt, by plaintiff's intestate, of various sums of money which defendants claim should have been applied as payments on account of the sealed note in suit, and which plaintiffs contend should be applied to others items of account between the original parties. The question at issue was the right of the plaintiffs to make such application. Various exceptions are presented, some relating to the admissibility of testimony, and others relating to charges by the judge, and refusals to charge. The verdict was for the defendants, and the plaintiffs appeal. A general objection is made by the defendants to the effect that no application was made to the Circuit judge for a new trial, but the appeal is directly from the judgment, and, therefore, as they contend, the exceptions taken at the trial cannot be heard. There is no ground for such an objection. It was competent for

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the plaintiffs to *have moved before the Circuit Court for a new trial, but as the objections to the verdict relate to matters of law alone, and could be heard in this court, the appellants were not bound to submit them to the Circuit judge, on a motion for a new trial, before appealing to this court. There is no provision of the code exacting any such condition to an appeal to this court, and no antecedent practice from which such a rule could be inferred. An appeal from a judgment involves any intermediate order involving the merits and necessarily affecting the judgment, (Code, § 11,) and this includes all rulings and charges material to the judgment.

The exceptions relating to the admissibility and competency of testimony will be next considered. The court admitted, against the objection of the plaintiffs, the testimony of the defendant, S. P. Hamilton, as a witness, to the effect that at the time when certain payments were made by Hamilton to the intestate, it was the intention and expectation of the defendant, Hamilton, that such payments should be applied to the note in suit, without any attempt to show that any disclosure or communication of such intent or expectation was made to the intestate. In order to show an intent to apply the payments then made, which the debtor had an undoubted right to do, it was necessary to bring that intent home to the party receiving the money.

It is questionable whether a naked intent, unaccompanied by any appropriate act or

declaration, can be proved in any case. Usually, intent is inferred from the acts and declarations forming part of the res gestæ of a transaction, of which intention is an important legal element. In a very limited and exceptional class of cases, the intent, inferable from the res gestæ, may be rebutted by direct proof, but this is not such a case. The effect of a direction as to application, made by one paying money to another, is in the nature of a contract, attaching a condition to the payment by the fact of acceptance, and an undisclosed intent could produce no such effect. The objection just considered was made to several distinct offers of testimony, which need not be separately considered, as the

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application of the foregoing princi*ples is the same in each instance. The rulings admitting such testimony of naked intent were clearly erroneous.

The defendant, Hamilton, as a witness in his own behalf, was questioned as to his having given a direction to the intestate at the time of certain payments made, or credits given to him by Hamilton, as to the application of such payments or credits. Objection was made to such testimony. Some difference of statement exists as to the fact whether the competency of Hamilton to testify as to a communication with the intestate, as against his administrators, (Code, § 415,) was raised in the Circuit Court. The counsel for the defendant, Walker, distinctly admits that such was the ground of objection, and that is sufficient to entitle the question to be considered. Hamilton was clearly incompetent to give such testimony, as it related to both a communication and transaction between himself and the deceased, sought to be given by a party to the suit as against the administrator of the deceased. Code, § 415.

It was contended, however, that Hamilton was qualified to testify as to the matter, by the fact that such matter had been introduced, in the first instance, by a witness called by the plaintiffs. Had either of the plaintiffs, the administrators of Brice, testified personally to such communication or transaction, as parties to the suit, the defendant, Hamilton, would have been competent, as a witness, to give testimony as to such communication or transaction. Code, § 415. The reason of this provision of the section is, that if one party avails himself of this class of testimony, it is fair that it should also be available to the other. But in this case such testimony was not given by a party to the suit, so that the defendant, Hamilton, was not within that exception to the general provisions of Section 415.

A memorandum offered in evidence by the plaintiffs, as made by the deceased in his lifetime, and found among his papers at his death, tending to show an intent and purpose to make the application contended for in his behalf, at the time of the receipt of certain moneys paid to him by the defendant, Hamilton, was excluded by the court. This testimony was properly excluded as a mere declaration of the deceased.

The court charged "that the intention and

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purpose of the *debtor when he made the payment was to be taken by them as evidence of the application." To this plaintiffs excepted. This involves the erroneous proposition that what a party intended to do in a given case is proof of what he did do.

The court further charged "that if there had been no application of the payments proved, they must apply them as Hamilton intended they should be applied to the Walker note." To this the plaintiffs excepted. The general rule of the application of payments was settled in Heilbron v. Bissell, Bail. Eq. 430, as follows: "If the debtor, at the time of making a payment, does not direct to which of several accounts on which he is indebted the payment shall be applied, the creditor is entitled to make the application, and is not limited as to the time within which he may do so." This rule had been practically acted upon in the previous case of Stewart v. Cochran, Bail. Eq. 380.

What was said in the subsequent case of Jones v. Kilgore, 2 Rich. Eq. 63, cannot be regarded as affecting the authority of Heilbron v. Bissell. In Jones v. Kilgore there had been an application by the debtor as evidenced by certain acts of the creditor, as was there decided. It was not necessary, therefore, to state the consequences of a failure on the part of both the debtor and creditor to make the application, and yet it was said "there is no doubt, if no directions are given by the party making the payment, the right to make the application is with the party receiving. If neither party has fixed the application, it devolves on the court, and will be made pro rata to the demands held by him who receives the money, against him who paid it, or, if one of the demands be less secured than the others, the application will be made to it in the first instance." The citations to this statement are 5 Mason 82; 4 J. J. Marsh. 97; 9 Cow. 420. No reference whatever is made to the well-reasoned case of Heilbron v. Bissell, or to the case of Stewart v. Cochran, which that case followed.

It cannot be denied that equity sometimes follows the principles here indicated, but only when there is a state of equities between the parties that forbids the application of the legal rule. An intimation to that effect is found in the opinion in Heilbron v. Bissell. It must be concluded that the case was not

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brought *to the attention of the court in Jones v. Kilgore, as it is not cited or commented upon, and, therefore, no intention to overrule it can be implied. Jones v. Kilgore does not determine when the creditor must

signify his application, and that is the point of the whole matter, but simply declares the consequences in the event that no application should be made by either debtor or creditor. The effect of Heilbron v. Bissell is to allow the creditor to make such application at any time before judgment or verdict, and there is nothing in necessary conflict with this in Jones v. Kilgore.

As the point was not necessary for decision in the last-named case, it cannot be regarded as decided with such effect as to overrule Heilbron v. Bissell and Stewart v. Cochran.

In the present case the matters at issue, under both the complaint and answer, were purely of legal cognizance, and, therefore, the legal rule of application was proper to be applied. But had the issues been such as belonged properly to equity, Heilbron v. Bissell is an authority that that circumstance alone would not have justified a court of equity in departing from the legal rule on the subject. The charge was, therefore, erroneous in laying down the rule of applying payments. In the absence of proof of application on the part of the defendant, Hamilton, at the time of making payment, the plaintiffs, as administrators of the creditor, are entitled to apply the payments by means of their action.

The proposition of the plaintiffs that a receipt is not open to explanation after the death of the party to whom it was given cannot be supported.

There must be a new trial.

Motion granted.

McIVER, A. J., and HASKELL, A. J., concurred.

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12 S. C. *39

*(Case No. 728.)

LUCY H. ALEXANDER v. WILLIAM L. HAMILTON.

(April Term, 1879.)

[*Dower* ⊂⊃85.]

Lands sold at sheriff's sale during coverture may be assessed, by commissioners in dower, at a greater valuation, at the date of sale, than the price for which they sold.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 325; Dec. Dig. ⊂⊃85.]

Before Aldrich, J., at Chester, November, 1878.

This was an appeal from the Court of Probate. The plaintiff was the widow of Sample Alexander, and demanded dower in a tract of land belonging to defendant. The land had been sold as the property of Sample Alexander, in 1868, during his lifetime, under a judgment upon which there was due over $2000. It was purchased by the brother of the plaintiff in that judgment for $500, and re-sold by the purchaser, in 1875, for $1500. The commissioners in dower valued the land, at the time of sale, at $1031.25, and assessed the widow's dower at $171.87. One of the commissioners, sworn as a witness, said he wanted the land when sold in 1868, and would have given $1031.25 for it, but did not bid, as he heard it was being sold under a judgment for a large amount. There was no other testimony. The judge of probate confirmed the return, and, upon appeal to the Circuit Court, his decree was affirmed.

Defendant appealed to this court, upon the ground that the value of the land, at the time of alienation, was ascertained by the positive proof of the sale by the sheriff and his deed, and that the valuation by the commissioners was merely speculative, and should be set aside.

Mr. S. P. Hamilton, for appellant.

Messrs. J. & J. Hemphill, for respondents.

April 28th, 1879. The opinion of the court was delivered by

McIVER, A. J. The only question in this case is whether commissioners appointed to

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admeasure a widow's dower in land, *which had been sold by the sheriff under executions against the husband, during his lifetime, are obliged to adopt the amount which the land brought at such sale as "the value of the land at the time of alienation," or whether they may not make their own estimate of such value. The language of the statute would seem to furnish a conclusive answer to this question. It is as follows: "On all assessments of dower against a purchaser, in behalf of a widow of a former owner, the value of the land at the time of alienation by the husband, with interest from the accrual of the right of dower, shall be taken and received by the courts of this state as the true value on which to assess the said dower." Gen. Stat., ch. CXIII., § 7, p. 530. The object of this statute, which was originally passed in 1824, was to fix the time at which the value of the land was to be ascertained, and thereby settle what had previously been a disputed question. If, therefore, the legislature had designed that the amount which the land brought at such alienation should be the test of its value, they would, doubtless, have said so. The mind of the legislature was at the time turned towards the purpose of making the law upon this subject definite and certain, and if they had intended to establish a rule by which the value could be definitely measured, as well as to fix the time when such rule should be applied, they certainly would have said so. Again, it would seem to be a work not only of supererogation, but of needless delay and expense, to appoint commissioners to fix an amount which could be as easily fixed by an inspection of the sheriff's books. But, in addition to this, we would be slow to conclude, in the absence of any express declaration on the part of the legislature, or an ab-

solutely necessary inference from what they have said, that they intended to establish a rule which would in many cases work the grossest injustice, and tend to impair materially the value of a right which is said to be favored in law. For experience demonstrates that a forced sale by a sheriff, under an execution, furnishes a very insufficient test of the real value of the property so sold.

No case has been cited which is directly in point, but the appellant contends that Brown v. Duncan, 4 McC. 346, furnishes ground for his position. That case, however, at the ut-

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most, *only holds that where the land was sold, at a public sale, for $40,000, and the commissioners in dower based their assessment upon an estimated value of $30,000, under the idea that the land had deteriorated in value between the time of the sale and the death of the husband, thus disregarding the provisions of the act of 1824, such estimate was erroneous, because it was in violation of the provisions of that act. But the question as to the rule by which the value is to be ascertained is not considered or determined. Reliance is also placed upon Keith v. Trapier, Bail. Eq. 63, or rather upon the following language, extracted from the decree of the Circuit Court in the case: "The value cannot be ascertained by any better test than what the property actually brought on sale." This language, however, must be construed in reference to the circumstances of the case in which it was used. These circumstances were as follows: "The husband of the dowress had contracted to sell the land to one Anderson for the sum of $34,000, but in order to disencumber the title it was agreed that the land should be sold under a judgment for foreclosure of a mortgage which rested upon it, and that Anderson should bid it off provided it did not go beyond the stipulated price, and if he should bid it off for less than that price, he was nevertheless to pay such price to the husband." At the sale the land was bid off for $27,000, and Chancellor Harper, in determining whether the amount actually agreed to be paid or the amount bid at the sale should form the basis for the assessment of the widow's dower, uses the language above quoted, and held that the price actually agreed to be paid, and not the amount bid at the sale, should form the basis for the assessment of the dower. This shows very clearly that, in the opinion of that distinguished Chancellor, the amount for which land is bid off at a public sale is not the absolute test of its value by which an assessment of dower is to be made. These two cases can, at most, only be said to establish the proposition that commissioners in dower, in estimating the value of land which has been sold during the coverture, will not be allowed to estimate such value at a sum less than the amount which such land actually brought at such sale, but they are very far from establishing the further proposition that they will not be allowed to estimate such

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value at an amount *greater than that which it brought at such sale. We think, as was said by the Circuit judge in Russell v. Gee, 2 M. Con. Rep. 255, that proof of the amount which the land brought at the sheriff's sale is far from conclusive evidence of "the value of the land at the time of the alienation."

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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12 S. C. 42

(Case No. 729.)

JOHN S. BRATTON v. WILLIAM N. GUY and NEELY SMITH.

(April Term, 1879.)

[1. *Limitation of Actions* ⇐6.]

An action for deficiency in quantity of land, founded upon the usual covenant of warranty in a deed of conveyance executed in 1858, is barred by the statute of limitations in four years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 28; Dec. Dig. ⇐6.]

[2. *Limitation of Actions* ⇐6.]

The limitations prescribed in Part 2, Title 2 of the code of procedure, do not apply where the right of action accrued before the adoption of the code; such cases are governed by the statute of limitations of force at the time. It was not the intention of Section 7, Chapter CXLVI., of the General Statutes, to give to actions any new or different period, but simply to declare that they should continue under the operation of the limitations applicable to them in then existing laws.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 28; Dec. Dig. ⇐6.]

[3. *Limitation of Actions* ⇐6.]

[Where a cause of action on a covenant of warranty was renewed by stipulation after expiration of the period of limitation, the new cause of action is governed by the statute in force when the original covenant was entered into, though a new statute of limitation was in force before the expiration of the period under the statute in force when the original covenant was entered into.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 28; Dec. Dig. ⇐6.]

[4. *Limitation of Actions* ⇐47.]

[An action for deficiency in quantity of land, founded on the usual covenant of warranty, accrues at the time the deed is executed, and limitations begin to run from that time.]

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 255; Dec. Dig. ⇐47.]

Before Aldrich, J., at Chester, November, 1878.

This was an action commenced in November, 1875, for breach of warranty contained in deed from J. G. Smith to plaintiff on January 8th, 1858. The alleged breach was

a deficiency in the number of acres, and also in a lot at a railroad station. The deficiency was clearly proven. The defendants claimed title under J. G. Smith, exactly how does not appear. The defendants plead the statute of limitations. It appeared in testimony that the defendant, Guy, and one Smith, as executors of J. G. Smith, sued Bratton, the

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plaintiff here, for balance due on his *bond for purchase money of this land, and recovered a verdict March 15th, 1869. Upon the declaration in that case was endorsed, in the handwriting of the attorney for Guy and Smith, executors, the following: "It is understood that the verdict in this case has been agreed upon without prejudice to the defendant's claim on the warranty." (Signed,) Melton, Hart & Melton, plaintiffs' attorneys.

At the close of testimony for plaintiff, the defendant moved for a non-suit. The court overruled the motion and defendants excepted. The defendants requested the judge to charge the jury that the action was barred by the statute of limitations, and plaintiff cannot recover. This was refused, and exception taken. The jury found a verdict for plaintiff. Defendants appealed to this court, upon the exceptions taken in the court below.

[For subsequent opinion, see 15 S. C. 609.]

Messrs. Patterson & Gaston, for appellants.

Mr. S. P. Hamilton, for respondent.

April 28th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The action was on a covenant of warranty for a deficiency of land existing at the time of conveyance, and the right of action accrued immediately. The then existing statute of limitations barred such an action, unless prosecuted within four years next after the cause of action arose. It is contended, however, that the cause of action was revived by an admission, in writing, made by the present defendant after the time for the prosecution of the action had expired; but it also appears that more than four years elapsed after such alleged admission and before the commencement of the present action. To this it is contended that the period of four years had not expired fully at the time of the adoption of the general statutes, but was then running, and that under the operation of Section 7 of Chapter CXLVI. of the General Statutes, the period of limitations, which was changed from four years to twenty years, as it regards actions on sealed instruments, and from four years to six as it regards actions on contracts not under seal, (Code, § 114,) is that prescribed for actions brought under the

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code. It is contended that if such is *the construction of the general statutes the action was not barred, and there was no error in the ruling of the Circuit judge excluding the defendant from the benefit of such statute of limitation. Section 113 of the code fixes the period of limitation for actions on sealed instruments at twenty years, and on all other contracts, express or implied, at six years. These provisions are subject to the general provisions contained in Sections 96 and 97. Section 96 provides that "the provisions of this title shall not extend to actions already commenced or to cases where the right of action has already accrued, but the statutes now in force shall be applicable to such cases according to the subject of the action and without regard to the form." In the final chapter of the general statutes the following section occurs: (Gen. Stat. 767, § 7.) "When a limitation or period of time prescribed in any of the acts repealed for acquiring a right or barring a remedy or any other purpose, has begun to run, and the same or similar limitations is prescribed in the general statutes, the time of limitation shall continue to run and have like effect as if the whole period had begun and ended under the operation of the general statutes." The question is, what time of limitation is here spoken of as continuing to run? certainly the time prescribed by some repealed statute. The effect of the running of such time is assimilated to that of a like or a similar term, commencing and ending under the statute, and, therefore, clearly a time prescribed by a repealed statute must be intended. It is not said that the period of time prescribed by the repealed statute shall be converted into the corresponding period of time provided by the general statutes, which would be necessary to sustain the argument of the plaintiff. On the contrary, the former period, namely, that prescribed by the repealed statute, is to continue to run, and only its effect, when completed, is declared by this section. The expression, "continue to run," shows clearly that that period was to continue to run which was fixed by the repealed statute, and not a period substituted therefor. We are compelled to give this section effect, together with Section 96, and in doing so it is not difficult to conclude that the object of this section was merely to give to the expiration of the period prescribed under a previous statute, and which had commenced

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to run before the adoption of *the general statutes, the same force and effect as by these statutes is given to the expiration of the period therein fixed in their application to the cases to which they are applicable. The necessity for such a provision is not apparent, but it cannot have the effect claimed for it by the plaintiff, for that would be to repeal Section 96. We must, therefore, conclude that the right of the plaintiff, if he had any, to sue upon the alleged admission,

expired in four years after such right accrued and before the commencement of the present action. It was argued that an action of debt on specialty could have been brought on the original covenant of warranty, and that such action could only be barred by presumption of payment before the code, and by lapse of twenty years under the code.

We must assume that the covenant of warranty, which is not set forth in terms, is in the usual form. If so, only unliquidated damages could be claimed under it, and, of course, an action of debt could not be maintained. Besides, it would be a mere evasion of the statute barring actions on covenant in four years. Whether the covenant of warranty might not have existed in a form that would support an action of debt, is not a question here; in the ordinary form, it certainly can have no such effect.

There must be a new trial.

New trial granted.

McIVER, and HASKELL, A. J.'s, concurred.

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12 S. C. 45

(Case No. 730.)

CARSON WARREN v. D. P. LAGRONE and J. H. LAGRONE, Executors of JACOB LAGRONE.

(April Term, 1879.)

[1. *Trover and Conversion* ⇐13.]

Where personal property has been converted and sold, an action lies either for damages for the conversion, or for the recovery of the proceeds of sale.

[Ed. Note.—Cited in Williams v. Dobson, 26 S. C. 112, 1 S. E. 421.

For other cases, see Trover and Conversion, Cent. Dig. § 103; Dec. Dig. ⇐13.]

[2. *War* ⇐31.]

An order from a subordinate military officer of the United States army forbidding interference with certain cotton "except in due and proper form," and an order from the com-

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manding general in Georgia, relating *to matters in his own department, are not within the terms or contemplation of "An act to grant rights vested under military orders," approved September 22d, 1868. Gen. Stat. 506.

[Ed. Note.—For other cases, see War, Cent. Dig. § 212; Dec. Dig. ⇐31.]

[3. *Trial* ⇐273.]

Exceptions cannot be taken after verdict rendered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 681; Dec. Dig. ⇐273.]

[4. *Appeal and Error* ⇐854.]

This court cannot consider grounds of appeal based solely upon surmise and conjecture, as to the data upon which the jurors arrived at their conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3430; Dec. Dig. ⇐854.]

[5. *New Trial* ⇐162.]

Under motion for new trial on the minutes upon the ground of excessive damages, the Circuit judge has power to order a new trial to be had, unless the plaintiff enter a remittitur for a certain specified amount.

[Ed. Note.—Cited in Finch v. Finch, 21 S. C. 344; Stuckey v. Atlantic Coast Line R. Co., 57 S. C. 399, 401, 35 S. E. 550; Hall v. Northwestern R. R. Co., 81 S. C. 533, 62 S. E. 848; Southern Power Co. v. White, 92 S. C. 220, 75 S. E. 459.

For other cases, see New Trial, Cent. Dig. § 324; Dec. Dig. ⇐162.]

[6. *Appeal and Error* ⇐110.]

[Cited in Kaminitsky v. Northeastern R. Co., 25 S. C. 66, to the point that no appeal lies from the ruling of a circuit judge on a motion for a new trial on the ground of insufficient evidence or excessive damages.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 740; Dec. Dig. ⇐110.]

Before Carpenter, J., at Edgefield, April, 1876.

This was an action of assumpsit brought by the plaintiff in 1866, against Jacob Lagrone, for the value of certain cotton. The defendant dying after action brought, it was revived against his executors. Plaintiff then filed an amended complaint, demanding judgment for $3765, for nineteen bales of cotton, and for $2922.80, for sixteen bales of cotton. The demands were set forth rather in the form of a declaration with several counts, one on a quantum meruit, another on account stated, &c. The defendants accepted service of this amended complaint on March 16th, 1870, in words following: "We accept service of amended complaint, and waive all irregularities as to additional cause of action." The defendants set up two sealed notes in discount. Also that plaintiffs' claim had been adjudicated in 1865 by the military authorities, as appeared by the following papers:

Edgefield C. H., S. C., August 10th, 1865.

Whereas, it has appeared to my satisfaction that Jacob Lagrone, a citizen of this district, is entitled to the unmolested possession and sale of a certain lot of cotton claimed to have been purchased by Carson Warren, also a citizen of this district:

It is hereby ordered that the said Warren refrain from any interference with the said Lagrone, or his agents, or the cotton in dispute between them, except in due and proper form; and that if he does so interfere he will lay himself liable to arrest and punishment. (Signed)

Witness: L. W. Metcalf,
C. Butler. Captain 33d U. S. C. T.
P. Lagrone.
Commanding Post Edgefield, S. C.

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*Headquarters, Depart. of Georgia,
Augusta, August 31st, 1865.

The cotton sold by Lagrone, which had previously been sold to Warren, will be delivered to Simons, to whom Lagrone sold it. Dr. Lagrone called on me some four weeks

since, and stated all the facts in this case, and I advised him to sell the cotton.

(Signed)

James B. Steadman,

Major-General Com.

At the trial plaintiff introduced testimony to show the purchase of the cotton by him from Lagrone, and the price of cotton in 1865, and its sale by Jacob Lagrone. Defendants moved for a non-suit, upon the ground that the action should have been trespass or trover, and not assumpsit. The motion was refused and defendants excepted. The defendants offered in evidence the papers set forth in their answer together with statement of Capt. Metcalf; his Honor ruled them inadmissible, and defendants excepted. The defendants introduced testimony to show that the cotton belonged to Jacob Lagrone at the time he sold it. They also proved their notes.

The jury found a verdict in favor of plaintiff for $5933.82.

Defendants moved for a new trial on the minutes, upon the following grounds:

1. Because his Honor erred in overruling the motion of defendants' counsel for a non-suit, made upon the grounds that the testimony in behalf of plaintiff showed that the action was improperly brought; that the action should have been trespass or trover, and not assumpsit; and in allowing the plaintiff to go to the jury upon the pleadings as presented.

2. Because it is respectfully submitted his Honor the presiding judge erred in not allowing full force and effect to the act of the general assembly of this state, entitled an "Act to quiet rights vested under military orders," approved and ratified on the 22d day of September, A. D. 1868; the defendants' testator, Jacob Lagrone, having under and by virtue of the military orders of Capt. L. W. Metcalf, 33d U. S. colored troops, then stationed at Edgefield C. H., and the orders

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of Major-General *James B. Steadman, stationed at Augusta, Ga., against rights which were intended to be, and were, as defendants submit, quieted and determined by said orders; and in not allowing full force and effect to said orders issued in August, 1865.

3. Because his Honor erred, as it is respectfully submitted, in not instructing the jury upon the evidence that the said testator having acted in the alleged conversion and sale of the cotton in question, under and by virtue of the said military orders, he should not have been held accountable either for the cotton, its value, or for interest from the date of the alleged conversion and sale.

4. Because his Honor erred in his instructions to the jury that they should allow interest from the date of the alleged conversion, whereas interest, if allowed at all, should have been allowed only from the date of the demand by plaintiff, and no demand was proved.

5. Because the jury, in arriving at their verdict, regarded the alleged contract for the purchase of the cotton as having been made with reference to confederate currency as a basis of value, whereas there was no proof to justify such a conclusion, but on the contrary there was positive and direct proof, uncontradicted and unimpeached, that said contract was made with reference to gold and silver.

6. Because the testimony showed that the value of the cotton alleged to have been converted, at the date of the alleged conversion, was twenty-one and one-half cents per pound; and the jury erred in estimating said cotton at said time at thirty-five cents per pound.

7 Because, it is respectfully submitted, the jury erred in disregarding the testimony that established the fact that the contract between plaintiff and defendants' testator was rescinded previously to said alleged conversion, inasmuch as the cotton was not to be delivered until paid for, and no tender of payment was ever made.

8. Because it is respectfully submitted that his Honor erred in charging the jury, as matter of law, that the contract had not been rescinded, instead of charging that there

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was testimony to *show that the contract had been rescinded, and tending to show that defendants' testator had a right to sell the cotton.

9. Because the verdict of the jury was excessive, oppressive, not warranted by the law and evidence, and contrary to the law and evidence.

The order upon the motion for a new trial is as follows:

1. It is ordered that the motion in arrest of judgment and all the grounds for new trial are overruled, except the ground as to excessive damages.

2. That the ground as to excessive damages be sustained.

3. That said motion for a new trial be and the same is hereby granted, unless the plaintiff within thirty days from the date hereof remit on the record the sum of $2975.82 of the verdict, as of the date thereof, in which case said motion is dismissed, without costs.

The defendants appealed to this court from so much of this order as—

1. Overrules the motion in arrest of judgment, and all the grounds of new trial, except the ground as to excessive damages.

2. As denies the motion for a new trial, in case the plaintiff, within thirty days from the date of said order, remits on the record the sum of $2975.82 of the verdict, as of the date thereof.

Mr. L. F. Youmans, attorney-general, for appellant.

Messrs. M. W. Gary and E. B. Gary, for respondent.

May 5th, 1879. The opinion of the court was delivered by

HASKELL, A. J. The first ground of appeal is that the Circuit judge erred in overruling a motion on the part of the defendants for a non-suit, made upon the ground that the testimony in behalf of the plaintiff showed that the action should have been trespass or trover, and not assumpsit.

The action was commenced in 1866, under the form of practice which existed prior to

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the adoption of the code of proced*ure. The pleading, as presented in the "case," contains the writ and an "amended complaint," upon which is the following endorsement: "We accept service of the amended complaint, and waive all irregularities as to the additional cause of action," dated March 16th, 1870, and signed by the attorneys for the appellants.

The complaint seems to have been again amended under an order of court, bearing date June 8th, 1874, and the cause was tried in 1876. This court is unable to perceive that the motion would have been sustained even under the former rules of pleading. It was optional with the plaintiff to sue for the proceeds of the sale of cotton, or for damages for the conversion thereof. The first would be an action of assumpsit for money had and received to the use of the plaintiffs, the second would be trover. The difference would have been in the rule by which the damages should be measured. But the fact is that the greater part of the proceedings and the trial took place after the adoption of the code, "and the rules by which the sufficiency of the pleadings is to be determined are those prescribed by this code of procedure." Gen. Stat. 604, § 163.

The amended complaint which is before us contains beyond question the requisites prescribed by section 165. The motion for a nonsuit was, therefore, properly refused.

For a second ground of appeal it is alleged that the judge erred "in not allowing full force and effect to the act of the general assembly of this state, entitled 'An act to grant rights vested under military orders'," approved September 22d, 1868. Gen. Stat. 506.

It is enough on this point to say that the military orders to which reference is made, do not purport to adjudicate any rights as to the ownership of the cotton, nor are they in other respects within the provisions of the act. One is an order from a subordinate officer forbidding Warren from interfering with cotton in possession of Lagrone, "except in due and proper form," while the other is an order issued by the officer commanding in the department of Georgia, and relates to transactions in that state. Neither comes within the terms or contemplation of the act, and, therefore, no question as to the force and effect of the act is before us.

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*The third, fourth and eighth grounds of appeal charge the judge with error of law in his instructions to the jury. The case, as made out by the appellants, shows no exceptions to the charge of the judge, and such exceptions cannot be taken after a verdict has been had. The third, fourth and eighth points are, therefore, not properly before this court, and need not be considered, though, perhaps, it may be as well to say that so far as is disclosed by the case, such exceptions, if they had been properly taken, would not have been of any avail to the appellants.

The fifth, sixth and seventh grounds are based solely upon surmise and conjecture as to what were the motives and reasons by which the jurors may have been influenced in arriving at their conclusion. Such suggestions may properly have been presented to the mind of the Circuit judge when he was considering the motion for a new trial, but they cannot come up on appeal, and, therefore, as to them the appeal must be dismissed.

The only remaining question in the case is raised by appeal from the order which determined that the damages were excessive, and granted a new trial, unless the plaintiff, within thirty days from the date hereof, remit on the record the sum of $2975.82 of the verdict, as of the date thereof, in which case said motion (for new trial) "is dismissed, without costs."

The appeal is from that part of the order which allows the plaintiff to remit the amount in excess, and thereby prevent a new trial being had.

It is well settled that this court has no power to review or correct the findings of fact in a trial by jury. Const., Art. IV., § 4. But it is provided that "the judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages." Gen. Stat. 636, § 288; vide, also, act of 1868, Gen. Stat. 497, § 4. From the decision of the Circuit judge on such motion, based upon error in fact, as for insufficient evidence or for excessive damages, there is no appeal. The Circuit Court, therefore, in such respect, is a court of final resort, and, except where especially directed by constitutional or statutory provisions, is to be governed in its proceedings by the principles of law and the rules of

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practice *which were of force and applicable to courts in the exercise of similar power prior to the adoption of the constitution in 1868. The practice of the Court of Appeals prior to 1868, before which court such motions were then heard, is too well settled to require more than a mere reference to the volumes of the reports of the adjudicated cases. In the case of Laney v. Bradford, 4

Rich. L. 2, the court, per Wardlaw, J., says: "These considerations induce the court to impose, upon the grant of a new trial in this case, extraordinary terms required by an extraordinary conjuncture of circumstances. The discretion of the court in imposing conditions upon the grant of a new trial may always be exercised according to the exigency of the case." A new trial was thereupon granted nisi. In Parker v. Walker, 12 Rich. 138, the court, per O'Neall, J., says: "Having thus the means of correcting the verdict and doing justice between the parties, we will pursue that course. A new trial is therefore granted, unless the plaintiff shall, within sixty days after notice of this order, enter upon the record a remittitur of so much of the verdict as shall exceed twenty-nine dollars and seventy-five cents." See, also, Walters et al. v. McGirt et al., 8 Rich. 287; Dotterer v. Bennett, 5 Rich. 295; Guerry v. Kerton, 2 Rich. 507; Farrand v. Bouchell, Harper 83. In fact, it requires but a glance at the authorities to show that where the proper limit of the damages was legally ascertainable, it was the common practice to grant the order nisi. 3 Graham & Waterman on New Trials 1162.

If the Circuit judge is empowered to grant a new trial because he considers the damages excessive, it is absolutely necessary to presume that he is able to fix damages which would not be excessive. If the plaintiff sees proper to reduce the verdict to that amount, no one can complain—most assuredly not the defendant.

If the plaintiff had obtained leave to remit before the defendant moved for new trial, the motion would rest, not upon the verdict as it had been, but as it was when the motion was made. The court certainly can grant leave to the plaintiff to do that which he could have done as of course on his own motion. The moment the reduction is made, the reason for a new trial has ceased to exist. The plaintiff in this case has remitted the amount, and the order of the Circuit

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judge stands, dismissing *the motion. We have no doubt of the power on the part of the Circuit judge to attach conditions to an order granting a new trial, and base such conclusion upon the reasons already given. From this decision there is no right of appeal.

The law is well expressed by Gray, J., in the following language: "Such a motion, so far as it depends upon the weight of evidence or other matter of fact, is exclusively addressed to the discretion of the presiding judge. When the damages awarded by the jury appear to the judge to be excessive, he may either grant a new trial absolutely or give the plaintiff the option to remit the excess or a portion thereof, and order the verdict to stand for the residue. Lambert v. Craig, 12 Pick. 199; Hurry v. Watson, 4 T. R. 659, note; Blunt v. Little, 3 Mason 102; Doyle v. Dixon, 97 Mass. 208.

The judgment must be affirmed.

Motion refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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12 S. C. 53

(Case No. 731.)

THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY v. THOMPSON EARLE and OWEN SMITH & CO.

(April Term, 1879.)

[*Equity* ⊂⊃415.]

While a judge, in an equity cause, may enlighten his conscience by the findings of a jury upon questions of fact submitted to them, the decree should be the conclusions of his own judgment on both law and facts; and a judgment in such a cause, resting wholly upon the verdict of a jury, is erroneous.

[Ed. Note.—Cited in Thorpe v. Thorpe, 12 S. C. 168; Ivy v. Clawson, 14 S. C. 273; Peake v. Peake, 17 S. C. 427; Brownlee v. Martin, 21 S. C. 402.

For other cases, see Equity, Cent. Dig. § 943; Dec. Dig. ⊂⊃415.]

Before Carpenter, J., at Richland, February, 1875.

The facts bearing upon the merits of the case are immaterial to a proper understanding of the opinion of the court. It was an action of interpleader, and the issues of facts raised between the defendants were submitted to a jury. The jury found a verdict

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*in favor of Owen Smith & Co. On the same day Earle moved for a new trial, and the motion was refused in these words: "That the motion for new trial be and is hereby overruled and refused."

From such refusal, and from the judgment entered up upon the verdict, the defendant, Earle, appealed to this court.

[For subsequent opinion, see 13 S. C. 44.]

Mr. J. P. Carroll, for appellant.

Mr. F. W. McMaster, for respondent.

May 5th, 1879. The opinion of the court was delivered by

McIVER, A. J. This was an action in the nature of a bill of interpleader under the old equity practice, and by it the plaintiff sought such relief as was administered only by the Court of Equity before that court was abolished. It must, therefore, be governed by the rules applying to actions which were formerly cognizable only by a court of equity. Regarding it in this light this appeal must be determined by the principles announced in the recent case of Sloan v. Westfield, 11 S. C. 445. It is very true that though this case is concluded by the decision in the case of Sloan v. Westfield, the practical result reached here is precisely the reverse of the

one reached in that case, but this is for the reason that in that case the appeal was only from the order of the Circuit judge refusing the motion of a new trial, while the appeal in this case is not only from such order but also from the final judgment. It appears from the record, as supplemented by the concessions made at the hearing, that the Circuit judge referred the issues of fact raised between the defendants to a jury for trial, not under an order framing such issues, as is the correct practice, but just as if the case had been an ordinary action at law, and upon their verdict judgment was entered without any hearing by the Circuit judge. This was clearly erroneous, as has been held in Flinn v. Brown, 6 S. C. 209; Gadsden v. Whaley, 9 S. C. 147, and Sloan v. Westfield, supra. For, as was said in Flinn v. Brown, and repeated in Gadsden v. Whaley, the parties in what is commonly called an equity case have a right to the opinion of the Cir-

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cuit *judge, notwithstanding his right to refer issues of fact to a jury for the purpose of enlightening his conscience, "but the verdict of the jury is not to be accepted as the conclusion which is to govern and control the case, and through the medium of which the judgment is to be pronounced in favor of one side or the other." The judgment in such a case must be the result of the conclusions of the judge, "both on the law and the facts," and as he, "in forming his conclusions," is not bound by the verdict of the jury, but may wholly disregard it, there is manifestly no necessity for or propriety in a motion for a new trial in such a case.

As it does not appear that the judgment appealed from in this case was upon a hearing by the Circuit judge after the verdict was rendered, but, on the contrary, as was conceded on the argument here, was simply entered upon the verdict as in an ordinary action at law, it cannot be allowed to stand. The consideration of the motion for a new trial cannot be regarded as such hearing, for the Circuit judge in refusing the motion for a new trial might have supposed, and, doubtless, did suppose, that he was not at liberty to disregard the verdict and form his own conclusions, but that he was confined to the inquiry whether the verdict was so manifestly against the weight of evidence as would justify him in exercising the power, given him by statute, of ordering a new trial in an ordinary action at law on the ground of "insufficient evidence."

The judgment of the Circuit Court is set aside, and the case is remanded to the Circuit Court for further proceedings in accordance with the practice herein announced.

Decree set aside.

WILLARD, C. J., and HASKELL, A. J., concurred.

12 S. C. *56

*(Case No. 733.)

CHESLEY D. EVANS v. JOHN D. McLUCAS and WILLIAM J. DICKSON.

(November Term, 1878.)

[1. *Mortgages* ⇐427.]

A prior encumbrancer is not a necessary party to a suit for foreclosure.

[Ed. Note.—Cited in Ex parte Mobley, 19 S. C. 339.

For other cases, see Mortgages, Cent. Dig. § 1284; Dec. Dig. ⇐427.]

[2. *Parties* ⇐75.]

Objections for defect of parties not taken by answer or demurrer are waived. Code, § 171.

[Ed. Note.—Cited in Anderson v. Baughman, 69 S. C. 40, 48 S. E. 38.

For other cases, see Parties, Cent. Dig. § 167; Dec. Dig. ⇐75.]

[3. *Covenants* ⇐5.]

It is settled in this state that the general covenant of warranty in a deed of bargain and sale, since the act of 1795, includes the various covenants in use in conveyances of land prior to that time.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 4; Dec. Dig. ⇐5.]

[4. *Vendor and Purchaser* ⇐310.]

Where defendant neither alleges nor proves damage to himself from outstanding prior encumbrances on land, he is not entitled to have a deduction on account of such encumbrances, in a suit upon the bond given for the purchase money.

[Ed. Note.—Cited in Lessly v. Bowie, 27 S. C. 198, 3 S. E. 198; Brown v. Thompson, 81 S. C. 382, 62 S. E. 440.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 905, 908; Dec. Dig. ⇐310.]

Before Townsend, J., at Marion, May, 1876.

In this case Hon. W. H. Wallace, Circuit judge, sat in the place of Associate Justice McIver, who had been of counsel in the cause.

The Circuit decree sets out all matters necessary to a full understanding of this case.

It is as follows:

This is an action for the foreclosure of a mortgage. In the complaint it is alleged that the bond was executed by the defendants on or about the 1st day of January, 1870, conditioned for the payment of $2,500 in two equal annual installments, with interest payable annually, from the 1st day of January, 1870; that the defendants, at the same time, to secure, the payment of said bond, executed a mortgage to the plaintiff of a certain tract of land, containing eighty-three and three-tenths acres; that on the 27th day of February, 1870, the bond and mortgage were consumed by a fire which destroyed the office of the plaintiff; that the condition of the bond and mortgage has been broken, and there is now due upon the bond the principal sum and interest, less a credit of an amount between $900 and $1000 paid by the defendant, McLucas, to Durham & Co. for the plaintiff

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on *the 1st day of January, 1871. The answer of the defendants admits the execution of the bond and mortgage, their destruction by fire, the fact of non-payment, the correctness of the credit to which the bond is entitled by reason of payments to S. A. Durham & Co. for the plaintiff, and feebly denies the correctness of the amount of principal and interest claimed in the complaint. The answer further alleges that the bond in question was given for the purchase money of the tract of land described in the mortgage. The various defences set up in the answer are:

1. That in March, 1866, the plaintiff executed a mortgage for the same tract of land described in the complaint to A. L. Evans, then commissioner in equity, to secure the payment of a bond then given to him for the purchase money, and that the bond is now unsatisfied and the mortgage effective, and that the owners of the same should be made parties to these proceedings before it is competent for the court to grant any orders directing a foreclosure and sale.

2. That at the time of the execution of the bond and mortgage by the defendants to the plaintiff, and the sale of the land, there were various judgments against the plaintiff, obtained at different times, and that others have been rendered since, none of which have been satisfied, but are now liens upon the land; that of the existence of any binding judgments at the time of the purchase of the land by them they had no knowledge or actual notice, and confiding in the plaintiff they made no inquiries or investigation; and that the holders of all the judgments, both prior and subsequent in date to the sale, should be made parties to these proceedings before a judgment of foreclosure can be rendered.

3. That when the trade with the plaintiff was made, it was done with the express condition and understanding that the plaintiff would remove the mortgage which he had given to A. L. Evans, and that he has not done the same, and his mortgage ought not to be foreclosed until this condition is complied with.

4. The proposition of law is here submitted, that all the plaintiff can properly claim is rent for the tract of land for the time it has been in their possession, and that the defendants are willing, under all the circum-

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stances, to pay rent, if it is dis*counted against the claim for amount paid by McLucas to Durham & Co. for the plaintiff.

At the hearing of this case, a motion was submitted by the plaintiff's counsel for judgment on the pleadings. The decision of this question was reserved by the court, and testimony was heard. As to the first defence, the defendants proved that they had express notice of the existence of the mortgage given to A. L. Evans before the purchase of the land and the execution of their mortgage, but stated that there was an express agreement that the plaintiff was to remove this mortgage by payment. There was no evidence that A. L. Evans was any party to or had any knowledge of this agreement.

The deed from the plaintiff to the defendants contained the usual clause of warranty. The case of Barkley v. Barkley, 14 Rich. Eq., [12] decides that a valuable agreement of this kind can be specifically enforced in the courts by the vendee against the vendor, but does not hold that the holder of the prior encumbrance, which it was agreed should be removed, is to be affected in any way in his rights. The existence of the agreement, then, does not entitle the defendants to the right in equity to have A. L. Evans made a party to this proceeding. His mortgage was on record within the time prescribed; and besides, the defendants had express notice of its existence. They purchased the land, subject to the lien of the mortgage. A. L. Evans was no party to the alleged agreement. The defendants, cannot, therefore, claim adversely to him. It seems they relied exclusively upon the integrity of the plaintiff and his warranty for protection against the prior encumbrance. What benefit will it be to them to make A. L. Evans a party to the proceeding? He does not seek to become a party. The respondents have their remedy on the agreement against the plaintiff, or can recover for breach of warranty.

There are prior judgment creditors who have a lien upon the land, with the exception, perhaps, of two of them, whose judgments may be satisfied by lapse of time. They are not seeking to be made parties. Of these judgments the defendants had constructive notice when they purchased the land. How is it to enure to their advantage to

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have the prior judgment creditors *made parties to the proceedings, I cannot see. They have been wanting in diligence in making inquiries about encumbrances, and must bear the legal consequences. As to subsequent judgment creditors, I can see no advantage to result to these defendants from making them parties.

But, it is urged, it is the practice of this court to make prior and subsequent encumbrancers parties to proceedings to foreclose a mortgage, so that all their rights may be adjudicated and adjusted without the multiplicity of suits. Such has not been the practice of the Court of Equity in this state. The only proper parties to an action of this kind, strictly speaking, are the mortgagor and the mortgagee and those who have acquired rights or interests under them subsequent to the mortgage. This is the rule. The mortgagee, even, has no right to make one who claims adversely to the title of the mortgagor, and prior to the mortgage, a party defendant

for the purpose of trying the validity of his adverse claim or title. But the mortgagee may make a prior encumbrancer a party to the action, for the purpose of having the amount of each encumbrance litigated; or he may, at his option, have the premises sold, subject to such prior encumbrance. I can find no authority directly supporting the doctrine that a mortgagor can claim the right to bring in, as parties to an action, prior encumbrancers of the land sought to be sold for foreclosure, particularly when their rights are not conflicting, or when they are, for the purpose of adjudicating them. In this action the court is not bound to make the prior judgment creditors or the holder of the prior mortgage parties in order to settle the rights of all the parties; nor is it necessary for the protection of the purchaser of the premises. He takes the interest of the mortgagee only under the sale. In fact, he will stand in his place, and all who are not parties to the proceeding are not affected thereby. The purchaser must inquire beforehand and ascertain definitely what he is to get by his purchase. The defendants are certainly not entitled to have unwilling parties made to this action simply for the benefit of the purchasers. If the junior judgment creditors are made parties, it will enure to their advantage alone.

The subsequent encumbrancers or judg-

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ment creditors are some*times made parties originally in actions of foreclosure. In the old practice in this state it has been done. But the mortgagee was the party who usually brought them in. The proposition that the defendants should be released from the contract, because of the encumbrances of this case and their want of diligence, and be allowed and required to pay only rent for the land, need not be considered by the court. To thus cancel the bond and mortgage and disregard the rights of the plaintiff, would be at variance with the law. I can find no authority to justify such action on the part of the court.

I am of the opinion that the plaintiff is entitled to his judgment of foreclosure and sale, without the addition of any other parties to the action, and it is so adjudged.

It is ordered that it be referred to S. G. Owens, clerk of this court, to ascertain the amount of the principal and interest due upon the bond, to secure the payment of which the mortgage sought to be foreclosed was given.

The defendants appealed to this court upon the following exceptions to the decree:

1. In that the judge, in his judgment, erred in holding that the plaintiff was entitled to have his mortgage foreclosed before he complied with his express agreement, when the mortgage was given, to remove a mortgage before that time given by him to A. L. Evans, commissioner in equity, on the same property.

2. In that the judge, in his judgment, erred in holding that the owner of the mortgage given by the plaintiff before the sale made by him to the defendants, was not a necessary party to the proceedings in this case.

3. In that the judge, in his judgment, erred in holding that prior judgment creditors of the plaintiff were not necessary parties to these proceedings, and notwithstanding two of the judgments had been recovered more than twenty years before the execution of the mortgage, and have since that time been renewed by the consent of the plaintiff.

4. In that the judge, in his judgment, erred in holding that subsequent execution creditors of the plaintiff were not necessary parties.

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*5. In that the judge, in his judgment, erred in ordering a foreclosure of the mortgage and in overruling the positions taken in defendants' answer.

Messrs. Johnson & Johnson, for appellants.

The court ought not to have ordered a foreclosure until after the vendor had removed the lien of the prior mortgage. 14 Rich. Eq. 12; 6 Johns. Ch. 398; Story Eq. Jur. 370, 785, 850; Moseley 318; 1 McM. 125. All encumbrancers should be parties. Story Eq. Pl. 193; 6 John. Ch. 450; 4 John. Ch. 605; 3 John. Ch. 459. Though encumbrancers in most cases may not be necessary parties, yet in a case like this, where the encumbrances are numerous, and some of them uncertain as to their validity, they ought all to be before the court.

Mr. C. A. Woods, for respondent.

Prior encumbrancers are not necessary parties. Pom. Rem., §§ 334, 342; 9 S. C. 197. Subsequent judgment creditors are proper but not necessary parties. Story Eq. Pl., § 193; 3 Johns. Ch. 459; Pom. Rem. 342. Defendants accepted title with full knowledge of the prior encumbrances, and must rely upon their warranty. And the removal of the prior mortgage was not a condition precedent. 14 Rich. Eq. 12. Defect of title cannot avail as defence until surrender of possession. 3 Rich. 196.

May 7th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The only objection for want of parties taken by the answer is that a mortgagee, prior to the plaintiff, is not joined. We held in Warren v. Burton, 9 S. C. 197, that a prior encumbrancer was not a necessary party to a suit for foreclosure. That case disposes of all question as to the alleged defect of parties, for the defendant not having raised any other question as to defect of parties, either by demurrer or an-

swer. such an objection is waived. Code, § 171.

The objection to the judgment, based on an alleged agreement to pay off all encumbrances on the premises, requires consideration. It appears that the plaintiff sold and conveyed to the defendant, with the usual

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covenant of warranty, and took back *a mortgage for the purchase money, which he is now seeking to foreclose. The defendant alleges outstanding encumbrances existing at the date of the conveyance with warranty, both by mortgage and judgment. He also alleges a parol agreement on the part of the plaintiff to pay off and discharge these incumbrances.

The Circuit judge does not pass directly upon the question of fact of the existence of such a parol agreement. It is placed in doubt by the evidence whether any distinct agreement of the character alleged, independent of what was accomplished through the covenant of warranty, was made between the parties. The covenant of warranty was itself a contract to pay the encumbrances in question. It is settled in this state, beyond dispute, that the general covenant of warranty, since the act of 1795, must be construed as containing the various covenants in use prior to that time in conveyances of land.

In Jeter v. Glenn, 9 Rich. 374, Wardlaw, J., held that the covenant of warranty embraces all the five English covenants, namely, that the vendor is seized in fee; that he has a right to convey; that vendee shall quietly enjoy; against encumbrances, and for further assurance. In Brisbane v. McCrady, 1 N. & McC. 104 [9 Am. Dec. 676], the existence of a covenant against encumbrances, as included in the ordinary covenant of warranty, was distinctly recognized. In Johnson v. Veal, 3 McC. 449, the same was held with regard to the covenant of seizin, and in reference to both the covenants of seizin and quiet enjoyment in Furman v. Elmore, 2 N. & McC. 189. The proposition above stated is based upon a construction of the act of 1795, and is so well settled and understood that it needs no particular consideration. Inasmuch, then, as there was an express covenant, under seal, between the parties, by which, in effect, the vendor bound himself to pay off all encumbrances on the land, the testimony as to a parol understanding may well be referred to this express contract as the contemplated means of enforcing that obligation. A parol contract, in addition to this formal one, would have been senseless and useless. We therefore conclude that the covenant of warranty was the obligation to which the parties looked as fixing

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*the duties of the vendor as it regards the discharge of encumbrances affecting the title to the land in question.

It appears that encumbrances, consisting of a mortgage and judgment, existed affecting the title of the land at the time of its conveyance by the vendor with warranty. Whether the mere fact of conveyance, with warranty, of an encumbered title constituted a breach from the moment of such conveyance, or only from the time when the covenantee sustained damage from the existence or enforcement of the encumbrance, need not be considered in this case. In Massachusetts and New York it is held that under such circumstances the covenant is broken from the time of the transfer of the encumbered title, but that covenantee can get only nominal charges, unless he has either been at cost to extinguish the encumbrance, or has suffered through its enforcement. Prescott v. Trueman, 4 Mass. 627; Delavigne v. Norris, 7 Johns. 358. It may be a question whether the case of Brisbane v. McCrady, 1 N. & McC. 104, assuming it to hold that the covenant is not broken until actual damage sustained, should not be restricted to contingent liabilities like that involved in that case, namely, a contingent right of dower dependent on surviving a husband, but it is not important to determine that question in the present case. The question is not directly that of the right to maintain an action for the breach of the covenant, independent of the question of damages, but whether the defendant has sustained any damage that should be allowed by way of counter-claim to the plaintiff's demand. It is very clear in all the authorities that no damage can be recovered until the vendee has either extinguished the encumbrance in whole or in part, and in that case to the extent of payment for the purpose and interest, or unless he has lost the land in whole or in part under such encumbrance. Brisbane v. McCrady, 1 N. & McC. 104; Prescott v. Trueman, 4 Mass. 627; Delavigne v. Norris, 7 Johns. 358.

It is well settled in this state that under the former practice, damages arising from a breach of covenant in conveyance of land, could be set up by way of discount against a claim for the purchase money, whether that claim was based on a parol contract or one under seal. Bell v. Huggins, 1 Bay 326;

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Sumter v. *Welsh, 2 Bay 558; O'Neall in Van Lew v. Parr, 2 Rich. Eq. 321; Garvin v. Cohen, 13 Rich. 153; Carter v. Carter, 1 Bail. 217; Taylor v. Fulmore, 1 Rich. 52. Such a defence can be made available under the code by way of counter-claim. But the defendant does not allege or prove any damage that can be deducted from the purchase money secured by the mortgage, and, therefore, the plaintiff was entitled to have his decree for the amount due on his mortgage.

and for the sale of the mortgaged premises for foreclosure.

The decree below must be affirmed and the appeal dismissed.

Decree affirmed.

HASKELL, A. J., and WALLACE, A. A. J., concurred.

12 S. C. 64

(Case No. 735.)

ROBERT ADGER v. WILLIAM M. BOSTICK et al.

(April Term, 1879.)

[*Homestead* ⇐128.]

Where an undefined homestead in a tract of land is excepted from the operation of a mortgage upon the entire tract, the extent of the homestead should be judicially ascertained before judgment of foreclosure is passed; such ascertainment to be by testimony taken before the court, or under a reference for that purpose, and not in the mode prescribed in the homestead acts of the general assembly.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 224; Dec. Dig. ⇐128.]

[This case is cited in Bostick v. Chovin, 55 S. C. 429, 33 S. E. 508, without specific application.]

Before Mackey, J., at Barnwell, September, 1878.

It would seem that the defendant executed a mortgage to the plaintiff upon a certain tract of land, excepting therefrom a homestead reservation, the limits of which were not defined either in the mortgage itself or by previous assignment. This action was brought by plaintiff to foreclose his mortgage, and defendant failing to answer, an order was obtained that a sale should be made "after a homestead has been set off to the defendant, Bostick, out of the mortgaged

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premises." Commissioners were *then appointed under the provisions of the homestead act of February 22d, 1873. The commissioners made their return, to which the plaintiff filed exceptions. After hearing testimony upon the matter of these exceptions, the Circuit judge set aside the return and assignment of homestead, and ordered a reappraisement by other appraisers named in the order. From this order the defendant, Bostick, appealed to this court.

Mr. J. C. Davant, for appellant.

Messrs. A. T. Smythe and A. B. Connor, for respondent.

May 26th, 1879. The opinion was delivered

PER CURIAM. We gather from the brief, which contains an imperfect statement of the proceedings in the case, that the decree of foreclosure is incomplete. The mortgage, in terms, excluded from the premises described in it a homestead reserver by the mortgagor, but such homestead is not defined as to its limits. It was necessary, therefore, that the extent of the homestead should be judicially ascertained before the judgment was complete. The extent of the homestead should have been ascertained in the manner in which all other facts are ascertained by a court of equity, either by testimony taken before the court or upon a reference to a master or referee, as the case may be. The act of 1873 prescribes the mode of setting apart the homestead where it is claimed out of property sought to be subjected to process, but does not preclude the court before which a question of homestead arises from determining that question in the mode employed for determining other questions of law or fact. We infer that the parties in the present case thought themselves bound to proceed in the mode pointed out by the statute. In this they were in error, and the order appointing commissioners, and all previous proceedings for the same purpose, must be set aside, and the cause remanded for the purposes already indicated.

Proceedings set aside.

McIVER and HASKELL, A. J.'s, concurred.

12 S. C. *66

*(Case No. 737.)

WILLIAM L. TRENHOLM, Executor, v. PETER C. GAILLARD, County Treasurer.†

(April Term, 1879.)

[1. *Taxation* ⇐527.]

A petition to the Circuit Court to have issues framed under act of June 9th, 1877, entitled "An act to prescribe the mode of proving bills of the bank of the state tendered for taxes, and the rules of evidence applicable thereto," dismissed—as the terms of that act, declaring that "in all proceedings by mandamus, or otherwise, to compel the reception of bills * * * an issue shall be framed under the direction of the judge, and * * * shall be submitted to a jury," authorized no new and specific proceeding, but were intended to regulate the framing and trial of the issues under established remedies then in common use.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 970–978; Dec. Dig. ⇐527.]

[2. *Taxation* ⇐527.]

The tender of the bills and their deposit with the clerk, was not the commencement of a legal proceeding, within the intent and meaning of this statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 978; Dec. Dig. ⇐527.]

Before Hudson, J., at Charleston, March, 1879.

This, and twelve other cases involving the same question, were brought before the Cir-

† Note—This case was carried by writ of error to the Supreme Court of the United States. By the decision of that court, filed March 22d, 1880, the judgment of this court was affirmed.—REPORTER.

cuit Court for Charleston county, by petitions, filed after the passage of an act entitled "An act to facilitate the collection of taxes," approved December 24th, 1878; and they were all heard together.

The prayer of the petitioners was granted by the Circuit judge, by an order directing the framing and submission of the issues specified in the act of June 9th, 1877, and at the same time he filed the following opinion:

These cases came up on petitions to be admitted to have issues framed pursuant to the act of June 9th, 1877, for bills of the Bank of the State of South Carolina, tendered in payment of taxes, prior to the act of December 24th, 1878. The question involved is, whether the latter act repeals the former, and if it does repeal it, whether such repeal

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is constitutional. The former *act is entitled "An act to prescribe the mode of proving bills of the bank of the state tendered for taxes, and the rules of evidence applicable thereto;" the latter is entitled "An act to facilitate the collection of taxes."

It has been repeatedly decided that, under the act establishing the Bank of the State of South Carolina, a contract was made by the state with the holders of the bills of such bank, that the same were receivable in payment of taxes.

It was important, in view of the difficulties connected with such bills, that the act of 1877 should be passed, so as to ascertain what bills were genuine, and not affected with the prohibitions. The act was passed with a view to the taxes of that year in which it was passed, and is to be construed by that light. The act itself recognized that bills might be tendered, and its provisions were intended to guard against the reception of bills which might be open to the objections which, according to the preamble of the act, would prevent their reception.

The tender of the bills to the treasurer, and his deposit of them with the clerk, operated as a conditional payment of the taxes for which they were tendered, which would become absolute upon the verdict of a jury in favor of the plaintiffs, upon the issues prescribed in the act.

The effect of the act was, that upon the tender of the bills, and their lodgment in the office of the clerk of the court, the first step had been taken in such proceedings as the act contemplated. The person tendering had become invested with a right to have the bills so lodged received for his taxes, in the event that he had established the facts, the burden of proving which had been put upon him by the act. And the state had become invested with a right to have such bills as had not been so proved, destroyed. It must, therefore, be construed, that upon a tender being made, and the bills sealed up and lodged with the clerk, such a proceeding had been commenced as the act contemplated. And it would follow, that a proceeding having been commenced, it could not be taken away by subsequent legislation.

The act of 1878 is not inconsistent with such view, for its third section seems to pro-

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vide rather an additional remedy, than *a deprivation of the former. If the tenderer did not see fit to assume the burden of proof cast upon him by the act of 1877, he could come in under the third section of the act of 1878. But if he claims to come in under the act of 1877, he comes in only on assuming the burden of proof as required by that act. There is, therefore, nothing inconsistent or repugnant in the provisions of the two acts, and necessarily implying a repeal, so far as those who, having tendered under the act of 1877, and were in the process of enforcing the remedy, had availed themselves of it.

But it is clear, that since the act of 1878 there can be no tender hereafter made under the act of 1877. And the principles of this judgment refer only to such persons as tendered under the act of 1877, and prior to the passage of the act of 1878.

The prayer of the petitioners in these cases is, therefore, granted, and an order will be made directing issues to be framed, under the act of 1877, in these cases.

The defendant appealed to this court. An abstract is given of only so much of the arguments as bears upon the questions decided by the court.

Messrs. De Saussure & Son, for appellants.

It is necessary to consider whether a proceeding had been commenced by the tender of the bills. And to arrive at a conclusion, the act of June, 1877, must be referred to.

Read by its own language, the act clearly intimates that the mere deposit of the package with the clerk of the court, was not a proceeding instituted. Something remained to be done. And the person making the tender was to be the actor, since he was charged with the burden of proving certain facts necessary to entitle him to the benefit of the act. The county treasurer could not be the actor; indeed, Section 3 clearly points out that he was to be defendant, while Section 1 as clearly shows that the proceeding to be instituted should be "to compel the reception of the bills of the said corporation as a legal tender for taxes to the state;" it is needless to argue that the county treasurer could not institute a proceeding to compel the reception of the bills.

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*The act contemplates that the proceeding may be by mandamus or otherwise. If by mandamus, when would such a proceeding be regarded as instituted?

The usual practice in this country in obtaining the alternative writ, is to present to the court a formal application, variously termed a petition, relation or complaint, setting forth in detail the grounds upon which the claim for relief is based, and praying the

aid of a mandamus. High on Extra. Rem., §§ 450, 502. It is grounded on a suggestion by the oath of the party injured, of his own right, and the denial of justice below. 3 Bl. Com. 3.

If, then, the proceeding to be instituted was by mandamus, it is clear that until the suggestion or petition was filed, no proceeding would be instituted.

But the proceedings may have been instituted otherwise than by mandamus.

Agreeably to the code, such other proceedings must have been by action or special proceedings.

Sec. 2. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

Sec. 3. Every other remedy is a special proceeding.

Sec. 122. An action is commenced as to each defendant, when the summons is served on him or on a co-defendant, who is a joint contractor or otherwise united in interest with him. Wait Pr. 467–501.

No summons has ever been issued or served, and if it was by way of special proceeding, to wit, an application at a regular term of the Court of Common Pleas for Charleston county, to the presiding judge, to direct the framing of an issue, such application was not made until after 24th December, 1878.

But Judge Hudson places his decision upon the fact that the sealed package was in the possession of the clerk of the court, and thereby the person tendering and the state had each become invested with certain rights as to the particular contents of that package.

The requirement that the package be deposited with the clerk of the court, was merely arbitrary; any other depositary could

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*have been selected; the court could take no cognizance of the package, except upon proceedings instituted; the object of the sealing up and depositing in designated hands, was obvious; it was to prevent the risk of the same bills being tendered for various persons.

It is certain that the state could take no action in regard to such package, and hence, until proceedings instituted, trial had and judgment rendered that the bills were not genuine or valid, the state had no right. If the person tendering had chosen to pay the taxes in such funds as the county treasurer was authorized to receive, the package could have been reclaimed by the person who had tendered, and the state could not possibly have retained the bills so sealed up.

Messrs. McCrady & Son and Miles, Walker & Bacot, for respondents.

1. "That the tender of the bills to the treasurer, and his deposit of them with the clerk, operated as a conditional payment of the taxes for which they were tendered, which would become absolute upon the verdict of a jury in favor of the plaintiffs, upon the issues prescribed in the act."

2. Upon the tender of the bills to the treasurer, and the enclosing of said bills in a package, and the deposit of said package with the clerk, "the first step had been taken in such proceedings as the act contemplated—the person tendering had become invested with a right to have the bills so lodged received for his taxes, in the event that he established the facts, the burden of proving which had been put upon him by the act—and the state had become invested with a right to have such bills as had not been so proved, destroyed."

Although the act goes on to say that such deposit with the clerk shall "abide the decision of the court in any proceedings which may be instituted in regard to said bills," it is plain that the "proceedings" here referred to are interlocutory and not original.

The remedy provided in the act of 1877 is in the nature of a "special proceeding," and not an "action."

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*"Remedies in the courts of justice are divided into: 1st. Actions; 2d. Special proceedings." Code, § 1.

The law lays down a general rule for the commencement of "actions," to wit, by service of a summons on defendant. Code, § 122.

But in "special proceedings" there can necessarily be no general rule for the commencement of the same; in each case a special rule must be laid down. It will scarcely be asserted that the remedy provided by the act of 1877 is not a "special proceeding," and, if a "special proceeding," then a special rule for commencement thereof ought to be laid down, which the legislature has done.

Again, the act of 1877 directs that "An issue shall be framed," &c. (see Section 1 of act), which is analogous to what was formerly termed "feigned issues." Section 95 of the code provides for our case. See 12 Barb. 385, cited Wait's An. Code, p. 19, note 1. It is therefore evident that no portion of the remedy provided in the act of 1877, is in its nature, an "action" which must be commenced under the general rule of summons served; but being altogether a "special proceeding," it has a special commencement, to wit, tender of the bills; enclosure of the bills so tendered in a package; deposit of said package with the clerk, &c.

Messrs. De Saussure & Son, in reply.

The appellees say this is a special proceeding; and "in special proceedings there can necessarily be no general rule for the commencement of the same; in each case a special rule must be laid down." If, for argument, this proposition is conceded, yet the act of June, 1877, prescribes that the deposit of the package with the clerk is to be

followed up by an act, viz., "a proceeding which may be instituted in regard to said bills." "In all proceedings by mandamus, or otherwise, to compel the reception of bills of the said corporation as a legal tender," &c. "In all proceedings by mandamus or otherwise under this act."

The language, therefore, clearly indicates that the person who tendered is to do an act, viz., to institute proceedings by mandamus or otherwise in regard to said bills to compel their reception. These provisions follow the deposit of the package, and, if

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they *have any meaning, definitively show that the legislature did not regard the deposit as the institution of a proceeding.

If, for argument, it is conceded that the proposition relative to feigned issues, as suggested by appellees' argument, is analogous, yet the argument fails by its own authority, since "an order" is requisite to put such machinery in motion. In these cases no order had been made; and by Section 2 of act of December, 1878, no order could be granted by any court or the judge of any court.

May 28th, 1879. The opinion of the court was delivered by

WILLARD, C. J. A fundamental question in this case is whether the act of 1877, (16 Stat. 302,) entitled "An act to prescribe the mode of proving bills of the bank of the state tendered for taxes, and the rules of evidence applicable thereto," gives a new and specific remedy, or is intended and applies to issues joined in the ordinary remedies. The respondent moved the Circuit Court, by petition to have issues settled under that act. Such application is a new and independent remedy, claimed to have been allowed by the act in question, and unless such claims can be substantiated the whole jurisdiction below fails, which necessarily affects the result of the present appeal. The circumstances that led to the passage of that act are a part of the judicial history of the state, and will help to an understanding of the intent of the act. The question of the right of holders of the bills of the bank of the state to compel the county treasurers to receive such bills in payment of taxes came before the court in State v. Stoll, 2 S. C. 538, and was finally decided in the Supreme Court of the United States on appeal. This litigation gave rise to a great number of applications for mandamus throughout the state, involving a similar demand to that made in State v. Stoll, and presenting issues of fact as to whether the bills of the bank of the state, held by the various relators, were genuine and valid obligations. The difficulty that lay in the way of investigating such issues of fact led the legislature, in 1877, to pass the act in question, having in view, as its principal object, the establishment of a rule governing the burden of proof in such and similar cases.

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*The act directs the county treasurer to enclose all bills of the bank of the state tendered in payment of taxes by any person in a package, "sealed and signed by the party tendering the said bills, and by the treasurer to whom said tender is made." Such package is to be deposited by such treasurer with the clerk of the Court of Common Pleas of the county, who is to give duplicate certificates of such deposit, one to the party tendering and the other to such county treasurer, and directs that such package "abide the decision of the court in any proceeding which may be instituted in regard to said bills." It then declares that "in all proceedings by mandamus, or otherwise, to compel the reception of bills of the said corporation as a legal tender for taxes to the state, and refused, an issue shall be framed under the direction of the judge, and at a regular term of the Court of Common Pleas for the county wherein said bills are tendered, shall be submitted to a jury to inquire and determine by their verdict if the bills so tendered in payment for taxes are genuine and valid bills of the said corporation and have not been funded by the state, and since fraudulently uttered, and are the bills the payment of which is not prohibited by the constitution of the state and by the constitution of the United States. And upon the trial of said issue the burden of proof shall be upon the person tendering said bills to establish that the said bills are genuine and valid bills of the said corporation, and have not been funded by the state, and since fraudulently uttered, and that said bills are bills the payment of which is not prohibited by the constitution of the state and of the United States." The act then provides that if such bills shall be found, by the verdict of the jury, genuine and valid, that they shall then be received by the county treasurer in payment of taxes due the state. If found not to be genuine and valid the clerk of the court shall cancel such bills in the presence of the court, and file the packages of canceled bills with the record of the case in his office.

The respondent alleges that he had tendered bills of the bank of the state to the appellant, as county treasurer, for the payment of taxes due to the state, and that such bills were enclosed in a package and deposited with the clerk of the court in the manner prescribed by the act, and prayed that an

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issue might be *framed in accordance with the provisions of the act in question, and, finally, that further proceedings to enforce said taxes "shall await the determination of the trial of the issues provided in said act of June 9th, 1877," &c.

On motion, an order settling issues was made by the Circuit judge, from which the

county treasurer has appealed. It is evident that if no such proceeding, as the act contemplated, is pending between the parties, there is no authority for the Circuit Court to proceed to try the issues framed, or any issues whatever, and in that case the whole proceeding would have to be dismissed. Two views of this question have been presented, the first being that the tender of the bills and their deposit with the clerk of the Court of Common Pleas in the manner prescribed by the act was, within the intent and meaning of the act, the commencement of a legal proceeding authorizing the framing and trial of issues of fact of the nature and with the consequences prescribed by the act in question, and, second, that the petition was, at all events, such a proceeding as the act contemplated. The first of these grounds is disposed of by the clear language of the act. The act declares that the bills so deposited shall "abide the decision of the court in any proceeding which may be instituted in regard to said bills." This contemplated the institution of some proceeding by means other than that of the making of the tender and deposit of the bills. This language would be senseless if the tender and deposit of the bills, in itself, had the effect of instituting such a proceeding. An implication creating a new and summary remedy, without a definition of its character and incidents, in a case where known and well-understood remedies exist, adequate for the purpose, if capable of being made under any circumstances, could not be made as against language so clear and explicit.

Is, then, the filing of the respondent's petition the institution of a remedy such as was contemplated by the act? If it is such a remedy, it is because the act has made it such, for, independently of the act, such a petition has no legal sanction, and can confer no jurisdiction on the Common Pleas.

The provisions of the statute in question, as to the framing of issues, are the only source from which authority to commence

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*such a proceeding can be claimed, if it exists. Do they warrant such an inference? These provisions are declared to be applicable to all "proceedings instituted by mandamus, or otherwise, to compel the reception of bills of the said corporation as a legal tender for taxes." Whether the language of the statute, the rules of construction, or the object of the statute, as defined by the circumstances under which it became a law, be considered, it is very clear that the proceedings intended by the statute were these established by law, and in common use for the same or like purposes. The object and end of the proceeding is distinctly stated, namely, "to compel the reception of the bills," &c. The petition contains no prayer that the county treasurer may be compelled to receive the bills in payment of taxes. If it had, possibly the petition might have been regarded as a suggestion for a mandamus. That the omission was not accidental may be inferred from the fact that the petition was filed after the passage of the act of December 21st, 1878, prohibiting the issuing of writs of mandamus for such purposes. State v. County Treasurer, 4 S. C. 520.

The only affirmative relief prayed for is in the nature of an injunction to restrain the enforcement of the taxes pendente lite—a remedy prohibited by law. Gen. Stat. 96. The theory of the petition is, that a verdict establishing the genuineness and validity of the bill is, in itself, a complete and perfect remedy, whereas the act distinctly provides that the issues framed, and the verdict taken upon them, shall be an incident merely of a remedy having for its end the compelling of the county treasurer to receive the bills in payment of the claimants' taxes. As the respondent does not ask to have his petition treated as a suggestion for mandamus, we need not consider the effect of State v. County Treasurer on the question of the validity of such a demand.

The proceeding on the part of the respondent fails, therefore, to possess the character due to the proceedings in which issues may be framed and tried under the statute. Again, the words "mandamus, or otherwise," exclude the idea that the statute intended to give a new and specific remedy for the purposes contemplated in it. These words describe a class of remedies, and not a par-

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*ticular specific remedy newly created. The leading and characteristic member of that class, selected to represent the nature and kind of remedies intended, is mandamus, a known remedy, and, in fact, the very remedy then generally employed for that purpose. The remedy particularly specified, according to familiar rules, characterizes the intention of the legislature so regulating the proceedings in existing remedies, and not as creating a new, and until then unknown, remedy. A mandamus is a regular and formal remedy, and its mention, in such a connection, excludes the idea that a summary and informal remedy was intended to be created. In a word, the object of the statute was to create a rule of proof as to existing remedies, to be applied to any known remedy that might be resorted to for the purpose contemplated in the act, and "otherwise" was inserted to prevent parties from escaping the burden of the rule of proof by selecting some other remedy in the place of mandamus—such, for instance, as an action for seizing property in satisfaction of the tax after tender alleged to be duly made.

It must, therefore, be concluded that the court was without jurisdiction to proceed upon the respondent's petition, and the appeal should be sustained, and the order framing issues set aside and the petition dismissed. The appellant has not objected to the appeal on the ground that an interlocutory

order in a special proceeding is not appealable, and it will not be considered.

Proceedings dismissed.

McIVER and HASKELL, A. J.'s, concurred.

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12 S. C. 76

(Case No. 738.)

THE STATE, ex rel. JAMES E. ATKINS, v. TOWN OF MAYSVILLE.

(April Term, 1879.)

[1. *Municipal Corporations* ⟸956.]

A municipal corporation has no power to levy taxes without express authority granted in its charter for that purpose.

[Ed. Note.—Cited in Mauldin v. City Council of Greenville, 42 S. C. 298, 20 S. E. 842, 27 L. R. A. 284, 46 Am. St. Rep. 723; Luther v. Wheeler, 73 S. C. 90, 52 S. E. 874, 4 L. R. A. (N. S.) 746.

For other cases, see Municipal Corporations, Cent. Dig. § 2010; Dec. Dig. ⟸956.]

[2. *Mandamus* ⟸112.]

Query: Can a municipal body be compelled by mandamus to levy a tax to pay judgments recovered against it?

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 238–248; Dec. Dig. ⟸112.]

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*This was an original application to the Supreme Court for a writ of mandamus to compel the corporate authorities of the town of Maysville, a municipal corporation, to levy a tax upon all of the taxable property within the town, to satisfy a judgment recovered by the relator against the town of Maysville, payment of which could not be enforced under the ordinary process of the Circuit Court. The charter of this town is silent upon the subject of taxation.

Mr. J. S. G. Richardson, for relator.

† 1. The charter of the town of Maysville is silent upon the subject of taxation; it neither denies the right, nor does it, in terms, confer it. For charter, see Acts of 1874, p. 551.

2. The action in this case was to enforce an obligation, arising not ex contractu but ex delicto.

That the charter is silent as to the power to tax for the purpose of satisfying obligations of that class, can hardly make any difference. Such power is never conferred in express terms; but we submit that in all cases it arises by necessary implication from the mere fact of corporate existence. Damages are, in their nature, penal—are often given for the purpose of punishing the offender—and can it be supposed that the legislature ever intended, in giving corporate existence to a body of men, that they, as an ideal whole, should escape the consequences of its delicts and other offences, whether public or private.

The legislature confers the corporate existence, and by its general laws commands it to commit no trespasses upon the rights of others. The sanction of the general law is the damage imposed for the breach of the command. It would be doing great injustice to the legislature to suppose that it deliberately and purposely intended to throw a shield over the corporation and thereby protect it from the sanctions which the general law imposes.

That the authority of a municipal corporation to impose taxes may arise by implication, is clear from many authorities, a good many of which may be found in the reports of the Supreme Court of the United States,

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from 23 How. to the present time. *We contend that the right to tax to pay damages recovered in actions ex delicto is never expressly conferred, but arises in all cases by implication; and we would go farther, and if necessary contend—if the legislature should ever, in terms, deny the right—that it would be the duty of the courts to declare the provision void, according to those principles of right and justice which are supposed to underlie all laws, which Lord Coke mentions, and which are set forth and approved by the court in Ham v. McLaws, 1 Bay 97; or it may be under a provision of the constitution, which we will now proceed to notice.

Article IX., Section 8, after providing that the corporate authorities of cities, towns, &c., may be vested with power to assess and collect taxes for corporate purposes, adds, "and the general assembly shall require that all the property, except that heretofore exempted within the limits of municipal corporations, shall be taxed for the payment of debts contracted under the authority of law." There cannot be a doubt, it seems to me, that every debt contracted by a corporation comes within the protection of this provision of the constitution; for how can a debt exist unless it be contracted by authority of law.

If a corporation should go through the form of contracting a debt, that form would amount to nothing, unless the authority to contract it existed; it would be a mere form and nothing more; or, in other words, there would be no debt. But even in such a case as that, if the corporation should be sued in some high court of general jurisdiction for the purpose of enforcing the supposed obligation, and judgment should be rendered against it, would not the obligation arising out of the judgment be a debt contracted by authority of law? The defendant would certainly be estopped from denying the validity of the original supposed obligation which now, un-

† This is the last argument made by Mr. Richardson in the Supreme Court.

der the authority of the law itself, has become res adjudicata, settling the question for all time to come. But whether this be true or not, as to void or voidable obligations arising in form ex contractu, it must be true as to obligations arising ex delicto. Obligations of this latter class arise from acts which the corporation, from the mere fact of its existence as a corporation, has capacity to commit. If it commits the act, the law imposes the obligation to pay the penalty—

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that is, *the damages which a jury may give, and when an action is brought by the injured party and judgment is recovered therein, the original obligation arising ex delicto merges in the judgment, and a new obligation arising quasi ex contractu is created by the judgment—this new obligation is a debt fixed and liquidated; it is a debt contracted by authority of law, to be enforced under the section of the constitution above cited, by taxes to be assessed and collected for that purpose.

But, if the constitution contained no such provision as that found in Article IX., Section 8, can there be a doubt that the authority as well as the duty to levy and collect taxes for the payment of obligations arising ex delicto, exists by implication. We cannot see how there can be a doubt about it.

To insert in a charter that the corporation shall satisfy its obligations ex delicto by imposing taxes for the purpose, would be to assume that the corporation is likely to incur such obligations. That would hardly be proper, and all such charters are, therefore, very properly silent upon the subject.

Our propositions, then, are—

1. That under the constitution of this state all debts contracted by a municipal corporation, when authorized by the charter, either by express terms or by necessary implication, must be paid by taxation, and that mandamus is the proper remedy to compel the corporation to levy the taxes. See Const., Art. IX., § 8; Com'rs of Knox Co. v. Aspinwall, 24 How. 376; Walkley v. City of Muscatine, 6 Wall. 481.

2. Where the charter does not deny the authority to tax, but merely ignores it, and the corporation is expressly authorized to contract a debt for any special purpose, nothing being said as to how the debt is to be paid, but the right to tax for its payment is not denied, then the debt is contracted by authority of law and must be paid by taxation.

3. Where the authority to contract a debt is conferred upon the corporation, but the authority to tax for its payment is expressly denied, as a general rule it may be said the debt would be null and void. Loan Association v. Topeka, 20 Wall. 655. But in this state, under the constitution, (Art. IX., § 8,)

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it would *seem not that the debt contracted by the corporation, but that the denial of the authority to tax, is void.

4. Obligations arising ex delicto stand upon a very different footing from those arising ex contractu. They can only be enforced, in the first instance, by an action at law. When judgment is recovered and the damages fixed and ascertained by the verdict, the obligation arising ex delicto is merged in the judgment, it becomes, in the language of the ancient jurists, an obligation arising quasi ex contractu—an obligation to be enforced, it may be, in the first instance, by execution against property under the judgment; but certainly by equal and just taxation, as directed by the constitution, and where neither the act of the legislature nor an ordinance of the town authorizes the levying of the tax, it is the duty of the court, by its writ of mandamus, to compel the corporation to make the assessment and levy the tax.

Mr. Joseph H. Earle, for respondents.

Under our construction of the charter of the town of Maysville, it is not the duty of the respondents to levy a tax to satisfy the relator's judgment, nor, indeed, have they any power to levy a tax for any purpose whatever. But it is necessary to the issuance of this writ that two pre-requisites appear. First, the relator must show that he has a clear, legal right to the performance of the particular act or duty at the hands of the respondents; and, second, that the law affords no other adequate or specific remedy to secure the enforcement of the right and the performance of the duty it is sought to coerce. High on Extra. Rem., § 10.

In the case at bar it must be admitted that there is, at least, much doubt and uncertainty as to the power of the respondents to levy a tax, since the charter is silent upon the subject; and where substantial doubt exists as to the duty whose performance it is sought to coerce, or as to the power of the officer to perform the duty, the relief will be withheld. High on Extra. Rem., § 32; 24 Tex. 317; 2 Chand. 250.

We admit that mandamus may be the proper remedy to enforce the satisfaction of a judgment against a municipal corporation;

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*but it must appear that this duty is plainly and specifically imposed by law upon the corporate authorities to levy a tax for that purpose. 4 Wall. 435; 8 Wall. 575; High on Extra. Rem. 375; 35 Me. 345; 24 Barb. 166; 27 Ark. 457; United States, ex rel., v. Macon County, (Supreme Court U. S., October Term, 1878.)

Are the respondents authorized to levy a tax? This is the one important question in this case. To ascertain this fact we must look to the charter of the town of Maysville. This is the organic law which gives to the corporation its existence and its character. It has no power except such as is conferred

by the charter. 4 Wait Actions and Defences 601; 21 Ohio 273; 4 Hill 76; Blackwell on Tax Titles 448; 1 Blackf. 336; Burroughs on Taxation 371; 56 Mo. 126; 2 Dill. on Mun. Cor. 605; 1 Id., § 336.

Being special grants of power, the charters of municipal corporations must be strictly construed. 35 Miss. 189; 29 Cal. 180. Any ambiguity or doubt arising out of the terms used must be resolved in favor of the public. 23 How. U. S. 435; 18 Ohio 523.

There must be a distinct legislative authority for every tax that is levied. This is a principle that admits of no exception whatever. Cooley on Taxation 244; 45 Ind. 310; 1 Dill. Mun. Cor., § 55.

The charter of Maysville certainly contains no express authority for the performance of the duty sought to be imposed upon the respondents, nor does such authority arise anywhere from necessary implication. It is equally clear that this power is not essential to the declared object and purposes of this corporation.

It cannot, upon any theory of construction, be determined that this great and dangerous power, of which the courts can never be too jealous, was ever intended to be vested in this corporation; and, if not intended, then the power does not exist; for such corporations have no inherent power of taxation. 47 Miss. 367; 13 Gratt. 78, 98; 11 Bush 18; 5 Gill 383, 395; 19 Wis. 624; 21 Gratt. 604.

We do not for a moment deny that the leg-

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islature can compel *a municipal corporation to recognize and pay a debt contracted under authority of law, by levying a tax. This doctrine has long since been established. Dill. on Mun. Cor., vol. I., § 44. But a petition to the legislature is a different proceeding from an application to this court for a writ of mandamus.

In our view of this case, it matters not whether the original obligation arose ex delicto or ex contractu, or whether the judgment be ex contractu or quasi ex contractu.

May 28th, 1879. The opinion was delivered

PER CURIAM. The relator asks a mandamus to compel the town of Maysville to levy a tax to pay the amount of a judgment recovered by the relator against said town. The only point discussed at bar is the power of the town of Maysville to levy taxes. It appears that no express authority is granted for that purpose in its charter. Such power can only be implied on the ground of necessary implication. To raise such an implication it would be necessary to hold that municipal powers cannot be effectively granted without the taxing power—a proposition that we cannot affirm; no such power of taxation can therefore be implied.

This is a sufficient answer to the relator's demand, and renders it unnecessary to decide the question already suggested in State v. City of Columbia S. C.[1] as not passed upon, namely, whether a municipal body can be compelled, by mandamus, to levy a tax to pay judgments recovered against it. That question was neither raised by the parties nor argued, and for that reason we do not feel bound to consider it.

The petition must be dismissed.

Petition dismissed.

[1] Case No. 736, unreported, opinion filed May 27th, 1879. It was an application to the Circuit Court for a writ of mandamus to compel the city of Columbia to levy a tax sufficient to pay the amount of a judgment recovered by one of the relators against that city. It did not appear that the relators had exhausted their legal remedies; and for that reason the application was refused.

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12 S. C. *83

*(Case No. 739.)

Ex parte C. T. MITCHELL, Receiver, In re DANIEL HAND, v. SAVANNAH AND CHARLESTON RAILROAD COMPANY et al.

(April Term, 1879.)

[*Receivers* ⇐121.]

An order directing repairs to be made for the preservation of railroad property in the hands of a receiver appointed by the court, to be paid for with certificates of indebtedness constituting a first lien upon such railroad, can be made only upon motion and after a proper investigation and hearing.

[Ed. Note.—Cited in Hand v. Savannah & C. R. Co., 17 S. C. 275.

For other cases, see Receivers, Cent. Dig. § 269; Dec. Dig. ⇐121.]

[2. *Appeal and Error* ⇐190.]

[Cited in State v. Port Royal & A. R. R. Co., 45 S. C. 468, 23 S. E. 880, as an example of the power of the Supreme Court to set aside on appeal an order of the circuit court granted without notice, no previous application to set aside having been made in the latter court.]

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1216–1220; Dec. Dig. ⇐ 190.]

[This case is also cited in Hand v. Savannah & C. R. Co., 17 S. C. 221, as to facts.]

Before Hudson, J., at Charleston, March, 1879.

The Circuit judge passed an order directing the receiver of the Savannah and Charleston Railroad Company to purchase new iron and cross-ties and one new locomotive, at a cost not exceeding $75,380. For such expenditure the receiver was authorized to issue his pay certificates, to be paid, in the first place, out of the net income of the road not already, by order of the court, otherwise appropriated; and if not so paid, then on the sale of the road, out of the proceeds of such sale, in priority to the mortgages. He subsequently filed the following paper as a part of his judgment:

On the morning of the 18th of March, A.

D. 1 79. C. T. Mitchell, Esq., as receiver of the Savannah and Charleston Railroad Company, submitted to this court a report of the condition of the road, setting forth the gross income thereof for several years past, and stating that from this source sufficient has not been, and manifestly will not be, realized to keep the road in repairs and furnish the much-needed additional rolling stock requisite to the business. The report is full, and shows the absolute necessity of immediate repairs to the road, and the urgent call for additional and safe rolling stock. Reference to the report must be had for its details. In filing this report, Messrs. Memminger, Campbell and Young, representing chiefly the holders of the seven per cent. mortgage bonds,

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issued under *act of 1869, applied to the court for an order allowing the receiver to purchase the necessary additional rolling stock, and to make the necessary repairs of the road, and in payment thereof to issue his certificates, which should stand as a lien on the road in preference of all mortgage liens.

After discussion by counsel for and against the measure, the court referred it to the superintendent of the road, Mr. C. S. Gadsden, and an engineer, to report to the court what repairs of the road are urgently demanded, and what additional rolling stock is really needed to enable the road to do the business required of it. At five o'clock p. m. of the same day this report was submitted to the court. In substance the report stated that the road could be made secure and safe to the public by relaying with new rails twenty miles of the track, and with the best of the old rails repairing the balance.

That many new cross-ties are needed, and that of rolling stock there are needed two new engines and fifty new box-cars. The estimated cost of these matters of purchase and repairs he puts at $110,000.

Pursuant to notice counsel appeared to defend and resist this proposed scheme of expenditure. The resistance came from a number of attorneys, representing chiefly the holders of the six per cent. bonds, issued under act of 1856, and recently declared by the Circuit Court to be a first lien on the road. In resisting the application aforesaid, they urged that sufficient notice had not been given; that the court has no jurisdiction to allow any expenditure to create a first lien; that the necessity therefor does not exist; that the matter should at least be referred to a master of this court for examination and report; that the interest of their clients will be greatly jeopardized by the proposed creation of a first lien.

On the contrary, it was urged that the court having assumed the custody, control and management of the road, is clothed with jurisdiction to order an expenditure and outlay sufficient to preserve the property, which being a public highway imposes on the court duties of the gravest character; duties and responsibilities not alone to the creditors, but to the public. That the expenditures asked are not for the improvement of the property,

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but for *its preservation, a measure which will redound as much or more to the advantage of the holders of the first liens, whoever they may be, as to other creditors; that unless the road be speedily repaired serious accidents to the traveling public are imminent, and great loss of business to the road. That already the owners of connecting lines have given notice that they will sever their connection with the Savannah and Charleston railroad as a connecting link of a through route, and will form other connections unless this road be put in repairs and made safe to the public. At the conclusion of the argument I announced my judgment orally in open court, and signed an order to carry the same into effect, which was placed on file in the cause.

It has since been suggested to me that the order is open to a construction at variance with the judgment pronounced. To avoid misunderstanding, I proceed simply to announce in writing the judgment orally delivered.

I do not regard the controversy as arising on a motion of which formal and due notice is required. The receiver of the road in the discharge of his duty, laid before the court important information touching the responsible trust imposed upon him, which information, in the judgment of the court, calls for prompt and decisive action. Unfortunately, the course of litigation between the creditors of this road has become very complicated; has already produced much delay, is likely to produce much more delay, and prevents me from signing an order for the sale of the property, which would be more agreeable to my feelings, and more conducive to the welfare of all concerned. Pending this delay, this court remains the custodian and manager of the property through its constituted agent, and having assumed, must discharge the full measure of the duties and responsibilities of that management to the company, its creditors, and to the public. The court at present can make no order of sale, and hence the road must be suspended in its operations, or continued as a public highway.

No one desires or asks that it be suspended. To suffer it to be operated at great hazard to human life, and at the risk of loss to private property, without the means of responding in damages, would not only be an act of remiss-

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ness and negligence in *the court, but would be criminal. The information laid before me by the intelligent receiver and superintendent, satisfies me that the exigency requires material repairs to preserve the property, and make the road a highway safe to travel and transportation, and leaves no doubt in my

mind as to the duty of the court. I feel that I would betray the trusts reposed in me by the law were I to withhold action, and carelessly suffer this road, in its unsafe condition, to be held out to the public as a highway and thoroughway, without repairs. But I deem my power in this respect to be exhausted, by ordering only such purchases of rolling stock and repairs of the road, as are necessary to preserve the property in running order.

I will, therefore, only allow the receiver to make an outlay in this direction not exceeding the sum of $75,380, to be expended for the items of repairs and purchases set forth in his estimate, except the fifty box cars and one of the locomotives.

In no event shall the face value of the certificates to be issued for the expenditures exceed the sum aforesaid, to wit, $75,380 in the aggregate, and the most scrupulous care and fidelity is enjoined upon the said receiver in carrying out this judgment, and the order based thereon of date March 18th, 1879. No rate of interest having been fixed for the certificates, in the said order, the receiver will see that they bear a rate not exceeding seven per centum per annum. Let this judgment be filed as of even date with the order of March 18th, 1879, of which it forms a part.

[For subsequent opinion, see 13 S. C. 467.]

The holders of a certain class of mortgages outstanding upon this railroad property, appealed, upon several grounds, including that upon which the appeal was decided. So far as the arguments of counsel bear upon the point decided, they were as follows:

Messrs. T. M. Hanckell, W. H. Brawley and Bryan & Bryan, for appellants.

We submit that said order has been made without due caution or deliberation, and, as appears by the record itself, without sufficient opportunity given to parties in interest, either to investigate the facts alleged in the

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reports of the receiver and the *superintendent of the road, or to examine the law applicable to the case, or opportunity given to the attorneys in the cause even to consult with their clients as to the advisability of the order, to obtain from them any information in their possession, or to receive any instructions whatsoever in the premises.

That said order was made, as appears by the record, without the usual reference to a master, in a case in which the courts have held that such an order should be made with the greatest care and circumspection, with full notice to all parties in interest, and with ample opportunity given to them to examine witnesses and accounts, to produce testimony, and submit argument upon the facts and the law.

That said order, as appears by the record, was made, after a reference for a few hours, to a referee, which reference was contrary to law, and the order made upon his report without opportunity given to the parties in interest to appear before him for the purpose of examining evidence or submitting either testimony or argument. Meyer v. Johnston, 53 Ala. 237, 346; Fosdick v. Schall, 9 Otto 235.

Mr. C. G. Memminger, for respondents.

The whole matter lay in the discretion of the court, and, in the effort to guide that discretion, the suggestions of counsel could not assume the technical form of a motion. The action of the court must be deemed spontaneous, and the first difficulty, therefore, which the present application to the Supreme Court presents, is whether it can be dealt with as an appeal.

The entire action is within the inner orbit of the court. The court has undertaken to manage. It has appointed its receiver; given him possession and directions. Difficulties occur in the management; he submits them to the court. There is no interference from without. It is the receiver (the agent of the court) who comes to his principal for instructions. That principal simply calls for argument for his own enlightenment, and then gives his own instructions. This is one of the absolute necessities produced by the situation, and no fault can be found with the judge for exercising his judgment. The only

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question which *can arise is, whether this judgment was so unwise as to call for the interference of the Supreme Court.

The objections made to the action of the court are in part formal and in part substantial.

The formal objection made to the want of notice is probably made from a want of knowledge of facts. Mr. Cutting's solicitors were not informed of the condition of the road any sooner than the solicitors of the other parties. The report of the receiver was only known to them at the same time that notice was given to the other parties, and the receiver himself stated that he expected the court would sit for one or two weeks beyond the time when he made his report, and that he was as much concerned as they were when he heard that the court was so soon to adjourn, and that he acted in good faith by hastening on the matter at the time he reported.

May 29th, 1879. The opinion was delivered

PER CURIAM. The order below, made on the application of C. T. Mitchell, receiver, was improperly granted. Orders of that class can only be made on motion and after a proper investigation and hearing. We are not called upon to determine the question of law raised by the appeal as to the authority of the court to make such order, and the propriety of the order itself.

Having the whole cause before us on appeal,† we are enabled to say that an early

† See post case No. 761 [Hand v. Savannah & C. R. Co., 12 S. C. 314].

sale of the road is practicable and desirable, which, if made, would obviate any necessity for the order in question.

We are, nevertheless, disposed to submit all questions regarding the time and terms of such sale to the determination of the Circuit Court, after hearing, on due notice.

The order must be set aside and the proceedings remanded to the Circuit Court for the purposes above indicated, with liberty to grant an order of sale, notwithstanding the pendency of the appeal and without prejudice to the rights of parties to apply to the court for prudential orders in conformity herewith, in order to maintain the efficiency of the service and the traffic of the road until sale and delivery.

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12 S. C. *89

*(Case No. 740.)

THE STATE v. ALFRED McNINCH.

(April Term, 1879.)

[1. *Grand Jury* ⇐15.]

The jury commissioner who assisted in drawing the grand jury that found the bill of indictment, and the petit jury that convicted the prisoner, was the husband of a fourth cousin of deceased. *Held*, no ground for quashing the indictment, or granting a new trial.

[Ed. Note.—Cited in State v. Perry, 73 S. C. 200, 53 S. E. 169.

For other cases, see Grand Jury, Cent. Dig. § 41; Dec. Dig. ⇐15.]

[2. *Grand Jury* ⇐34.]

That the Circuit solicitor went into the room of the grand jury after they had agreed, and at the request of the foreman, to instruct him how to write the finding, is no ground for quashing an indictment. Distinction drawn between this case and State v. Addison, 2 S. C. 356.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 73, 85; Dec. Dig. ⇐34.]

[3. *Grand Jury* ⇐34.]

It is the right and duty of the solicitor on many occasions to inform and instruct the grand jury as to the manner in which the business in their hands is to be conducted. Semble.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 73; Dec. Dig. ⇐34.]

[4. *Jury* ⇐122.]

The established practice of permitting the state in a case of felony to order jurors to stand aside without challenge or cause shown, until the panel has been exhausted—approved.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 501; Dec. Dig. ⇐122.]

[5. *Criminal Law* ⇐742.]

Whether a witness is drunk or not, and whether his evidence, relating to the question in issue, is material or not, are questions of fact for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1719; Dec. Dig. ⇐742.]

[6. *Criminal Law* ⇐1129.]

In a capital case this court will take notice of errors apparent upon the record affecting the substantial rights of the prisoner on his trial, although not made a ground of appeal.

[Ed. Note.—Cited in State v. Washington, 13 S. C. 455; State v. Dodson, 16 S. C. 462; State v. Davis, 27 S. C. 614, 4 S. E. 567; State v. Turner, 36 S. C. 542, 15 S. E. 602; State v. Green, 48 S. C. 147, 26 S. E. 234.

For other cases, see Criminal Law, Cent. Dig. § 2954; Dec. Dig. ⇐1129.]

[7. *Criminal Law* ⇐913.]

A prisoner has the right to cross-examine a witness for the prosecution before he leaves the witness-stand; and a refusal of such right is proper ground for a new trial.

[Ed. Note.—Cited in State v. Howard, 35 S. C. 202, 14 S. E. 481.

For other cases, see Criminal Law, Cent. Dig. § 2144; Dec. Dig. ⇐913.]

[This case is also cited in State v. Turner, 36 S. C. 535, 15 S. E. 602, and distinguished therefrom.]

Before Aldrich, J., at Laurens, February, 1879.

The prisoner was indicted for the murder of William C. Kilgore, on December 2d, 1878.

Besides the facts stated in the opinion of the court, it appears that while the jury was being empaneled, the solicitor ordered jurors to stand aside, without challenge or cause shown; but that the panel being exhausted these same jurors were recalled and presented to the prisoner.

J. S. Grimes, a witness sworn for the prosecution, gave testimony concerning the circumstances of the difficulty which ended in the death of the deceased. In his charge to the jury the judge said: "I do not give the

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evidence of this witness [i. e., Grimes,] *because he was withdrawn and not cross-examined; I suspected he was drunk, but as the attention of the court was not called thereto, I exercised a liberal charity and let him go. He said nothing material." His Honor made the following report afterwards upon this matter, the Mr. Garlington referred to being counsel assisting the solicitor in the prosecution:

"The witness, Grimes, was presented by the state, and was examined by Mr. Garlington. His answers to the first questions attracted my attention. I suspected he was intoxicated. A few more answers convinced me he was drunk. The examination proceeded until, I think, the counsel, the jury, and the bar came to the same conclusion, when Mr. Garlington proposed to withdraw him, in which I acquiesced. The defence claimed the right to cross-examine, which was admitted by the solicitor. The presiding judge said: 'Of course you have the right to cross-examine, but I do not see the use of continuing the examination in his present condition; he may be recalled, either to resume his examination in chief or to cross-examine, as may be desired by the prosecution or the defence.' The witness was withdrawn, after some consultation between the counsel for the defence, and was not recalled by either side. No exception was taken, and the right to cross-examine not denied.

"After he was withdrawn I lost sight of him; had never seen him before and supposed he was very drunk, until to-day, when I was informed it was his natural manner. This may be so, but I do not think I could be mistaken. In my opinion the man was drunk."

At the conclusion of his charge to the jury, the judge was requested by the prisoner to charge the jury in the words set out in the third and fourth grounds for a new trial in this court. Upon these two requests his Honor reports: "I was requested to give certain instructions to the jury, as contained in first request, which being, in my opinion, covered by the charge, were refused. I did charge as requested in the second request, but added that it was the duty of the jury to inquire who was the first wrong-doer."

The prisoner was convicted.

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*The case was brought to this court by the defendant upon the following notice and grounds:

The defendant, Alfred McNinch, notifies of an appeal, and that he will move in the Supreme Court, at the next regular term thereof, to reverse the ruling of his Honor Hon. A. P. Aldrich, in his refusal to quash the indictment herein:

I.

1. Because Stobo D. Garlington, the jury commissioner, who assisted in drawing the grand jury who found the bill of indictment, was the husband of a cousin of the deceased, William C. Kilgore.

2. Because the solicitor, B. W. Ball, Esq., had, under the direction of the court, free access to the grand jury, and did visit the same, before and during the day they had under consideration the bill of indictment in this case.

II.

1. And the said defendant will at the same time move to set aside the verdict in this case, and the judgment of the court thereon, on the further ground that his Honor the presiding judge erred in allowing the solicitor, when the petit jury was empaneled, to cause jurors then presented to the prisoner to stand aside, without challenge and without cause shown.

2. Because his Honor the presiding judge erred in withdrawing from the consideration of the petit jury charged with the trial of this action, the testimony of one J. S. Grimes, a witness on the part of the prosecution, after he had testified.

3. Because his Honor the presiding judge, although requested so to charge, refused to charge the jury that all the circumstances of the homicide having been disclosed by evidence for the prosecution, the homicide does not imply malice, but malice can be established only by the circumstances themselves.

4. Because his Honor, when charging by request, that "it is for the jury to inquire if the deceased struck the first blow with his pistol upon the prisoner, and if the prisoner should reasonably fear for his life, or fear great bodily harm, then, as a matter of law, the prisoner might be found not guilty,"

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erred in adding *that it was also the duty of the jury to inquire who was first in the wrong.

5. Because the said jury commissioner, being connected by marriage with the said deceased, assisted in drawing the petit jury who tried this cause.

Because the Circuit judge erred in charging the jury that in the testimony of J. S. Grimes, he said nothing material.

[For subsequent opinion, see 13 S. C. 452.]

Messrs. Pope, Baxter & Caldwell, for appellants.

Upon the first ground taken for quashing the indictment, reference was made to 5 S. C. 429; and upon the second ground, to 2 S. C. 356. The challenge to the array of the petit jury and the motion to set aside the venire because drawn by a relative of the deceased after his death, should have been sustained. 5 S. C. 429. The state having now the right to challenge two jurors peremptorily, cannot require any to stand aside. Before the act of 33 Edward I., the right of peremptory challenges by the king was unlimited. 1 Chit. on Crim. Law 534. That act took away from the king the right of peremptory challenge, and it became the practice to allow the king to require the jurors to stand aside. That act was made of force in South Carolina in 1731, but was repealed by implication in 1871, (14 Stat. 694,) and expressly in 1872, (Gen. Stat. 782.) So now the state has only two peremptory challenges.

The witness, Grimes, was withdrawn before cross-examination, without the consent of the prisoner, who insisted upon his right to cross-examine. In charging the jury that this witness said nothing material, his Honor disregarded the requirement of Section 26, Article IV., of our state constitution. Its materiality was a question of fact, and the judge's misapprehension of that testimony invalidates the judgment. 1 Mill Con. R. 200, 216; 1 Bail. 482; 2 Bail. 128; 5 S. C. 65, 67. Upon the third ground for a new trial, counsel cited 6 S. C. 185; 42 N. Y. 1; 53 N. Y. 164; 1 Archb. Crim. Pr. and Pl., Pomeroy's Notes, 152. Upon the fourth ground, they contended that the words added were indefinite and might mislead. It may have carried their minds to offensive words, rather than to illegal acts. 6 S. C. 185.

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*Mr. Solicitor Ball, for the state.

As to the relationship of the jury commissioner, see 1 Burr. Law Dict. 69, title "Affinity." There is no nearness in this case. A challenge to the array may be based on

partiality of the officer. 1 Co. Lit. 156, 1st Am. ed. The early decisions have reference to the sheriff or other officer who returned the venire. 3 Whart. on Crim. Law., § 3016. But here the state is a party and not the deceased. Under our statute, there are three officers. The motion to quash is not proper—there should have been a challenge to the array, and that could be only in writing. 3 Whart. on Crim. Law, § 2947. If defendant is correct, the trial might be perpetually blocked. As to the solicitor going into the grand jury room, we have no statute in our state. Mr. Chitty says it is permitted in England. See 1 Whart. on Crim. Law 495, 496. This case in every aspect is very different from Addison's case. 2 S. C. 356.

The right of the state to require jurors to stand aside temporarily, is well settled. Gen. Stat. 747; 2 N. & McC. 553; 7 Rich. 416; 3 Whart. on Crim. Law, § 2956. The present statute does not affect this right, because it gives to the state two peremptory challenges; standing aside for cause, as authorized in 33 Edward I., does not mean the same thing.

As to the witness, Grimes. He testified in the hearing of the jury, and it was no error in the judge not to read over his testimony to them. There was nothing that he said that was favorable to the prisoner, and therefore he is not prejudiced.

The judge properly refused the first request to charge, as he had already fully covered the whole ground of the case. It is not error in such cases for the judge to refuse to charge an abstract proposition of law, selected from some decided case, as in this case from 6 S. C. 185. 1 Archb. Cr. Pr. and Pl. 171, 641, 1643; 5 Wend. 289. The second request to charge is the demoralizing principle announced in Selfridge's case; but his Honor's qualification states the correct doctrine, and just as he had already charged, and the jury could not have been misled by the charge. Notes to 1 Arch. Cr. Pr. and Pl. 643, citing 3 Strob. 155.

As to the principles upon which new trials

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are granted, see *4 Whart. on Crim. Law 3226, 3248, 3253; 2 N. & McC. 261; 2 Bail. 37, 69, 665; 14 Geo. 55; 3 Wat. New Trials 302, 862; 3 Brev. 522.

May 31st, 1879. The opinion of the court was delivered by

HASKELL, A. J. The motion to quash the indictment in this case was upon two grounds:

1. Because the jury commissioner who aided in drawing members of the grand jury "was the husband of a cousin of the deceased."

2. Because the solicitor "had, under the direction of the court, free access to the grand jury, and did visit the same before and during the day they had under consideration the bill of indictment in this case."

The appeal is from the refusal of the Circuit judge to grant the motion. As to the first ground, the testimony is that the wife of the jury commissioner is a cousin of the deceased in the fourth or fifth degree, and there is no evidence of affinity other than that incident to such connection. There is no consanguinity between the jury commissioner and the deceased, and the degree of affinity shown is remote—too remote to be of itself evidence of bias or prejudice against the person charged. The case of State v. McQuaige, 5 S. C. 429, was decided upon the ground that the jury commissioner was a near blood relation—first cousin of the deceased. It is unnecessary, perhaps impossible, to draw an absolute line to mark what degree of relationship or affinity must control in such cases; but it is sufficient here to say that in the present case there is no relationship by blood, and no evidence of such affinity as, of itself, would reasonably lead to the presumption that the jury commissioner would thereby be affected in such manner as to impair the proper discharge of his duties.

As to the second ground, the evidence is that the solicitor did go to the grand jury room, "at the request of the foreman, * * * and instructed him how to write the findings, but that he had not been in the room while the case of the prisoner was under consideration." The evidence is conclusive on the point in question; but this court does not

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hesitate to say that the solicitor has *on many occasions the right and the duty to communicate with the grand jury as to the manner in which the business in their hands is to be conducted. It is the established practice for the Circuit judge to instruct the grand jury to apply to himself, or to the solicitor, for such further instruction or information as they may deem necessary. The solicitor is a sworn officer of the state, and responsible for the proper discharge of the duties of his office; he is presumed to have the power to discriminate between matters on which he should or should not communicate with the grand jury, and error must be shown and not presumed. The case of State v. Addison, 2 S. C. 356, is entirely different, and not applicable to the point now under consideration. In that case it was not a solicitor whose conduct was in question, but an attorney who was conducting the prosecution, and who was, further, a paid attorney, retained to aid in the prosecution. The facts were entirely different, for, in that case, the attorney actually interfered with the grand jury in their consideration of the bill, and argued the case in the grand jury room. Here there were no such circumstances; but this much is said to indicate that there is a broad distinction between the solicitor—an officer of the state—and one who acts merely as an attorney-at-law to aid in the prosecution. The ruling of the Circuit judge must be sustained.

The first ground for new trial is that the judge erred in allowing the state, when the petit jury was being empaneled, to cause jurors to "stand aside" without challenge, and without cause shown. The practice pursued in this respect by the Circuit judge has been long since established, and no law or sufficient reason has been advanced to show why it should be changed. State v. Barrontine, 2 N. & McC. 553; State v. Wise & Johnston, 7 Rich. 412. The order to stand aside for a time is distinct from a challenge, and is not affected by the act of 1871 (14 Stat. 690), which confers upon the state the additional right of peremptory challenge to a limited extent. The ruling of the Circuit court as to this point is sustained.

The second ground is that the judge erred "in withdrawing from the consideration of the petit jury, charged with the trial, * * * the testimony of J. S. Grimes, a witness on

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the part *of the prosecution, after he had testified." It appears, by the judge's report of the case, that the witness was allowed to be withdrawn at the instance of counsel employed to assist in the prosecution, and that the accused, although he insisted on his right, was not allowed to cross-examine the witness prior to his being withdrawn, although the judge does say that he would have been allowed to call the witness back at some other time to be cross-examined. It is difficult to see how this would have helped the accused, for the witness was practically set down on the ground that he was drunk. Whether or not he was drunk was a question on which no one but the jury was to reach a conclusion so as to affect the case; but, even if the judge had the power to decide that the witness was drunk, he could not either take away from the jury the testimony already given, nor could he deprive the accused of the right to immediately cross-examine. Suppose this witness had been the last, (perhaps it was so,) when could the prisoner have called him back? He could have been deprived absolutely, as he was substantially in this case, of one of the most inestimable rights which belong to those who are tried for crime. The fact that the appellant was deprived of his right to cross-examine the witness before his removal and withdrawal is not contained in the grounds of appeal, but is in the report of the judge. It is urged that the appellant had thus waived his right to appeal from such action of the court below. The same rule does not apply in this respect to civil actions and to trials involving human life. This court is bound, in a capital case, to take notice, in behalf of the accused, of any error apparent upon the record by which the prisoner has been deprived of any of the substantial means of enjoying a fair and impartial trial. As already indicated, it was not the province of the judge to decide that the witness was drunk, nor was it proper to decide that the evidence was immaterial and must be withdrawn. The evidence related to the question in issue, and could not, in a proper sense, be called immaterial; while its materiality, as measured by its weight or value, was a question solely for the jury. Either of the reasons would give sufficient ground for new trial. But the right to cross-examine is one which must remain inviolate. To take it away would render almost value-

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*less the constitutional right "to meet the witnesses against him face to face." Const., Art. I., Sec. 11. It is the law of evidence that "When a witness has been examined in chief, the other party has a right to cross-examine him." 1 Greenl., § 445. "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth." Ib., § 446. The right loses its efficacy if its exercise is to be postponed until the witness has had time to reflect or to be subjected to evil influences. It is unnecessary, perhaps, to say more on this point. The law is too plain to require authority. The prisoner was practically deprived, though, doubtless, unintentionally so, of the right to cross-examine the witness produced against him—one of the most inestimable rights by which a man may maintain his defence. It is concluded, therefore, that there is material error in the action of the court with regard to the witness, Grimes; the rulings upon the character of his testimony; its withdrawal from the jury, and the practical deprivation of the right to cross-examine then and there.

The third and fourth grounds show no error, and do not require particular consideration. The fifth ground has been already disposed of.

The judgment of the Circuit Court is therefore set aside, and a new trial granted.

Motion granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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12 S. C. 97

(Case No. 741.)

H. F. ADICKES, WILLIAM McGILL and THOMAS McGILL v. J. T. LOWRY and FENTON DIGGS.

(April Term, 1879.)

[1. *Execution* ⊂⊃116.]

Executions having an unexpired lien on November 25th, 1873, under the provisions of Section 314 of the code of procedure, then acquired, by virtue of the act of that date amending this section, an extended lien for ten years from the day the lien attached. Arnold v. McKellar, 9 S. C. 335.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 266–271; Dec. Dig. ⊂⊃116.]

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[2. *Judgment* ⟸795.]

*Judgments entered in courts of record since November 25th, 1873, constitute a lien upon the real estate of the judgment debtor in the county where the same are entered, for a period of ten years. 15 Stat. 498.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1388; Dec. Dig. ⟸795.]

[3. *Execution* ⟸221.]

A levy being made under an execution having active energy, the sheriff may sell at any time thereafter while the lien of the judgment remains.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 626; Dec. Dig. ⟸221.]

[4. *Process* ⟸166.]

In an action to recover the possession of lands purchased under execution, the defendant, a purchaser from the judgment debtor, cannot object to the judgment, under which the sale was made, for insufficient service of original process upon the judgment debtor, particularly when such service was accepted by this defendant, subscribing himself as attorney in fact for the defendant in that cause.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 255; Dec. Dig. ⟸166.]

[5. *Vendor and Purchaser* ⟸260.]

Land in the possession of a vendee under a contract bona fide to purchase, cannot be sold under judgments subsequently obtained against the vendor. Massey v. McIlwain, 2 Hill Ch. 421, approved. But such defence, being equitable in its nature, should be decided by the judge, and not submitted to the jury for determination.

[Ed. Note.—Cited in Adickes v. Lowry, 15 S. C. 132; Cooper v. Smith, 16 S. C. 333; Smith & Co. v. Bryce, 17 S. C. 545; Chapman v. Lipscomb, 18 S. C. 233; Brownlee v. Martin, 21 S. C. 402; McGee v. Hall, 23 S. C. 392; Moore v. Smith, 24 S. C. 320; Sale v. Meggett, 25 S. C. 81; Reams v. Spann, 28 S. C. 533, 6 S. E. 325; Carrigan v. Evans, 31 S. C. 266, 9 S. E. 852; Hardin v. Clark, 32 S. C. 489, 11 S. E. 304; DuPont v. DuBos, 33 S. C. 397, 11 S. E. 1073; Capell v. Moses, 36 S. C. 561, 15 S. E. 711; Threatt v. Brewer Mining Co., 42 S. C. 95, 19 S. E. 1009; Holliday v. Hughes, 54 S. C. 157, 31 S. E. 867; Hall v. Boatwright, 58 S. C. 549, 36 S. E. 1001, 79 Am. St. Rep. 864; Independent Steam Fire Engine Co. v. Richland Lodge No. 39, A. F. M., 73 S. C. 540, 53 S. E. 993; Keenan v. Leslie, 79 S. C. 476, 60 S. E. 1114; Jenkins v. Jenkins, 83 S. C. 543, 65 S. E. 736; Godfrey v. E. P. Burton Lumber Co., 88 S. C. 142, 70 S. E. 396; Southern Ry.—Carolina Div. v. Howell, 89 S. C. 393, 71 S. E. 972, Ann. Cas. 1913A, 1070; Mitchell v. Hamilton, 98 S. C. 293, 82 S. E. 427.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 664–669; Dec. Dig. ⟸260.]

[6. *Judgment* ⟸753.]

[Cited in Warren v. Raymond, 17 S. C. 192, to the point that the Code amendment of November 25, 1873, provides the only way in which a lien may be acquired on a judgment entered prior to that date and after March 1, 1870.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1312; Dec. Dig. ⟸753.]

[This case is also cited in Templeton v. Lowry, 22 S. C. 390, as to the facts, and in Martin v. Bowie, 37 S. C. 115, 15 S. E. 736, as to the right of sale under first levy.]

Before Hudson, J., at York, March, 1878.

The plaintiffs purchased a tract of land at sheriff's sale as the property of J. R. Bratton; the defendant, Lowry, was in possession of this land, claiming it as his own, and Fenton Diggs was his tenant. This action was brought by the plaintiffs against the defendants to recover possession of the land and damages for its detention.

J. R. Bratton was a member of the firm of Allison & Bratton. Judgment in favor of Hugh Galloway was entered up on January 15th, 1871, against J. R. Bratton for $100.60, costs of a suit instituted by Bratton. No levy was endorsed upon the execution in this case. Judgment by default was entered up before the clerk of the court in May, 1872, for $354.36, in favor of Schieffelin & Co. against Allison & Bratton, personal service of the summons accepted by Allison signing the firm name. In July, 1873, separate judgments by default were entered up before the clerk against Allison & Bratton, in favor of Dowie, Moise & Davis, for $194.49, and L. M. Grist for $125.40, respectively. On the summons in the Dowie, Moise & Davis case appears this endorsement: "Personal service of a copy of within summons admitted, May 12th, 1873. (Signed) J. R. Bratton, per John T. Lowry, attorney in fact." In September, 1873, judgment by default before the

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clerk was obtained by McGill, *administrator, against Allison & Bratton, for $675.05, service of summons being accepted by Allison and also by "J. R. Bratton, per John T. Lowry, attorney in fact." The Dowie, Moise & Davis and Grist executions were properly levied upon the land in dispute, as the property of J. R. Bratton, on September 22d, 1873; and the Schieffelin & Co. and McGill executions were also levied November 5th, 1873; and on the day that these levies were made, certified copies of the executions and levies were filed with the clerk. In these four cases, the judgment recited that J. R. Bratton had been personally served with the summons. On sale-day in December, 1873, the land was sold under these levies, and bid off by J. T. Lowry, who was then in possession, for $1405. During the month Lowry paid to the sheriff $400, (which were applied to the Dowie, Moise & Davis and Grist executions, satisfying them in full,) but failing fully to comply, the land was advertised to be re-sold at his risk on sale-day in January, 1874. Meantime, an order of injunction at the suit of Mrs. Agnes B. Harris prevented the re-sale. This order was modified February 12th, 1874, restraining the re-sale until the assets of Allison & Bratton were exhausted. These partnership assets were exhausted in April, 1874. On February 11th, 1874, judgment was obtained by Mrs. Agnes B. Harris against J. R. Bratton, for $666.95. This judgment recited that the defendant appeared by attorney, answered and admitted the cause of action. Execution was lodged with the sheriff during the same month, but

was never levied. H. F. Adickes obtained judgment by default for $663.70, against Allison & Bratton on February 14th, 1874, which recited that the summons and complaint were served personally on the defendants, and adjudged that the plaintiff recover of "said defendants," &c. Upon the summons was endorsed an acceptance by Allison alone. Execution was lodged but never levied. The land was re-sold by the sheriff in June, 1875, and bid off by the plaintiffs for $1000, who complied and received deed of conveyance. Before suit brought in any of these cases (except Galloway's), J. R. Bratton had left the state and remained away. No attachments were issued against his property, and there was no service by publication of summons.

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*The defendant claimed the property under deed from J. R. Bratton dated in 1874. He also claimed to have had previously a bond for titles, executed and delivered to him by J. R. Bratton in 1871, in the presence of two witnesses, which bond had been afterwards destroyed in a fire, which consumed his dwelling-house. He denied the validity of the sale, and the legality of all the judgments obtained since Bratton left the state.

The deed was offered in evidence. The witnesses resided out of the state, but proof was admitted under Section 30, Chapter CX., of General Statutes.

The plaintiffs requested the presiding judge to charge: 1. That any execution whose return-day had not expired at the date of injunction order, still kept its active energy during the existence of the injunction. 2. That the defendants had no right to attack, in this action, the judgments under which the sale was made, on the ground that J. R. Bratton was not personally served with the summons. 3. That even though said executions under which the land was sold were void, the sale would still be valid if there was another and valid execution and judgment to which the sale could be referred. 4. That if a levy were made before the return-day of an execution, a sale after return-day would not thereby be void. 5. That if from the testimony, the jury were satisfied that the deed made to J. T. Lowry was for the purpose of hindering, delaying and defrauding the creditors of J. R. Bratton, then that said deed was void. 6. That the re-sale was not affected by the active energy of the execution expiring after first sale. 7. That J. T. Lowry and his tenant were, in this action, estopped from denying that J. T. Lowry was duly authorized to accept service on the summonses against J. R. Bratton.

His Honor declined the third request, on the ground that it was not applicable to the present case. He refused the fourth request, saying that any sale after the one hundred and twenty days had elapsed, was void, even though the levy had been made prior to the return-day of the execution. He granted the fifth request to charge. Upon the remaining exceptions, his Honor held as follows: "That he had grave doubts whether there had been such service of process as would sustain the

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executions in *these cases against Bratton's individual property; that even were service good, the lien of the executions and the sheriff's power to sell under them expired one hundred and twenty days after the levy, or one hundred and twenty days after all prior encumbrances were removed; that more than one hundred and twenty days appeared to have elapsed after such removal of prior encumbrance affecting the executions last levied; that in the case of W. H. Schieffelin & Co., the execution was levied more than sixty days after it was issued, and the levy was void; and that none of the executions, in the judgment of the court, were effective process to authorize a sale of Bratton's individual property in June, 1875. He further held that these defendants were not estopped upon these questions, as it was incumbent upon any one claiming possession under a sheriff's title, upon an execution sale, to show the validity of the proceedings on which the executions issued. He charged the jury that if they believed that the defendant was in possession, under a bond for title, or contract of sale, at the time of the levy, which was afterwards converted into a fee simple title, that the land could not be taken in execution against Bratton, unless the transaction between Bratton and the defendant was for the purpose of hindering, delaying, or defrauding creditors; and of this they must be the judges."

To all of which charges (except the fifth) and refusals to charge, the plaintiffs excepted. The jury retired; and then brought in a verdict for defendants. The plaintiffs thereupon made a motion for a new trial, which motion was refused, and exception thereon taken. The defendants thereupon entered up judgment against the plaintiffs on day of , 1878, for the sum of dollars, costs and disbursements.

From which judgment, charges, refusals to charge, and refusal to grant a new trial, the plaintiffs appealed to this court, and asked that the rulings of the presiding judge be reversed, and a new trial granted, on the ground that his Honor erred in refusing to charge—

1. That any execution whose return-day had not expired at the date of the injunction order, still kept its active energy during the existence of the injunction.

2. That the defendant had no right to at-

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tack, in this action, *the judgments under which the sale was made, on the ground that J. R. Bratton was not personally served with the summons.

3. That even though said executions, under

which the land was sold, were void, the sale would still be valid if there was another and valid execution and judgment to which the sale could be referred.

4. That if a levy were made before the return-day of an execution, a sale after return-day would not thereby be void.

5. That the re-sale was not affected by the active energy of the executions expiring after the first sale.

6. That J. T. Lowry and his tenant were estopped in this action from denying that J. T. Lowry was duly authorized to accept service on the summonses against J. R. Bratton. And in charging—

7. That the right to sell under the executions depended upon the lien of the executions, and that said lien had expired before the second sale.

8. That the sheriff was without authority to re-sell the land at the time he did sell.

9. That if the defendant, Lowry, was holding the land at the time of the first sale, under a contract to purchase from Bratton, then that the land could not be sold as Bratton's property. And—

10. In refusing to grant a new trial.

11. Because his Honor erred, in his rulings, on the admissibility in evidence of the power of attorney, and the deed from Bratton to Lowry.

[For subsequent opinion, see 15 S. C. 128.]

Mr. J. S. R. Thomson, for appellants.

1. The judgments express, upon their face, that the summons had been served personally upon J. R. Bratton. This recital cannot be controverted, except in proceedings instituted by the defendant in execution directly attacking the judgments. 3 McC. 346; 1 N. & McC. 408; Harper 463; Freeman on Judg., §§ 130, 131; Rorer on Jud. Sales, § 468.

2. The power of attorney gave authority to Lowry to accept service of summons for J. R. Bratton. 1 Wait Pr. 50.

3. Defendants are estopped from denying

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that J. T. Lowry *was duly authorized to accept service of the summons in either of the actions. Rorer on Jud. Sales, §§ 445, 457, 656; 2 Pars. on Cont., § 799; Bigelow on Estoppel 433, and note; Story on Agency, § 264.

4. His Honor should have charged "that even though the said executions under which the land was sold were void, the sale would still be valid, if there was another and valid execution and judgment to which the sale could be referred." 1 McM. 349; 2 Spears 91; 2 Rich. Eq. 4; 3 Hill 289; 11 Johns. 513; Freem. on Ex., § 274.

5. If a levy was made before return-day, a sale after return-day would not thereby be void. 1 Mill Const. R. 325; 3 Hill 289.

Mr. J. F. Hart, for respondent.

As to the first exception, there was no execution which had an active energy. As to the second, any party may collaterally take advantage of void proceedings. 2 Strob. 208; 1 Bail. 611. Was the sale void? Under the Galloway judgment there was no levy and no lien. A sale under it would have been void. 2 Bail. 361; 2 Bay 524. The executions of Grist and Dowie, Moise & Davis, were against Allison & Bratton, and Bratton not being served, his individual property could not be seized. Code, § 159, Subd. 1. There was no service by Lowry's acceptance, because—(1.) The power of attorney referred only to Bratton's individual estate; (2.) It would have conflicted with act of 1785; 4 Rich. 267; 6 Rich. 487. (3) It was in conflict with the code, which requires service to be personal. 13 How. Pr. 43; 5 Ib. 341; 14 Ib. 381; 16 Ib. 144; 1 Wait Pr. 511, 530, 531; (4.) There was no attachment taken out. 17 How. 106. The Schieffelin & Co. execution was not levied in time, and in the McGill case there was no service. The Harris and Adickes executions were not in existence in December, 1873, and their subsequent issue could not validate the sale. 3 Rich. 119; 10 Rich. 448. In June, 1875, when the land was re-sold, all liens had expired.

After the expiration of the lien the sale cannot be made. 1 Mill Const. R. 323. As to the re-sale: The act of 1839, (Gen. Stat. 473,) must be strictly followed. 3 Bay 524; 2 Brev. 417; 3 Strob. 306; 1 Bail. 618.

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*The valid execution and judgment to which the sale could be referred, must be such as create a lien. 2 Spears 90. As to the sixth exception, there can be no estoppel if act is void. 1 Bail. 618.

As to the ninth ground of appeal, the Circuit judge is fully sustained by 2 Hill Ch. 428, and Freem. on Judg., §§ 357, 363.

June 19th, 1879. The opinion of the court was delivered by

HASKELL, A. J. This is an action brought to recover certain lands, with damages for the detention thereof. The land was levied on as the property of J. R. Bratton, and sold by the sheriff on sale-day in December, 1873, under and by virtue of executions then in his office against the business firm of Allison & Bratton, of which J. R. Bratton was a member, and was bid in by J. T. Lowry, one of the respondents, who failed fully to comply with the terms of the sale, and received no title from the sheriff. It appears that Lowry was in possession at the time of the sale. The land was advertised by the sheriff for re-sale on the succeeding sale-day in January, 1874, but the sale was prevented by orders of the court restraining further proceedings against the property of J. R. Bratton until the assets of Allison & Bratton had been exhausted. It is further shown, in the case as made, that the assets of the firm were exhausted by sale in April, 1874, and that on sale-day in June, 1875, the land was re-sold

by the sheriff "at the risk of the former purchaser, and bid off by the plaintiffs for $1000, which they paid," and that they received a title deed from the sheriff, on which title the appellants rely. The defence claims possession by J. T. Lowry under a deed from J. R. Bratton "prior to said sale," and further denies that there was "any valid sale by the sheriff," upon the grounds: 1. That the premises were the individual property of J. R. Bratton, and that he had never been served with process in the suits under which the land was sold; and second, that no valid levies had ever been made by the sheriff under the executions in his office, and that the sale by him was without authority of law. There was evidence to show that there was in the sheriff's office, prior to the first sale, an execution in the case of Hugh Galloway

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v. J. R. Bratton, judgment *bearing date January 15th, 1871, and that no levy was ever endorsed on said execution. That there were also in the sheriff's office, at the time of the first sale, executions issued upon judgments, of title and date as follows, viz.: Schieffelin & Co. v. Allison & Bratton, May 22d, 1872, execution issued and lodged same day; Dowie, Moise & Davis v. Same, July 28th, 1873; L. M. Grist v. Same, July 28th, 1873; McGill et al., administrators, v. Same, September 30th, 1873. Executions in the last three cases were issued and lodged in each on the same day that the judgment was entered up. It was also in proof that subsequently to the first sale, but prior to the re-sale, that is, on the 11th of February, 1874, and on the 14th of February, 1874, judgments were entered up, one in favor of Agnes B. Harris v. J. R. Bratton et al., execution issued and lodged 14th of February, 1874, and another in favor of H. F. Adickes v. Addison & Bratton. And that levies were made on the said land by the sheriff, and certified copy of each levy and execution filed in the cases, and at the dates as follows, viz.: L. M. Grist v. Allison & Bratton, September 22d, 1873; Dowie, Moise & Davis v. Same, September 22d, 1873; Schieffelin & Co. v. Same, November 5th, 1873; McGill and others v. Same. November 5th, 1873. At the time when each of these four judgments was obtained a judgment did not of itself constitute a lien upon real estate. Code, § 313, Gen. Stat. 643. Such lien, however, might be created by a levy made by virtue of an execution issued to enforce the judgment, and by the filing of a certified copy of the execution, with proper certificate thereon, in the office of the register of mesne conveyance. Code, § 314. It is in proof that in the four cases last above-named such proceedings were properly had, and that in at least three of the cases the sixty days, within which the original executions were returnable, had not expired at the time the levy was made, and that as to one of them, the execution held by McGill et al. v. Allison & Bratton, the sixty days had not expired on November 25th, 1873, which date it will be seen, has important bearing upon the point involved. It is plain from the statement thus presented that there was evidence to show that at the time of the sale, on sale-day in December, 1873, there were three executions in the sheriff's office which had been

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levied within *the time in which they were returnable, and that according to law (Code, § 314.) the lien attached to the land for one hundred and twenty days subsequent to the date of filing the proper certificates, and one hundred and twenty days after the removal of prior encumbrances. But on November 25th, 1873, an act entitled "An act to alter and amend the code of procedure, being Title V., Part III., of the General Statutes," (15 Stat. 495,) became law. See Arnold v. McKellar, 9 S. C. 335. By Section 14 of said act, it is provided that "final judgments hereafter (after November 25th, 1873,) entered in any court of record in this state, shall constitute a lien upon the real estate of the judgment debtor in the county where the same are entered, for a period of ten years." It is further provided that "where any judgment has been obtained and execution issued since the first day of March, A. D. 1870, and the said judgment or execution has now [November 25th, 1873,] a lien by reason of a levy in accordance with the provisions of the code of procedure, then the lien of such judgment or execution shall date from the day upon which it became a lien under said code of procedure," and, as to real estate, endures for ten years from that time. The leading purpose of Section 14 is to make a judgment a lien upon real estate for ten years from the time the judgment is entered up. As to cases, however, where judgments had come into existence between March 1st, 1870, and November 25th, 1873, and such judgments had not acquired a lien according to law, the mode by which lien may be acquired and the period from which the lien is to run are both provided for. But in cases where the judgment had acquired a lien under the code for a period limited by the one hundred and twenty days rule, the provision above cited does nothing more than fix the time from which the extended or ten-years lien shall run, and requires no summons or other proceedings to show cause why it should not become a lien, from the fact that the lien had already been acquired. Executions, also, under the act of 1873, (15 Stat. 495,) cease to be returnable within sixty days, and retain their active energy "until the regular term of the court from which they were sued, which shall follow next after the full completion of five years from its lodgment." It is thus obvious

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that three such judg*ments as those above cited might have constituted a lien upon the land for ten years after the times at which

they respectively acquired lien under the code of procedure. The two other judgments offered in evidence, viz., Agnes B. Harris v. Bratton, and Adickes v. Allison & Bratton, having been entered up subsequently to the adoption of the act of November 25th, 1873, would unquestionably constitute a lien upon the property. Thus, there being evidence of the existence of such judgments and executions, it was manifestly error to instruct the jury "that the right to sell under the executions depended upon a lien of the executions and that said lien had expired before the second sale." The fact is that the whole trial was conducted upon the assumption, on all sides, that the act of 1873, above cited, was not of legal force, and that its provisions did not go into effect until the 8th of March, 1875, at which time they were re-enacted; but, as already said, this court held otherwise in Arnold v. McKellar, supra. The judgment lien fixed by the act of 1873 disposes of most of the questions of law contained in the exceptions of the charge of the judge, and it is unnecessary that they should be further considered.

There remain, therefore, only two questions to be disposed of.

1. Whether the defendants had any right to attack the judgments under which the sale was made, on the ground that J. R. Bratton, the judgment debtor, was not personally served with the summons. The defendants are, in no sense, parties to the judgment. The general doctrine is thus briefly stated: "Third persons may sometimes have a judgment vacated on the ground that it is collusive, or that the cause of action on which it is based was fictitious, but they are not allowed to take advantage of errors or irregularities of proceeding." Freem. on Judg., § 91. In Barkley v. Screven, 1 N. & Mc.C. 408, it was held that the purchaser of real estate at sheriff's sale, could rest his title upon the judgment and execution. "The purchaser," says the court, "is not required to look into the regularity of the proceedings. The seal of the court is evidence enough for him. Nor can objections of this nature be made by third persons if the proceedings were clearly irregular." The same is held in Guignard v. Glover, Harp. 457, and in Henry v. Ferguson, 1 Bail. 512. The

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de*fendant, Lowry, sets up for a defence that the service of summons on Bratton was accepted by Bratton, per J. F. Lowry, (the defendant,) and that he, the defendant, was not duly authorized to thus accept service. Henry v. Ferguson is exactly in point and is conclusive. Admitting that Lowry had not full authority at the time he accepted the service, nevertheless Bratton has never objected, and, certainly, Lowry cannot, at law or in equity, avail himself of his own wrong. The defence is inadmissible, and should not have been allowed to stand.

2. Whether the judge erred in his instruction to the jury—"That if the defendant, Lowry, was holding the land at the time of the first sale under a contract to purchase from Bratton, then that the land could not be sold as Bratton's property." The judge further submitted to the jury to decide whether such sale to Lowry was "for the purpose of hindering, delaying or defrauding creditors." The law, as announced by the Circuit judge, is sustained by the case of Massey v. McIlwain, 2 Hill Ch. 421, which is a leading authority on the subject. It is proper, however, to remark that the conclusion reached on the point by the Circuit judge should be regarded in the light rather of a judgment than of an instruction to the jury. Such defence is equitable in its nature and belongs to that side of the court which exercises the chancery jurisdiction. Under the former practice such defence could not have been set up in the action at law to try the title and recover possession. The defendant would have been obliged to file his bill in equity to restrain proceedings at law, and to seek such other relief as in equity he might have a right to demand. Under the code of procedure all this may be effected by the pleadings in a single action, and new parties, if necessary, may be brought in; but, at the trial, the legal and the equitable issues must be distinguished and decided by the court in the exercise of its distinct functions as a court of law and a court of equity, and only those should be determined by a jury which are properly triable by jury, while those which would formerly have been properly triable in equity must be determined by the judge in the exercise of his chancery power. In the latter class, when questions of fact are submitted to the jury, the purpose can only be to enlighten the under-

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standing of the *judge by giving him the aid of a verdict, but the verdict is not binding, and may be totally disregarded by the judge in arriving at his final determination.

The question of the admissibility of certain deeds in evidence is rendered immaterial by the decision as to the lien of the judgments, and as to the right of the defendant to assail judgments to which he is not a party. The right of the sheriff to resell cannot be disputed after the lien of the judgments is admitted; and whether the resale could be at the risk of the former purchaser is not made a question.

Having thus disposed of the material questions raised, the case is remanded for a new trial, attention being called to the manner in which the equity portion of the case should be tried.

Motion granted.

WILLARD, C. J., and McIVER, A. J., concurred.

12 S. C. 109

(Case No. 744)

JOHN T. PRINCE v. J. C. SUTHERLAND.

(April Term, 1879)

[*Costs* ⊂⊃212.]

A sheriff is entitled to his costs as taxed and entered up in the judgment. If there is error in the taxation it should be corrected by motion or on exceptions taken; it cannot be questioned in proceedings by rule against the sheriff.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 790; Dec. Dig. ⊂⊃212.]

Before Wallace, J., at Marlborough, February, 1879.

The defendant, Sutherland, paid the execution in this case in full, less certain costs for serving witnesses, taxed up in the judgment in favor of the sheriff. The sheriff, W. P. Emanuel, refused to enter satisfaction on the execution, and this was a rule requiring him to show cause why he so refused. The Circuit judge ruled that the charges were legal, and discharged the rule. The defendant appealed.

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*Messrs. Dudley & Newton, for appellant.

Messrs. Townsend & Livingston, for the sheriff.

June 19th, 1879. The opinion of the court was delivered by

HASKELL, A. J. The sheriff was ruled for refusing to enter satisfaction on an execution in his hands, which it was claimed had been paid in full. He responded for cause "that he had charged one dollar for each witness served by him, besides mileage, and for so doing he had not been paid." * * * *

The Circuit judge * * * ruled that the charges were legal, and ordered the rule to be discharged." The record was not brought up, but the above is the statement of the case made. It was admitted by the counsel that the sheriff's costs had been regularly taxed and entered up in the judgment, and that he charged no more than the sum so taxed. The whole proceeding by rule, therefore, was irregular, and the rule should have been discharged without deciding upon the legality of the costs taxed. Costs as taxed are legal until the taxation has been set aside; that should be done by motion or on exception taken. The sheriff was unquestionably entitled to collect the costs as taxed; but whether the taxation was proper was not in issue in the proceedings by rule, and must be considered as not having been decided. The conclusion, however, of the Circuit judge in discharging the rule is sustained. The appeal must be dismissed.

Motion refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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*(Case No. 745.)

Ex parte W. G. CHILDS, Assignee. Ex parte W. A. CLARK, Assignee. Ex parte W. A. CLARK, Assignee.

(April Term, 1879.)

[1. *Certiorari* ⊂⊃64.]

Where the legislature establishes an inferior tribunal, and gives no right of appeal from its decisions, the only office of the writ of certiorari is to determine whether the inferior tribunal has acted within the scope of its powers, and not to determine whether in so acting, it has committed errors of law or fact. Cases reviewed.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 174; Dec. Dig. ⊂⊃64.]

[2. *Courts* ⊂⊃207.]

The jurisdiction of the Supreme Court as defined in Article IV., Section 4, of the constitution, embraces a writ of certiorari only when necessary to a general supervisory control over an inferior court—that is, such a supervision as will enable it to keep the inferior court within the limits of its jurisdiction.

[Ed. Note.—Cited in Richland County v. Miller, 16 S. C. 249; State ex rel. Richland County v. Columbia, Id. 414; State ex rel. Richland County v. Columbia, 17 S. C. 83; State ex rel. Sawyer v. Fort, 24 S. C. 510, 517; Ex parte Bacot, 36 S. C. 130, 15 S. E. 204, 16 L. R. A. 586; Ex parte Riggs, 52 S. C. 302, 29 S. E. 645.

For other cases, see Courts, Cent. Dig. §§ 733–741; Dec. Dig. ⊂⊃207.]

[3. *Courts* ⊂⊃196.]

The "Court of Claims" established by the legislature by the act approved March 22d, 1878, (16 Stat. 555,) is not a court, organized under the authority of Article IV., Section 1, of the constitution, but a tribunal in the nature of a board of audit, created under Article XIV., Section 4, to inquire into the amount and character of the unfunded debt of the state.

[Ed. Note.—Cited in Wheeler v. County of Newberry, 18 S. C. 136; Ex parte Whipper, 32 S. C. 10, 10 S. E. 579; Campbell v. Sanders, 42 S. C. 528, 20 S. E. 415; Carolina Glass Co. v. State, 87 S. C. 283, 69 S. E. 391.

For other cases, see Courts, Cent. Dig. § 177; Dec. Dig. ⊂⊃196.]

[4. *States* ⊂⊃184.]

Claims known as "Little Bonanza Warrants" being presented before the commissioner of such "Court of Claims," before the enactment of the amendatory act of December 24th, 1878, it was not error on the part of such commissioner to require the claimants to prove the bona fides of the original consideration upon which their claims were founded.

[Ed. Note.—For other cases, see States, Cent. Dig. § 174; Dec. Dig. ⊂⊃184.]

This was an original application to this court for a writ of certiorari.

On December 24th, 1875, the general assembly of South Carolina passed two acts providing for the payment of certain claims against the state. The first was entitled "An act to provide for the payment of certain indebtedness of the state," and was nick-named the "Little Bonanza;" the other was entitled "An act to provide for the settlement and payment of certain claims against the state," and was nick-named the "Big Bonanza." By

these nick-names they are sometimes designated in subsequent legislation. The little bonanza act specified certain claims by name and amount, for which the comptroller-gen-

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eral should *issue his warrants in sets of three, payable in one, two and three years, with interest from date.

The petitioners in the three cases stated at the head of this decision, were assignees of some of these little bonanza warrants.

On March 22d, 1878, the legislature passed an act entitled, "An act to provide for the settlement of the unfunded debt of the state incurred before the first of November, 1876." The scope of this act is sufficiently set forth in the opinion of the court, the class of claims against the state alluded to, as being provided for in the fifth section, being big bonanza warrants.

The petitioners presented their claims to Hon. James C. Coit, commissioner of this Court of Claims, who required them to prove the bona fides of the original consideration against the state, upon which their claims were founded.

On December 24th, 1878, this act was amended, (16 Stat. 787), Section 5 of the original act (providing for the payment of the big bonanza warrants) having added to it these words: "And in all other cases, including the warrants known as little bonanzas, the burden of proof shall be upon the claimant to establish the bona fides of the original consideration upon which the claim is based."

The petitions in the three cases were all presented to this court in April, 1879, and were heard together during the same term of the court.

Messrs. Rion, Lyles & Barron, for petitioners.

This court has jurisdiction to grant the writ prayed for. Const. Art. IV., §§ 1, 4; 5 S. C. 117. The "Court of Claims" is a judicial tribunal, having a clerk, seal and records. The error alleged is one that will be reviewed by this court upon this writ. 5 Wait Pr. 451, 452, 465. The court will go beyond mere jurisdictional questions, the proceedings below being of a summary character, and there being no other remedy. 2 Wait Act. & Def. 139, § 5; 29 Wis. 444; 40 N. Y. 154; 39 N. Y. 81; 40 Cal. 479. In our own state, see 2 Hill 367; 3 Rich. 113; 5 Strob. 29; 9 Rich. 292; 5 S. C. 117. The writ will lie, unless expressly taken away by statute. 2 Hill 367; 5 S. C. 117; 1 Strob. 198; 23 Wend. 277; 20 Johns. 430; 40 Cal. 479.

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*Mr. L. F. Youmans, attorney-general, for respondent.

The alleged error is not an error of law; if error at all, it is error of fact, not remediable by certiorari. 2 Wait Act. & Def. 140. Section 5 shows that only those warrants should be received without evidence. The amendatory act amending Section 5, makes it still plainer. Respondent has followed the acts. The petitioners, by their action, have waived all objections to the two acts. The Supreme Court has no jurisdiction of these cases. Const., Art. IV., § 4. This is not a court at all. It is a tribunal created under Article XIV., Section 4; what might have been committed to a committee of the legislature, or other board, or officer. If errors are committed they can be corrected only by the legislature. Certiorari is not a writ of right, but grantable only in the sound discretion of the court. 2 Bac. Ab., tit. "Certiorari," A, 164, 165; 5 Wait Pr. 454, 459, 460; 2 Wait Act. & Def. 135. The common law certiorari (that here prayed for), reaches only patent defects. 2 Wait Act. & Def. 135, 139. For the judicial department to attempt a settlement of the unfunded debt of South Carolina, would open Pandora's box of evils, and would be in violation of Article I., Section 26, of the constitution.

June 25th, 1879. The opinion of the court was delivered by

McIVER, A. J. These three cases, involving the same questions, were heard and will be considered together. They were petitions addressed to this court in the exercise of its original jurisdiction, praying that writs of certiorari be issued, directed to James C. Coit, Esq., commissioner of the Court of Claims, established by "An act to provide for the settlement of the unfunded debt of the state, incurred before November 1st, 1876," approved March 22d, 1878, (16 Stat. 555), as amended by an act approved December 24th, 1878, (16 Stat. 787), for the purpose of "ascertaining all legal and just claims which have not been funded in bonds or stock," commanding the said commissioner to certify to this court the records of the several claims of the petitioners, that they may have justice done to them in the premises. Upon the filing of the petitions rules were issued requiring said commissioner to show cause

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why the writs should not issue *as prayed for in the petition. To these rules the commissioner has made return, as follows: "1. That the action of respondent, set forth in the petition, is final and not reviewable by any of the courts of the state. 2. That this honorable court has not jurisdiction to issue the writ of certiorari prayed for. 3. That the action of respondent, set forth in the petition, is not an error of law."

The error of law alleged in each of the petitions is that the commissioner required the petitioners to make proof of the bona fides of the original consideration upon which the claim was based, notwithstanding it had been previously approved by the legislature and ordered to be paid, and a warrant given therefor by a former comptroller-gener-

al of the state. It will be seen, therefore, that the error which this court is thus asked to review and correct is not one of a jurisdictional character, but only an alleged error of law in applying the rules of evidence as to the burden of proof. There is no allegation that the commissioner has either exceeded his jurisdiction, or has failed or refused to exercise any of the powers conferred upon him by the act establishing his office. The question whether a common law writ of certiorari goes only to correct errors of a jurisdictional character or extends to any error of law, and is, in fact, a substitute for a writ of error, where no other remedy has been provided, has given rise to much conflict of opinion, and has been variously decided.

We think, however, that the true rule, which is not without the support of high authority, is this: where the legislature establishes an inferior tribunal, and gives no right of appeal from its decisions, the only office of the writ of certiorari is to determine whether the inferior tribunal has acted within the scope of its powers, and not to determine whether in so acting it has committed errors of law or fact. It cannot be used for the purpose of determining whether such inferior tribunal has committed an error of judgment in exercising the powers granted, but only to determine whether it has exceeded or has failed to exercise any of the powers granted. Any other rule would deny to the legislature the power of establishing an inferior tribunal with jurisdiction to hear and finally dispose of any matter. If the

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*legislature, in establishing an inferior tribunal, designed that its decisions should be reviewable by appeal or otherwise, it would be very easy to say so, but if they did not so intend, then, certainly, this court ought not to thwart their intention by the exercise of what is at least a doubtful power. When, however, such inferior tribunal undertakes to go beyond the limits of its jurisdiction, as prescribed in the act creating it, or fails or refuses to exercise any of the powers granted, it then becomes the duty of this court to see that it keeps within the limits prescribed for it, and that it performs the functions for which it was created, thus carrying into effect, instead of thwarting, the intention of the legislature. A reference to some of the cases will show that these views are not without the support of authority.

In Groenvelt v. Burwell, 1 Salk. 144, the question was whether the Court of King's Bench could send a writ of certiorari to the censors of the College of Physicians, who, by their charter, were authorized to fine and imprison for malpractice. The writ was allowed, and Holt, C. J., said: "It is a consequence of every inferior jurisdiction of record that their proceedings be removable into this court to inspect the record and see whether they keep themselves within the limits of their jurisdiction."

Rex v. Moreley, 2 Burr. 1040, was an application to the Court of King's Bench for a writ of certiorari to be sent to a justice of the peace to bring up the record of the conviction of certain persons prosecuted under the conventicle act. It was contended that the act, by implication at least, forbid that court from issuing the writ, inasmuch as the act provided "that no other court whatsoever shall intermeddle with any cause or causes of appeal upon this act, but they shall be finally determined in the Quarter Sessions only." From this it was argued that the Court of King's Bench could not review the proceedings even by certiorari, and hence it would be useless to issue the writ. But the court held that the writ should issue, saying: "A certiorari does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds." See, also, Rex v. Whitbred, 2 Doug. 549; Rex v. Abbott, reported in note to 2 Doug. 553; Anonymous, 1 B. & Ad. 382; 20 E. C. L. R. 405.

In Birdsall v. Phillips, 17 Wend. 474, recog-

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nized and approved *in Simpson v. Rhinelander, 20 Wend. 104, it was distinctly decided that on a return to a common law writ of certiorari no other questions can be raised except those relating to the jurisdiction of the officer or court before whom the proceedings are had, and the regularity of such proceedings. The decisions as to the admission or rejection of evidence, or the instructions given to the jury, cannot be reviewed by certiorari. The policy of the law creating their summary jurisdictions, is that their decisions on the merits shall be final and conclusive, and if they err upon questions either of law or fact, the parties are without remedy as long as such inferior tribunals keep within the limits of the jurisdiction assigned to them. Cowen, J., in this case uses the following language: "The court below being possessed of the cause, and prima facie having jurisdiction and proceeding regularly with its process and continuances, all the rest relates to the merits. These include the evidence offered, its competency and effect, and the charge of the judge, and it is not the office of a common law certiorari * * * to bring up such matters for review. This writ is but an emanation from the general supervisory duty of the Supreme Court to restrain the action of all inferior magistrates to matters within their legal grasp." This case also recognized and approved in Ex parte Mayor of Albany, 23 Wend. 277, where the court, after a review of the cases in New York, says: "The amount of these is that we will not, in any case, on a common law certiorari, go beyond the question of power,

which is another word for jurisdiction." It is very true that in subsequent cases in that state, the most recent of which is Clapp v. Board of Police, 72 N. Y. 417, the courts of New York have taken a different view of the matter, and have extended the operation of a common law writ of certiorari much further than we are disposed to do, and much beyond the limits originally prescribed for it.

The cases in our own state do not decide the question under consideration, though there are passing remarks made in some of them, which seem to support the view contended for by the counsel for the petitioners. But these remarks, besides being mere dicta, were evidently not made with any reference to the question we are considering, and are

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not, therefore, entitled to the weight *which would otherwise be accorded to them. It seems to us that the proposition contended for by the counsel for the petitioners, that the common law writ of certiorari is a substitute for a writ of error, where there is no other remedy provided, and may be used to effect the same purposes, leads necessarily to the conclusion that it is beyond the competency of the legislature to establish an inferior tribunal for any purpose whatever, whose decisions upon the merits of any question, properly within its jurisdiction, should be final and conclusive, and not reviewable through the agency of a writ of certiorari, a conclusion which we would be very slow to adopt.

But the question in the case now before us is still narrower than the one we have been considering. Here the application is to this court, in the exercise of its original jurisdiction, for the writ in question. The jurisdiction of this court is defined in Section 4 of Article IV. of the constitution, and, as there defined, it embraces four distinct classes of powers: 1. Appellate jurisdiction in "cases of chancery." 2. "The correction of errors at law," under such regulations as the general assembly may prescribe. 3. The power to issue certain specified writs. 4. The power to issue "such other original and remedial writs as may be necessary to give it a general supervisory control over all other courts in the state." It will be observed that the jurisdiction for the correction of errors at law is not given in general and absolute terms, but only "under such regulations as the general assembly may by law prescribe;" and as it is not pretended that the general assembly has prescribed any regulations by which the errors of any inferior tribunal can be corrected through the medium of a writ of certiorari, it would seem to be very clear that such errors cannot be so corrected by this court, and, therefore, however it may be as to the Court of Common Pleas, this court cannot issue a writ of certiorari as a substitute for a writ of error. Then, as to the fourth class, under which the power invoked is claimed to have been conferred. In this class, too, the power conferred upon this court is not general and absolute, but can only be exercised in such cases as "may be necessary to give it a general supervisory control over all other courts in the state." Hence, whenever this

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court is asked to *issue a writ of certiorari, (one of the writs embraced in the general terms employed in conferring the fourth class of powers), it is necessary to show: 1. That the writ is to go to one of the courts of this state, as was decided in the recent case of Ex parte Carson, 5 S. C. 117. 2. That such writ is demanded for the purpose of giving this court some "supervisory control" over the court to which it is directed.

In these cases the demand is that the writs of certiorari prayed for be directed to "James C. Coit, Esq., commissioner of the Court of Claims," and the question is, whether that tribunal is a court within the sense of that term as used in the constitution. The fact that it is so called in the act constituting it, does not determine the question. Nor is the question to be determined by the nature of the means or instrumentalities it may employ, but rather by the objects which the legislature had in view in creating it, and the scope and effect of its powers. It is undeniable that some of the powers incident to a court have been conferred upon it, but on the other hand it was a tribunal of a temporary character, which did not proceed according to the course of the common law, dispensed with all pleading, was not governed by the rules of evidence which obtain in every court of justice, but, on the contrary, in the language of the act, "the evidence for and against the claim may be brought forward in the usual mode of auditing accounts and under such rules as may be prescribed by the commissioner; it had no means of enforcing its judgments, and, more than all, it did not render judgment according to the right of the matter, or according to the law and the evidence, but arbitrarily reduced the amount found to be due one-half. It is very clear to our minds that it was not a court in the sense of that term as used in the constitution. The general assembly, in creating it, evidently did not act under the powers conferred in Section 1 of Article IV. of the constitution, but rather under the provisions of Section 4 of Article XIV., which ordains that "the general assembly may direct by law in what manner claims against the state may be established and adjusted." Its object, undoubtedly, was not to create a court in the sense of that term as used in the constitution, but simply a tribunal, more as a board of audit than as a court to inquire into the amount

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and character *of the unfunded debt of the

state, which, but for the magnitude of the matter, might just as well have been referred to one of its own committees, and to prescribe the mode in which such claims against the state should "be established and adjusted."

But, even were we to regard this tribunal as a court, it would still be necessary, as we have seen, to inquire whether the writ is demanded for the purpose of enabling this court to exercise "supervisory control" over such inferior court. To determine this question it will be necessary to inquire what is meant by the terms "general supervisory control," as here used. They certainly do not mean that this court is to correct any error into which any inferior court of this state may fall in the exercise of the jurisdiction committed to it, for that would necessarily lead to the conclusion that this court could, through the medium of a writ of certiorari, review the findings of fact of any inferior court, a conclusion which no one is willing to adopt. Nor is it reasonable to suppose that the framers of the constitution meant by these words that this court should have power to correct any errors of law committed by any of the other courts of the state, for that would be repeating, in the fourth class of powers, the same power already conferred in the second class. These words must, therefore, mean just what the word "control" implies, that this court, through the medium of these writs, is to exercise such a supervision over the other courts of the state as that they may thereby be kept within the limits assigned to them, and no one of them be allowed to overstep its jurisdiction. This, as we have seen, was the office of a writ of certiorari at common law, and as one of the rules in construing the constitution is that it should be read in the light of the common law, (Cooley on Const. Lim. 60), we find that the construction which we have placed upon these terms in the constitution, instead of antagonizing, harmonize with the common law.

The respondent also takes the position in his return that his action, as set forth in the several petitions, constitutes no error of law. As the writ of certiorari is not a writ of right, but grantable only in the sound discretion of the court (1 Bac. Ab., A, 349), the writ should not, of course, be granted where the

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alle*gation of error, contained in the petition, does not appear to be well founded. While, from the view which we have taken of these cases, it is scarcely necessary to decide this question, yet we may say that we are not satisfied that any error of law is shown in the petitions. The error assigned consists in requiring the petitioners, as holders of warrants known as "Little Bonanzas," to prove the bona fides of the original consideration upon which such warrants were based; whereas the petitioners claim that the warrants themselves were sufficient prima facie evidence, and until the consideration upon which they rested was assailed by evidence adduced on the part of the state, it was not incumbent upon them to offer any evidence as to such consideration. This question, it will be borne in mind, is to be determined, not by the general rules of evidence obtaining in all courts of justice, but by the special provisions of the acts constituting the tribunal. By the first section of the original act, the object of establishing the tribunal is declared to be "for ascertaining all legal and just claims," not merely all legal claims. By the second section it is provided, not that the evidence for and against the claim shall be brought forward according to the usual rules of evidence, but the provision is "the evidence for and against the claim may be brought forward in the usual mode of auditing accounts, and under such rules as may be prescribed by the commissioner;" and by the fifth section it is provided that, so far as a certain class of claims against the state (to which class the claims held by petitioners do not belong) are concerned, the warrants drawn by the comptroller-general "shall be deemed sufficient evidence of the claims set forth therein," which, under the maxim expressio unius exclusio alterius, would seem to show that the legislature intended that, so far as all other classes of claims were concerned, such warrants should not be deemed sufficient evidence. Then, too, if we are permitted to gather the intention of the legislature which passed the acts in question from the condition of things which rendered it necessary to institute an inquiry into the validity of the debt of the state, it must be apparent to any one who is in the least degree conversant with such condition, that the legislature could not have intended that the

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inquiry *should be limited to an ascertainment of what claims had been passed and ordered to be paid by the previous legislatures, and warrants given therefor by any of the previous state officials, as such a course would practically defeat the very object of the inquiry, except in reference to that class of claims especially excepted in the fifth section of the act, which had already been subjected to the scrutiny of a tribunal somewhat similar to the one whose conduct is now under review.

From all these considerations, which it is not necessary for us to dilate upon, we are not prepared to say that the commissioner erred in the construction placed by him upon the terms of the original act. But if there were any doubt upon this point that doubt is entirely removed by the provisions of the third paragraph of the first section of the amendatory act, which, in express terms, casts the burden of proof upon the claimant to establish the bona fides of the original

consideration upon which the claim is based, "except in that class of claims specially mentioned in Section 5 of the original act." It is contended, however, that as this amendment was passed after the claims of the petitioners in these cases had been presented, after their actions had been commenced, so to speak, it cannot alter the rules of evidence in force at that time, so far as these claims are concerned. Without stopping to ascertain the weight to which this argument would be entitled if this were a question arising in one of the courts of this state, where the general rules of evidence apply, it is sufficient to say that, as appears by the journal of the general assembly, this question was brought to the attention of that body by the report of the commissioner, and they, simply in the exercise of the power conferred by Section 4 of Article XIV. of the constitution, directed by law in what manner the claims against the state should be established; and if the petitioners were unwilling to submit to the mode which the general assembly prescribed, by which such claims should be established, all they had to do was to withdraw them, for, at the time of the passage of the amendatory act, these claims had not been adjudicated by the commissioner, and it is only "after adjudication" that the commissioner is directed to cancel the claims.

It seems to us, therefore, that in any view

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of the question the *petitioners are not entitled to the writs of certiorari as prayed for in the petitions. In each of the cases above stated the rule must be discharged and the petition dismissed.

Application refused.

WILLARD, C. J., and HASKELL, A. J., concurred.

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12 S. C. 122

(Case No. 747.)

JOHN M. CURETON v. ANNA M. DARGAN.

(April Term, 1879.)

[1. *Attachment* ⟸250.]

The Circuit judge, on motion upon notice, may dissolve an attachment at chambers.

[Ed. Note.—Cited in Bray Clothing Co. v. Shealy, 53 S. C. 15, 30 S. E. 620.

For other cases, see Attachment, Cent. Dig. §§ 877 880, 893, 895, 897; Dec. Dig. ⟸250; Judges, Cent. Dig. ⟸132.]

[2. *Attachment* ⟸249.]

Summons was dated same day attachment was granted and levied, but the endorsement of the sheriff's entry on the summons was dated the day after, on which day it was served. *Held*, that in the absence of other testimony it was error to dissolve the attachment, as irregularity by the clerk who granted the order cannot be presumed, and the summons may have been issued the day of its date by delivery to some other person than the sheriff for service; McIver, A. J., dissenting—that under Section 122 of the code, action can be commenced only by service of summons, or by delivery to the sheriff or other officer for service.

[Ed. Note.—Cited in Montague v. Stelts, 37 S. C. 212, 15 S. E. 968, 34 Am. St. Rep. 736.

For other cases, see Attachment, Cent. Dig. § 862; Dec. Dig. ⟸249.]

[This case is also cited in Darby & Co. v. Shannon, 19 S. C. 531, as an example of the authority of the court to dissolve an attachment upon motion.]

Before Hudson, J., on Eighth Circuit, October, 1879.

The opinion of the court fully states the case.

[For subsequent opinion, see 16 S. C. 619.]

Mr. E. F. Stokes, for appellant.

Messrs. Earle & Wells, for respondent.

June 25th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The action is for the recovery of money on a promissory note, and the place of trial Greenville county. The plaintiff obtained an order for the attachment of the property of the defendant on the ground that the defendant was about to

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*remove her property out of the limits of the state with intent to defraud her creditors. After the attachment had been executed by the sheriff, and a summons served, the defendant moved before the clerk, who issued the attachment, to discharge the same, which motion was denied by the clerk. Defendant then gave notice of a motion before the Circuit judge, then sitting within the circuit at Walhalla, to set aside the attachment upon the affidavits upon which the motion had been heard before the clerk of Greenville county, on two grounds—first, because no summons was issued before the attachment was granted; and, second, because the note upon which the warrant of attachment was granted was not due. The Circuit judge heard and granted the motion, at Walhalla, vacating the attachment.

The plaintiff now appeals from the order vacating the attachment, on several grounds, which will be considered. It is objected by the plaintiff that the motion could not be heard except in the county where the action was triable, and, also, that it could not be heard at chambers. The general rule, as it regards the place where motions must be made, is contained in Section 417 of the code, and is as follows: "1. An application for an order is a motion. 2. Motions may be made to a judge or justice out of court, except for a new trial on the merits. 3. Orders made out of court, without notice, may be made by the judge of the court in any part of the state. 4. Motions, upon notice, must be made within the circuit in which the action is triable, or, in the absence or inability of the judge of the circuit, may be made before the judge of a circuit adjoining that in which it

is triable." Unless, therefore, there is some provision of the law applicable to attachment constituting an exception to the general rule just stated, it was competent to make the motion before the Circuit judge at chambers in Oconee county, which is within the same circuit with Greenville, the county in which the action was triable. As the motion was not for a judgment, or any relief properly obtained through a judgment (Section 416), it was a case within the provisions of Section 417; and as it was not a motion for a new trial, on the merits, it was capable of being heard in any part of the circuit in

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which the action was *triable, and even in an adjoining circuit in case of the absence or inability of the judge of the proper circuit to hear it.

Has, then, the law relating to attachments created an exception to this general rule limiting motions to dissolve an attachment to be heard before either the clerk or the court in the county in which the action is triable? This is substantially the proposition contended for by the appellant. The provisions of the code of procedure relating to attachments are taken substantially from the act to regulate attachments passed in 1868. 14 Stat. 102. Sections 16 and 17 provide a means of obtaining a release of property attached from the attachment by the defendants giving a bond with sureties for the payment of any judgment in the action in which the attachment was issued, but it assumes the validity of an attachment, and is not the remedy of the party complaining that the attachment was improperly granted.

By the code, attachment is classed among the provisional remedies (Title II.) The provisions of the sixteenth and seventeenth sections of the act of 1868 relating to the release of attached property upon giving a bond for the payment of the judgment, should one be recovered, are re-enacted in Sections 264 and 265. A clause is, however, added at the end of Section 265, in the following words: "And in all cases the defendant may move to discharge the attachment as in the case of other provisional remedies." This provision includes, beyond doubt, the motion to discharge the attachment on the ground of invalidity or irregularity, and refers us to the general rules governing the provisional remedies at large for the rules governing such an application. We will then inquire what provisions exist in similar cases in regard to the various provisional remedies, which include arrest and bail, claim and delivery of personal property, injunction, attachment, receiverships and orders for the surrender of some subject of suit admitted to be due to the claimant in such proceeding. The only provision in case of the order of arrest is "that the defendant arrested may, at any time before judgment, apply on motion to vacate the order of arrest, or to reduce the amount of bail." Before whom and at what place the motion should be made is

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left to be governed by the general *provisions of the code applicable to motions in general, which are contained in Section 417, already referred to. The provisions as to the claim and delivery of personal property are silent as to any similar motion. It is provided that a motion to dissolve an injunction may be made on notice "to the court or a judge thereof in which the action is brought to vacate or modify the same." This is equivalent to allowing the motion to be made either to the court or a judge at chambers. It is not said that such motion must be made to the judge or court who granted the motion, in which case it might be perhaps contended that an injunction granted by the court must be dissolved by the court, and one granted at chambers dissolved at chambers; but the language is: "To the court or a judge thereof in which the action is brought." The one requisite qualification of the judge, in order to hear such motion at chambers, being that he is "a judge of the court in which the action is brought." The other provisional remedies are left wholly to be governed by the general provisions of the code as it regards similar motions. The strongest reasons exist why motions to discharge orders of this class should be facilitated by being heard at chambers during the vacations of the court in which the action is triable. Such orders are granted ex parte and on affidavits alone, and in the case of order of arrest, affecting the liberty of the defendant, and the order of attachment, removing his property from beyond his control, may be granted by the clerk. Plaintiffs sometimes obtain such severe remedies on sworn charges of a general character without setting forth any facts and circumstances sufficient to authorize the conclusion that a case for such remedies exists as was done in Brown v. Morris, 10 S. C. 467, recently decided by this court, and where that practice was condemned as illegal. In the present case the affidavit was defective in that respect, but as the defendant did not demand the discharge of the attachment on that ground, he must be regarded as having waived such irregularity. In such cases, to allow an improperly-obtained process against the property or the person of the defendant to remain in force until a court is convened in the county where the action is triable, would invite parties to sue out such orders in cases when they know they could not hold

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them, in the hope *that the defendants would offer security for the payment of the debt claimed, rather than submit to the loss of personal liberty or the control of their property until an opportunity, perhaps only after the lapse of months, could be offered for showing that they were entitled to be relieved from such severe process. The objection of the appellant to the jurisdiction of

the judge to grant the order appealed from stands upon no just grounds.

It is very clear that the judge who granted the motion to discharge the attachment had not before him evidence sufficient to justify the discharge of the attachment. We must assume that all the proofs before the Circuit judge on the motion are brought before us, for that is the requirement of Rule I. of this court, and it is not alleged that there has been a failure to comply with that rule. The defendant, who alleged irregularity in the granting of the attachment, was bound to prove the fact of such irregularity, as irregularity in the proceedings of courts or their officers will not be presumed. The charge of irregularity was that summons had not been issued at the time that the attachment was granted. The warrant of attachment was issued July 24th, 1878. The summons bears date the same day. The summons was served on the 25th. The only proof offered that the summons had not been issued at the time of the issuing of the warrant, was a memorandum purporting to be made by the sheriff of Greenville county, on the back of the summons, as follows: "Entered July 25th, 1878. P. D. Gilbreath, S. G. C." Whether a memorandum of this character, made by the sheriff, is competent proof of the fact to which it relates, need not be considered, for even if it is, it does not exclude the idea that the summons had been regularly issued before that day. The order of attachment may be made "at the time of issuing the summons or at any time afterwards." Code, § 250. The summons is issued whenever it is placed in the hands of a person legally capable of serving the same for the purpose of service. The summons may be served by the sheriff of the county where the party may be found, or by any other person not a party to the action. Code, § 156. It follows that the fact, if admitted, that the summons was not lodged with the sheriff until the day after the attachment was made, does not exclude, in any

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legal sense, *the idea that it had previously been placed in the hands of some other person competent to serve it. Indeed, it is very common practice to place the summons in the hands of a person other than the sheriff, and afterwards, for greater convenience, to transfer it to the sheriff for service.

As the objection of the defendant on this ground is purely technical, and no possible injury can have been sustained by the defendant for a day's delay in the service of the summons, she is bound to make a strict proof of the irregularity she alleges, and this she has not done. No evidence whatever was given in support of the statement of the defendant contradicting the affidavit on which the attachment issued that the debt claimed was due.

The complaint is not before us, nor the terms of the promissory note sued upon, nor anything enabling us to see that the Circuit judge was justified in holding that the fact of a debt due, as alleged in the affidavit, on which the attachment issued had been contradicted. Had there been any evidence on which the judge could have concluded that as matter of fact no debt was due to the plaintiff, such a conclusion of fact could not be reviewed by us on appeal. But as no such evidence appeared, no ground existed for such a determination of fact.

The appeal must be sustained, and the order vacating the attachment must be set aside.

HASKELL, A. J., concurred.

McIVER, A. J., dissenting. This is an appeal from an order of the Circuit judge, sitting at chambers, vacating an attachment. The grounds upon which this order was applied for were: "1. Because no summons was issued before the attachment was granted, as required by the law of this state. 2. Because the note, upon which the said warranty of attachment was granted, was not then, and is not now, due." As the record brought here furnishes no evidence whatever to sustain the second ground, and, as we are bound to assume, in the absence of any averment to the contrary, that "all the papers upon which the court below acted in making the order," are embraced in the record sent up to this court, as required by Rule I. of

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this court, we must *assume that the Circuit judge granted the order to vacate the attachment on the first of the above-stated grounds, and it is only necessary to inquire whether that ground is well founded. The facts necessary to the determination of this question, as disclosed by the record, are as follows: On the 24th of July, 1878, the plaintiff obtained from the clerk of the Court of Common Pleas for Greenville county, a warrant of attachment, which, on the same day, was lodged with the sheriff and duly executed by the seizure of defendant's property. The summons in the action bears date 24th of July, 1878, and by endorsement thereon appears to have been lodged in the sheriff's office on the 25th of July, 1878, the endorsement being in these words: "Entered July 25th, 1878. P. D. Gilbreath, S. G. C." The sheriff's return shows that the summons was served on the 25th of July, 1878. Under this state of facts it seems to me that the Circuit judge was fully justified in granting the order to vacate the attachment. It is very clear that a warrant of attachment should not be granted before the issuing, but only at the time of issuing the summons, or any time afterwards. Code, § 250. And it is equally clear, from the facts above stated, that the only evidence before the Circuit judge showed that the summons had not been issued until the day after the warrant of

attachment was granted. It may be that the entry of the sheriff, endorsed on the summons, showing the date when it was entered in his office, is not conclusive evidence as to the time when the summons was issued, but in the absence of any other the Circuit judge was fully warranted in the conclusion that, from the evidence before him, the summons had not been issued until after the warrant was granted, and, therefore, the attachment should have been vacated. The suggestion that, under the provisions of Section 156 of the code, the summons may be served by any person not a party to the action as well as by the sheriff, and, therefore, for aught that appeared in this case, the summons might have been placed in the hands of some private person to be served on the day of its date, and afterwards lodged with the sheriff, loses its force when it is remembered that Section 122 of the code fixes the time of the commencement of an action at the time when the summons is served, or when it "is

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delivered with the intent that it shall *be actually served to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided," not when it is delivered to any person not a party to the action. For Section 250 provides that "in an action arising on contract * * * the plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of such defendants or corporation attached in the manner hereinafter prescribed, * * * and for the purposes of this section an action shall be deemed commenced when the summons is issued." This shows that the design was only to allow the remedy by attachment "in an action" which had already been commenced, or which should be commenced at the time the attachment is applied for; and, reading this section in connection with Section 122, it is plain that the action cannot be regarded as commenced until the summons is served, or until it is delivered, not to any person not a party to the action, but "to the sheriff or other officer of the county." The reason for this distinction is obvious. For, while there may be no objection to fixing the time at which an action can be said to have been commenced at the time when summons is served, even though such service should be made by a private person, there would be manifest impropriety, as opening the door to fraud, in providing that an action should be deemed commenced from the time the summons is delivered to a private person to be served, as that would be a fact known only to the plaintiff and such person, which the defendant would have no means of contradicting. But when the summons is delivered to a public officer to be served, the fact of such delivery, and the time when it is made, becomes more open and notorious, and is accessible to the defendant as well as to any other interest. The objection raised by the appellant that the Circuit judge, sitting at chambers, had no authority to grant the order in question is so fully and satisfactorily disposed of in the opinion of the Chief Justice that it is unnecessary to say anything upon that point. For the reasons above stated, I am unable to concur in the conclusion reached by the Chief Justice, and on the contrary, I think that the order of the Circuit judge should be affirmed.

Order vacated.

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12 S. C. *130

*(Case No. 751.)

JOHN W. DANIELS, Clerk of Court for Anderson County, v. MONTGOMERY MOSES et al.

(April Term, 1879.)

[1. *Costs* ⇐277.]

Whether the costs of a former action should be paid before a second action is allowed to proceed, must to a large extent depend upon the discretion of the Circuit judge, and would not ordinarily be the subject of appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1058; Dec. Dig. ⇐277.]

[2. *Costs* ⇐277.]

A second action (especially if it is for the recovery of a debt) should not be stayed until the costs of the first action are paid, where the first action was not tried upon its merits, unless the court is satisfied that the second action is vexatious.

[Ed. Note.—Cited in Columbia Water Power Co. v. Columbia Land & Investment Co., 42 S. C. 497, 20 S. E. 378, 540; Hadwin v. Southern Ry., 67 S. C. 466, 45 S. E. 1019.

For other cases, see Costs, Cent. Dig. § 1048; Dec. Dig. ⇐277.]

[3. *Costs* ⇐277.]

A motion to stay until the costs of a former action have been paid comes too late after the second action has been called for trial.

[Ed. Note.—Cited in Peterman v. Pope, 74 S. C. 299, 54 S. E. 569.

For other cases, see Costs, Cent. Dig. § 1059; Dec. Dig. ⇐277.]

[4. *Parties* ⇐96.]

The objection that plaintiff has not legal capacity to sue, or that there is a defect of parties, when appearing upon the face of the complaint, is waived, unless taken by demurrer.

[Ed. Note.—Cited in Anderson v. Baughman, 69 S. C. 40, 48 S. E. 38.

For other cases, see Parties, Cent. Dig. § 167; Dec. Dig. ⇐96.]

[5. *Bonds* ⇐122; *Clerks of Courts* ⇐65.]

The clerk of the Circuit Court is the proper party to bring an action on a bond payable to a former commissioner in equity of the same county, and without joining with him the parties for whose benefit the action is prosecuted.

[Ed. Note.—Cited in Clark v. Smith, 13 S. C. 594.

For other cases, see Bonds, Cent. Dig. § 151; Dec. Dig. ⇐122; Clerks of Courts, Cent. Dig. § 89; Dec. Dig. ⇐65.]

[6. *Mortgages* ⇐416.]

Where, in an action for foreclosure, a surety on the bond, secured by the mortgage, is made

a party defendant, and dies pendente lite, the action may proceed without making his representative a party.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1225; Dec. Dig. ⟸416.]

[7. *Bankruptcy* ⟸214.]

A proceeding for the enforcement of a lien upon land in the possession of A, which demands no personal judgment against him, is not affected by a subsequent adjudication of bankruptcy against him.

[Ed. Note.—Cited in Kibler v. McIlwain, 16 S. C. 554.

For other cases, see Bankruptcy, Cent. Dig. § 320; Dec. Dig. ⟸214.]

[8. *Evidence* ⟸353.]

The acknowledgment of the receipt of the purchase money contained in a deed of conveyance is not conclusive proof that it has been paid.

[Ed. Note.—Cited in Lenhardt v. Ponder, 64 S. C. 365, 42 S. E. 169; Park v. Southern Ry., 78 S. C. 306, 58 S. E. 931; Montague v. Prietser, 82 S. C. 495, 64 S. E. 393.

For other cases, see Evidence, Cent. Dig. § 1410; Dec. Dig. ⟸353.]

[9. *Partition* ⟸143.]

Lands lying in several districts were partitioned under one proceeding instituted in 1854 in one of those districts, separate writs of partition being issued for each district. *Held*, to be the proper practice.

[Ed. Note.—Cited in Connor v. McCoy, 83 S. C. 173, 65 S. E. 257.

For other cases, see Partition, Cent. Dig. § 274; Dec. Dig. ⟸92.]

[10. *Partition* ⟸104.]

The lien of the act of 1791 attached to intestate lands sold for partition, even if by the same proceedings other lands held under a deed of conveyance were partitioned among the same parties.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 341–351, 375, 377, 380–395; Dec. Dig. ⟸104.]

[11. *Partition* ⟸104.]

Taking personal security for the purchase money did not avoid the statutory lien given by the act of 1791.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 351; Dec. Dig. ⟸104.]

[12. *Partition* ⟸104.]

This statutory lien is not affected by the repeal of the act of 1791 in the General Statutes, when it had attached before such repeal. Gen. Stat., ch. CXLVI., § 4.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 341–351, 375, 377, 380–395; Dec. Dig. ⟸104.]

[13. *Partition* ⟸104.]

No length of possession, without proof of

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something more, will bar an *action to foreclose the lien given by statute to secure the payment of the purchase money of lands of an intestate sold for partition.

[Ed. Note.—Cited in Clark v. Smith, 13 S. C. 585.

For other cases, see Partition, Cent. Dig. §§ 341–351, 375, 377, 380–395; Dec. Dig. ⟸104.]

[14. *Vendor and Purchaser* ⟸265, 278.]

The vendee of the purchaser of such lands, and those claiming under him, are not protected by want of express notice of the lien.

[Ed. Note.—Cited in Clark v. Smith, 13 S. C. 600.

For other cases, see Vendor and Purchaser, Cent. Dig. §§ 703, 777; Dec. Dig. ⟸265, 278.]

[15. *Bonds* ⟸135.]

Judgment may be given for the penalty of a bond when the principal sum due, with accrued interest, exceeds that amount, although the penalty is more than double the amount intended to be secured thereby.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 241; Dec. Dig. ⟸135.]

[This case is also cited in Peterman v. Pope, 74 S. C. 296, 54 S. E. 569, and distinguished therefrom.]

Before Pressley, J., at Sumter, May, 1878.

This was an action instituted in Sumter county by John W. Daniels, clerk of the court of Anderson county, against M. Moses, F. J. Moses, Henry Ryttenberg, Marcus G. Ryttenberg and Joseph Ryttenberg. The facts are fully stated in the opinion of the court.

The defendants appealed.†

Messrs. Moise & Lee, for appellants.

If no perfect title passed to M. Moses, then he held adversely to the world from time the last installment fell due. Rice Eq. 373. And the statute giving the lien was repealed before action brought. Gen. Stat. 801; 6 Otto 595; 2 Story Eq., § 1520. The deed admitted the receipt of the purchase money: that should protect an innocent purchaser without notice. 2 Bail. 101; 3 S. C. 105. There were no records in Sumter county to give notice. Proceedings for partition must be had in the district where the lands lay. 5 Stat. 164; 1 N. & McC. 253. None but parties to that cause were bound by the decree. 1 Bail. Eq. 283; 2 McC. Ch. 125. Bond with sufficient sureties being required, rebuts the presumption that the statutory lien was con-

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*templated. If loss has happened, it has been owing to plaintiff's laches. 3 S. C. 530; 2 Story Eq., § 1520, and notes.

The costs of the former action should have been paid before this action was heard. 2 Rich. 27; Chev. 217; 4 East 585; Bac. Ab., "Costs." The representative of F. J. Moses should have been a party. If a statutory lien, he had an equity of redemption; and the defendants should have had the benefit of any defences that F. J. Moses might set up against the bond. 10 Rich. Eq. 484.

The proceedings in Van Wyck v. Maverick were of broader scope than a partition of

† The act of 1791, referred to in the arguments and in the opinion of the court, is entitled "An act for the abolition of the rights of primogeniture and for giving an equitable distribution of the real estates of intestates, and for other purposes therein mentioned." The seventh section provides how partition may be had of estates, real and personal, and, if sold, how sold, and concludes—"and the property so sold shall stand pledged for the payment of the purchase money." In Compton v. Ulmer, 2 N. & McC. 430, it was held that this section applied only to cases of intestacy—a decision which has been followed in all subsequent cases where the question arose, although not without suggestions of doubt as to the correctness of such construction. — Reporter.

intestate lands; it included lands held under deed. Hence there is no lien under act of 1791. The act was not fully complied with. There should have been a separate suit in Sumter, as in cases of dower. 4 Stat. 742. And the evidence of M. Moses and the admissions of the deed prove payment. 10 Rich. Eq. 484. The bond being no part of the record, an examination of the record would not have shown the lien. In 2 Hill Ch. 575, and 2 Rich. Eq. 162, the purchasers had actual notice, and proceedings were had in the county where land lay.

The bond should have been only for the credit portion of the purchase money, and the penalty in double that sum.

The policy of the law is against secret liens. 3 S. C. 530; 9 Rich. Eq. 55; Perry on Trusts, § 218.

Mr. Jos. H. Earle, for respondent.

The lien under the act of 1791 has been assimilated to a purchase money mortgage. 9 Rich. Eq. 53. Possession by the purchaser from mortgagor for ten years, is no bar to a foreclosure. 3 S. C. 25; 5 Rich. Eq. 81; 1 McM. Ch. 395; 4 Rich. Eq. 164. The repeal of the act of 1791 cannot affect the rights of parties accrued under it. Dwar. on Stat. 675, 680, 681; 1 Hill 183; 13 Rich. 277.

The admission in the deed, like any other receipt, is not conclusive. 1 McC. Ch. 53; 4 Desaus. 122; 1 Hill Ch. 307; 1 Bail. 175; 7 S. C. 228; 2 Whart. on Ev., § 1042. The commissioner had no authority beyond the order under which he was acting. It was not necessary for proceedings to have been

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had in *Sumter, if writ issued to commissioners in Sumter. The judgment is conclusive. 2 Hill Ch. 582. No record was necessary. 9 Rich. Eq. 53. The lien is a better security than any that could have been taken, and, being statutory, is beyond the control of the court. 2 Hill Ch. 575.

There can be no question that there was a lien. 5 Stat. 164; 2 Hill Ch. 582; 4 Rich. Eq. 164; 3 S. C. 109. Which can be divested only by payment or sale under it. 2 Rich. Eq. 162.

There is no evidence that the offer of payment made by M. Moses was ever assented to. 1 Wait Act. & Def. 83. The recital of deed was sufficient to put subsequent purchasers on the inquiry. Wade on Notice, § 310; 2 Hill Ch. 646; 2 Desaus. 262; 16 Ves. 250; 9 Ves. 583; 1 Story Eq. 388; Adams Eq. 157–8–9; 2 Sch. & Lef. 315; Amb. 311; 2 Ves. 417.

The plaintiff was the proper party to bring this action. 14 Stat. 17; Gen. Stat. 571; 6 S. C. 121; Dwar. on Stat. 662. He should not be stayed until costs of an action brought by Norris are paid. 2 Bail. 415; 5 Duer 688; 3 Abb. 363. And it is too late to make such motion at the trial. The bond being joint and several, upon the death of F. J. Moses, plaintiff had right to discontinue as to him, and proceed against the other defendant. 22 How. Pr. 405; 1 Wait Pr. 154; Code, § 143. Ryttenburg's bankruptcy cannot affect the jurisdiction of the state court over the parties and subject matter before it. 39 How. Pr. 363; 4 B. R. 1; 3 B. R. 123; 9 Wheat. 531; 7 How. U. S. 624; 10 Pet. 400. His assignee had the right to come in. Bump on Bank. 124; 12 Abb. Pr. (N. S.) 255. The penalty of the bond is not excessive. While usually fixed at double the amount to be paid, (1 Jacob L. Dict. 350) it may be for more or for less.

The heirs of Maverick having surrendered their rights to the court, the court should protect them. 2 Rich. Eq. 171.

July 30th, 1879. The opinion of the court was delivered by

McIVER, A. J. The action in this case was brought to foreclose a statutory lien on a lot of land in the town of Sumter. For a proper understanding of the questions raised by the appeal it will be necessary to make a brief statement of the facts.

In the year 1852 one Samuel Maverick, a

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resident of Ander*son district (now county), died intestate. Some time in the year 1854 a bill was filed in the Court of Equity for that district, praying for the partition of his estate, which was alleged to consist, amongst other things, of quite a number of tracts and lots of land, situate in the said district of Anderson, (which formerly constituted a part of Pendleton district,) and in several other districts in this state, including Sumter. In this bill it was stated that shortly before the filing of the bill the records of certain voluntary conveyances from said Samuel Maverick were discovered, purporting to convey quite a large number of these tracts of land—not, however, including the lot in Sumter, which is the subject matter of this controversy—to his three children, dated as far back as 1822; and while the main purpose of the bill was partition, it also asked the opinion of the court as to the validity and construction of these conveyances. Chancellor Wardlaw, who heard the cause, stated in his decree that doubts existed whether such deeds were ever delivered to the parties themselves, or to any one interested for them, but as the parties took the same shares under the deeds as they would take if the deeds were never executed, the question was of no great consequence. He therefore ordered partition of all the lands described in the bill, including the tracts mentioned in the deeds, saying that "as the said lands are situated in many of the districts of this state, it will be necessary that writs of partition should be granted for each district where the lands lie." Accordingly a separate writ of partition was issued to divide the lands in Sumter, and, upon a return to this writ recommending a sale, an order was passed for the sale of the

Sumter lands on the following terms: One-fourth cash on the day of sale; the balance in three equal annual installments, to be paid in one, two and three years, with interest payable annually—"any purchaser being permitted to pay in cash, on the day of sale, more than one-fourth if desirable." Purchasers were also required to enter into bonds, with good and sufficient sureties, for the payment of the purchase money. In pursuance of this order the said lot in Sumter was sold by A. O. Norris, as commissioner in equity for Anderson district, on the 3d of March, 1856, and bid off by the defendant, M. Moses,

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who complied with the terms of sale by *giving bond, with F. J. Moses as surety, for the amount of his bid, which, however, was credited, at its date, with the amount required to be paid in cash, and received a deed therefor from the said commissioner, which is alleged by the defendants to contain an acknowledgment that the whole of the purchase money was then paid. On the 7th of November, 1871, the said lot of land was sold by the sheriff of Sumter county, under an execution against the defendant, M. Moses, and bought by the defendant, Joseph Ryttenberg, who subsequently conveyed the same to the defendant, Henry Ryttenberg, and the defendants, Joseph and Marcus G. Ryttenberg, are alleged to be now in possession of said lot, holding under the said Henry Ryttenberg. The plaintiff demurred to several of the defences interposed by the answer of the Ryttenbergs, and the questions raised thereby will hereafter be partially mentioned. The demurrer was sustained by the Circuit judge, by his order of March 30th, 1878, to which exception was duly taken. At a subsequent special term the case was brought on for trial, when the counsel for appellants insisted upon the following positions: 1. That all proceedings in this case should be stayed until the costs of a former action, brought on the same cause of action, were paid. 2. That the personal representatives of F. J. Moses, who had died during the progress of the cause, were necessary parties. 3. That the defendant, Henry Ryttenberg, having been adjudicated a bankrupt by the United States court on the 2d of May, 1878, the cause was necessarily suspended as to him. These positions being overruled, to which exception was duly taken, the court, after hearing the testimony and argument of counsel, rendered a decree establishing the statutory lien, rendering judgment against the defendant, M. Moses, for the sum of $1340, the amount named in the bond as the penalty, (the accruing interest having carried the amount due considerably beyond such penalty,) and directing that unless the said sum was paid by a day named the said lot of land be sold to satisfy such judgment; and if the proceeds of such sale proved insufficient for that purpose, that the plaintiff have execution against defendant, M. Moses, for the balance. To this decree various exceptions were filed, which will be noticed hereafter.

While we purpose to consider all the va-

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rious questions raised *by this appeal, we do not expect to take them up exactly in the order in which they are presented in the brief. The facts upon which the motion to stay the proceedings until the costs of the former action were paid are based, are not fully or clearly presented in the brief. So far as we have been able to gather them, it would seem that an action had been previously commenced by A. O. Norris, the late commissioner in equity for Anderson district, but whether against the same parties, and for the same purpose, does not distinctly appear. To this action a demurrer was sustained (whether correctly or not it is not important now to inquire) upon the ground, as we infer from what was said in the argument here, that Norris had no right to bring the action, it being nowhere intimated that such former action was tried upon its merits, which, as it will be seen, is a very important consideration. But, looking at the question in the light most favorable for the appellants, and assuming that the former action was between the same parties, and sought the same relief as in this case, we are yet unable to perceive any error upon the part of the Circuit judge in refusing the motion. As was said in Miller v. Grice, 2 Rich. 36 [44 Am. Dec. 271], there is no inflexible rule in this state upon the subject, and while the general rule may be that the costs of a former action should be paid before a second action should be allowed to proceed, a point, however, which we do not propose to decide, yet after all, it is a question which, to a large extent, must depend upon the discretion of the Circuit judge, and would not, therefore, ordinarily be the subject of appeal. But we are not content to rest our decision upon this. We are entirely satisfied that so far from there being any abuse of discretion in this case, it was very properly exercised in refusing the motion. In England the rule seems to be that a motion to stay the proceedings until the costs of a former action have been paid will not be granted unless the former action has been tried on the merits, or the court is satisfied the second action is vexatious; and, where the former action has failed on some formal or technical ground only, such a motion will not be entertained, especially in an action "for the recovery of a debt." Bass v. Firmen, 1 Ld. Raym. 697; Melchart v. Halsey, 3 Wills. 149; Pashley v. Poole, 3 Dow. & Ry. 53; 16 E. C. L. 134.

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*In actions of ejectment the rule there is different, doubtless because one recovery in ejectment could not be pleaded in bar of a second action for the same lands. Keene v. Angel, 6 T. R. 740; Doe, ex dem. Feldon, v.

Roe, 8 T. R. 645; Doe, ex dem. Pinchard, v. Row, 4 East 585. Possibly, too, the rule may be different in such actions as trespass, malicious prosecution, &c. Western v. Withers, 2 T. R. 511; Pashley v. Poole, supra. It is very manifest, therefore, that the discretion of the Circuit judge was properly exercised in this case, which was an action "for the recovery of a debt," and which could not be regarded as vexatious merely, as the former action was not tried upon the merits, but failed on a purely technical ground.

Another fatal objection to the motion was that it came too late. It does not seem to have been made until the case was called for trial, not only after issue joined, but after a demurrer to portions of one of the answers had been heard and sustained, and after all the expense incident to a preparation for trial had been incurred. As is well said in Miller v. Grice, supra, at page 37, "such a motion should be made at as early a period as practicable to prevent suprise and an unnecessary accumulation of costs."

The next question is as to the right of the plaintiff to bring this action, and the necessity for making the persons interested in the money due upon the bond parties to the action.

The objection that the plaintiff has not legal capacity to sue, or that there is a defect of parties when appearing upon the face of the complaint, as in this case, should be taken by demurrer. Code, § 167. And if not so taken, is deemed to be waived. Code, § 171. But even were the objection taken in the proper way we do not think it could be sustained. As was said in Billings v. Williamson, 6 S. C. 122, the plaintiff is the proper person to bring the action, and Section 136 of the code shows that it was not necessary to join the parties interested in the money to be recovered on the bond.

We do not think there was any error in refusing to require that the representatives of F. J. Moses, who had died during the pendency of the action, should be made parties. He was a mere surety on the bond, and not,

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therefore, a necessary party in the *first instance; and if, after his death, the plaintiff chose to proceed without making his representatives parties, he certainly had a right so to do, as the only effect would be to deprive him of the right to a judgment against such representatives. It is a mistake to suppose that F. J. Moses was one of the mortgagors, and, as such a necessary party, and that after his death it would be necessary to bring in his personal representatives. (In that event it would be more correct to say heirs and representatives.) He had no contention whatever with the sale out of which the statutory lien arose; no title was made to him, and he could not in any sense be regarded as a mortgagor. It was not until after the sale that his connection with the matter commenced, and then he only came in as a mere surety on the bond.

Nor do we think that there was any error in refusing to suspend the cause as to Henry Ryttenberg, because he had been adjudicated a bankrupt. There can be no doubt that when this action was commenced the court below had jurisdiction of the case against Henry Ryttenberg, along with the other defendants, such adjudication not having been made until May 2d, 1878, after the action was commenced and after issue joined therein. This proceeding being merely for the enforcement of a lien, so far as the bankrupt is concerned, and not for the purpose of obtaining any personal judgment against him, cannot be affected by the proceedings in bankruptcy. Baum v. Stern, 1 S. C. 415; Bump on Bank. 292–3, (7th ed.)

The next question is, whether the bond, which is the cause of action in this case, has been paid. This, of course, is a question of fact, and while it would be quite sufficient for us to say that, in accordance with the established rule of this court, we will accept the conclusion of the Circuit judge where there is any evidence to sustain it, we may be permitted to add that we agree entirely with him in the conclusion which he has reached. It is contended, however, that the deed to M. Moses contains an acknowledgment that the whole amount of the purchase money was paid at the time of sale. The deed itself is not before us, but the presumption is, as we understood from the statements made in the argument the fact to be, that the deed is in the usual form, and, after stating the amount of the consideration,

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adds the *customary words, "the receipt whereof is hereby acknowledged," or something of that kind. This, in the absence of any other evidence, might be sufficient to show that the consideration had been paid; but, certainly, under the facts proved in this case, would not warrant any such conclusion. Indeed, whatever may have been the form in which acknowledgment may have been made, it would not be conclusive, for no rule of law is better settled than that a receipt is not conclusive. Creditors of Rochelle v. Campbell, 1 McC. Eq. 53 [16 Am. Dec. 595]; Pinchback v. McCraven, 1 Hill Eq. 307; McElwee v. Jeffreys, 7 S. C. 228. To say nothing of the other circumstances proved in the case, the testimony of M. Moses puts it beyond question that the bond was not paid at the time the deed was executed, for, if so, why should he in 1864, propose to pay, by way of settlement, that which had been paid ever since 1856; and he does not anywhere in his testimony even pretend to intimate that the purchase money was paid at the time the deed was executed, but, on the contrary, in reply to the question whether the bond was paid, undertakes to show that it was, in a way wholly inconsistent with the

idea that it was paid at the time the deed was executed.

The next question raised by the exceptions, which we propose to consider is, whether the lien provided for by the act of 1791, in case land is sold for partition, attached to the lot now in question. It is contended that in order to give rise to such lien the provisions of that act must be strictly followed, which, it is argued, was not done. First, because the proceedings for partition were instituted, not in Sumter, where the land lies, but in Anderson, and the case of Brown v. McMullen, 1 N. & McC. 252, is cited as authority to show that such proceedings must be instituted in the district where the land lies. In that case the proceedings were instituted in Fairfield district, while all of the lands sought to be partitioned were situate in other districts, and a motion to dismiss the proceedings for want of jurisdiction was granted. The court, in that case, after considering the argument drawn from the provisions of the statute in relation to proceedings for dower, which was likewise urged in this case, lays down the following terms: "It is the opinion of the court that the writs of partition can only issue in those districts where

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the lands *lie, and that where there are lands in several districts, several writs must issue." So that so far from that case being authority for the position taken by the appellants, it sustains the practice pursued by Chancellor Wardlaw in the case under which the lot in question was sold. For it does not decide that separate proceedings for partition must be commenced in each district or county where the lands of which partition is sought lie in several different districts or counties, but only that, in such cases, "several writs must issue," just as was done in the original case for partition.

The view contended for by the appellants would lead necessarily to the result that where a person died intestate, leaving real estate in several different counties, it would be necessary, for the purpose of partitioning his estate, to institute actions in each of such counties. Such a construction of the act, involving, as it would, unnecessary expense and likely to produce confusion, we would not be disposed to adopt, unless required so to do by the express terms of the statute, but, on the contrary, we prefer what seems to have been the construction adopted by the distinguished Chancellor under whose order the writs of partition were issued.

Next, it is insisted that the act of 1791 only purports to give a lien where land is sold under proceedings for the partition of an intestate's estate; so that where a sale is ordered for partition of lands held by tenants in common, under a deed or otherwise than as heirs of an intestate, the provision for the lien does not apply; and as the proceedings under which the sale in question was made were not for partition of lands of an intestate alone, but also for the partition of those lands embraced in the deed above referred to, the statutory lien did not attach. It might be a sufficient answer to this to say that the decree under which the sale was made treated all the lands as if they were lands of the intestate, and no exception thereto was taken by any of the parties, and they, as well as the appellants, who claim under them, are excluded from now raising the question. But a still more conclusive answer is, that however it may be as to the lands covered by said deeds, no such position could be maintained, so far as the lands in Sumter are concerned, as they are not embraced in either of the deeds,

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and were undoubtedly a portion of *the intestate's estate, and must, therefore, when sold for partition, have been bound by the statutory lien to secure the payment of the purchase money.

Again, it is argued that the requirement in the order of sale that the purchaser should give bond, with sufficient sureties, rebuts the presumption that any statutory lien was contemplated in this case, and shows that it was not the intention of the decree to rely upon any such security. When it is remembered that at the time this sale was made and up to the commencement of the recent war, it was the very general, if not universal practice, to require purchasers at judicial sales of real estate to give good and sufficient personal security, as well as a mortgage of the premises, it will be seen that such a presumption would have but little to support it. But what is more important, this argument proceeds upon the erroneous idea that a statutory lien is the creature of the court, whereas, in fact, it owes its origin solely to the provisions of the statute, and the courts could not, if they would, dispense with such a statutory provision any more than they could with the most solemn act of the legislature. Messervey v. Barelli, 2 Hill Eq. 575.

The next question raised by the exception is as to the effect of the repeal of that feature of the act of 1791, which provides for a statutory lien upon sale for partition. Gen. Stat. 801. The position taken by the appellants upon this question, that this provision of the act of 1791 having been repealed prior to the commencement of this action, the plaintiff is prevented from setting up the lien in this case, besides being in conflict with the general principles which govern in the construction of statutes, as laid down in Potter Dwar's. on Stat. 155–57, Pacific Mail Steamship Co. v. Joliffe, 2 Wall. 450 [17 L. Ed. 805], is likewise in conflict with the express provisions of Section 4, Chapter CXLVI., (Gen. Stat. 766), where, in speaking of the effect of the repeal of the several acts mentioned therein, this language is used: "It shall not affect any act done or

right accruing, accrued or established * * * before the repeal takes effect."

Now, certainly the statutory lien claimed in this case was a right which had accrued long before the repeal took effect, and, therefore, by the express terms of the general

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statutes, to say *nothing of the general rule of construction, such right cannot be affected by such repeal.

The next position taken by appellants is, that after the expiration of ten years from the day of sale, or at least from the maturity of the bond, the action could not be maintained. If by this is meant that payment is to be presumed after the lapse of such a time, it certainly cannot be maintained; but if the meaning is, as we presume from the argument of the appellant's counsel it is, that Moses having had possession for more than ten years before the lot in question was sold by the sheriff and bought by Ryttenberg, his title could be referred to such possession rather than to his deed from the commissioner in equity, the position is still without any foundation.

It must be remembered that in order to constitute title by possession it must be shown to be an adverse possession, and so far as we can discover, there is no evidence whatever upon that point. But, in addition to this, Moses, as we have seen, undoubtedly went into possession as a mortgagor, for, in this respect, a statutory lien does not differ from an ordinary mortgage, and no length of possession, as such, without proof of something more, will be a bar to an action to foreclose such lien. Norton v. Lewis, 3 S. C. 25, recognizing and affirming Wright v. Eaves, 10 Rich. Eq. 582.

The next exception is based upon the proposition, which we do not think well founded, that Ryttenberg had no notice of the statutory lien, and, therefore, when he purchased he took his title free from such encumbrance, and those who hold under him hold with like exemption. If a party has such notice as will be sufficient to put him on inquiry, that is enough. 1 Story Eq. Jur. 399, 400, and notes. That Ryttenberg had such notice, there can be no doubt. The recitals in the deed from the commissioner in equity to Moses, which, though not before us, must be presumed to be in the usual form, were sufficient to indicate to him that Moses derived his title from a judicial sale made for partition, and the law then informed him that at such a sale the land stood pledged for the payment of the purchase money. The most ordinary prudence, therefore, should have dictated to him the propriety of examining the record of the case under which such

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*sale was made, in order to ascertain whether such encumbrance had been removed. If he had done this he would have discovered that the bond had not been paid, but was still outstanding, as the proper place for the bond was in the office where such record was kept, and in the absence of any evidence to the contrary, we are bound to assume that it was there until it was taken out for the purpose of bringing an action upon it, and even then, if the officer who had charge of it did his duty, which, of course, is to be assumed, there would still be evidence that the bond was not paid. If he bought without making such inquiry, and upon the mistaken belief that the bond was paid, he having the means of correcting such mistake by an examination of the records of the case, he must take the consequences. In fact, we do not see how the purchaser of property, covered by a statutory lien, of which he has no express notice, can stand in any better position than the purchaser of property covered by a formal mortgage, duly recorded, of which he has no express notice. In the former case no recording is required, the proceedings under which it arises being regarded, doubtless, as a substitute for such recording, and which, therefore, operate as notice, just as the formal recording does in the latter.

The next exception is in these words: "Because his Honor held that without notice the land of defendant, Ryttenberg was liable to the demand of the plaintiff." If this exception was designed to represent the Circuit judge as holding that express notice was not necessary, then, as we have seen, there was no error; but if the purpose of it is to assail the decision on the ground that it was held therein that Ryttenberg's land would be liable, even though, at the time of his purchase, he had no notice of the lien of any kind, either express or such as would be implied, from the recitals in the deed to Moses and the records of the office in which the proceedings for partition were instituted, then the exception has been taken in entire misapprehension of the Circuit decree, as no such doctrine is announced therein.

The last ground taken by the appellants is that the penalty of the bond was larger than it should have been, and that the Circuit judge erred in decreeing for the amount of the penalty, as stated in the bond. This ex-

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ception is based upon the idea that *the penalty of a bond for the payment of money must necessarily be exactly double the sum, the payment of which it is intended to secure. Now, while it may be and doubtless is the usual practice to fix the penalty of a money bond at double the amount of the condition, yet we know of no authority requiring this as matter of law, and none such has been cited. We do not see why a person may not bind himself in a penalty of any amount he pleases to pay a certain specified sum of money. Moses undoubtedly knew, or ought to have known at the time he signed the bond, the amount of the penalty named

therein, and that it was more than double the sum of money which it was intended to secure, and if he assented to it then, as he did by signing the bond, he cannot now, nor can any one else, ask a court to change the terms of the contract which he then deliberately entered into.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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12 S. C. 144

(Case No. 752.)

GEORGE M. BROWN v. C. J. CONEY et al.

(April Term, 1879.)

[1. *Partition* ⟸84.]

The statutory lien given by the act of 1791, in cases of partition of an intestate's real estate, arises only when such partition has been made pursuant to the provisions of that act, and by a court of competent jurisdiction.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 232; Dec. Dig. ⟸84.]

[2. *Judgment* ⟸951.]

In the absence of any evidence by record or parol, of the existence of a judgment in partition, such judgment will not be inferred from imperfect and incomplete records of proceedings prior to the writ of partition, showing, in themselves, that the proper parties were not all before the court, although such records are supplemented by parol evidence of an actual partition by certain persons, two of whom were named as commissioners in the order for the writ, and by proof of the loss of records of an adjoining county, in which the decree, if rendered, was signed, and of the papers in the office of the complainant's solicitor.

[Ed. Note.—Cited in Reynolds v. Rees, 23 S. C. 445; Hunter v. Hunter, 58 S. C. 392, 36 S. E. 734, 79 Am. St. Rep. 845.

For other cases, see Judgment, Cent. Dig. § 1812; Dec. Dig. ⟸951.]

[3. *Evidence* ⟸82.]

[Cited in Gardner v. Cheatham, 37 S. C. 80, 16 S. E. 368, in concurring opinion, to the point that an order of sale affords a presumption that all proceedings leading up to such order are regular.]

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 104; Dec. Dig. ⟸82.]

[This case is also cited in Reynolds v. Rees, 23 S. C. 438, and distinguished therefrom.]

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*Before Townsend, J., at Marion.

This was an action brought by George M. Brown, as assignee of his father, Moses W. Brown, against Christopher J. Coney, James A. Brown, Robert N. Brown, Mary P. Manheim and Michael Manheim. Mary E. Brown died intestate in 1844, leaving as her distributees her husband, Moses W. Brown, and five children, Robert N. Brown, J. A. Brown, Mary P. Brown, (afterwards Rugg and now Manheim), David W. Brown and George M. Brown; and possessed of a tract of land containing five thousand acres. The children were all minors, and they, with their father, lived upon this land until 1859 or 1860, when Moses W. Brown moved to Florida. In August, 1860, a bill was filed, as stated in the opinion of the court, by M. W. Brown and R. N. Brown against A. J. Rugg and wife and others, praying a partition of this land. The two elder children, R. N. and James A., were then of age; the other three were minors, and continued so to be until after the court held at Darlington, in February, 1861, with the possible exception of Mary, who was born in 1840, month not given. The fragments of the records of that case are stated in the opinion of the court. Julius Dargan was the solicitor who filed the bill. By common consent, Chancellor Carroll held a court at Darlington, in February, 1861, for the transaction of business for the counties of Marion, Marlborough, Chesterfield and Darlington. There was evidence that the bill and other papers in the cause were taken over to Darlington at that time. A day or two after the adjournment of this court, Mr. Dargan was taken ill and died within a few weeks. Mr. Dargan's papers afterwards suffered loss from several removals and from a fire. Many of the records of the court at Darlington have been destroyed by a fire occurring since 1861. The records of the court of Marion show no entries or copies of any papers in this cause.

According to parol evidence submitted by plaintiff in this action, including that of the commissioners in partition, there was a writ of partition executed by four commissioners, two of whom are named in the order for the writ introduced in evidence. From this testimony it appears that all of

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the children received, *under the return to this writ, about their share, except James A., who received over one thousand acres, charged with the payment of $1750 to his father, who received no land.

Subsequently Moses W. Brown sold this alleged claim to his son, George M. Brown, and James A. Brown sold the land to the defendant, C. J. Coney. George M. Brown then brought this action against C. J. Coney to enforce this demand, claiming a statutory lien under the act of 1791; † or, if the court determined that no partition of the lands of Mary E. Brown had ever been made, then judgment was prayed that the interest of the plaintiff in this tract of land, both as assignee of his father and also as heir-at-law of his mother, be set apart to him in severalty. The other defendants named are plaintiffs' brothers, his sister and her husband.

Under the view taken of this case by the court, a statement of the testimony is unnec-

†See note, ante p. 131.

essary. The defence was, purchaser for valuable consideration without notice, estoppel in pais and no partition; that if other defences fail there should be partition of all of Mary E. Brown's lands.

Upon the point decided by this court, the Circuit Court held that under the authority of Smith v. Smith, Rice. 232, and McQueen v. Fletcher, 4 Rich. Eq. 152, parol evidence was admissible to complete the record and show the partition; and that such parol evidence clearly showed a partition, and that J. A. Brown received more than his share and was to pay the excess, $1562.33, to M. W. Brown, which gave to M. W. Brown a lien under the statute on this tract of land.

From this decree the defendant, Coney, appealed.

Mr. W. W. Harllee, for appellant.

The first ground of appeal attacks the decree of the Circuit judge on his conclusion that there was a judgment in partition in this case as unsupported by evidence. It is submitted that his Honor is entirely at fault in his deductions from the cases of Smith v. Smith, Rice 232, and McQueen v. Fletcher, 4 Rich. Eq. 152, as in both of those cases it will be seen that the judgment of the court was produced as matter of record, and

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the questions there *were, could secondary evidence of the previous proceedings be received in proof of the service and preliminary proceedings to support the judgment, which, of itself, presumed that it was properly rendered with the proper parties before the court. But here it is sought to prove a judgment by parol by showing the commencement of the action, the service on a portion of the parties and the order for a writ of partition to issue. It is admitted that none of these proceedings amounted to a judgment, and it is conceded that there is no evidence that the return was ever before the court, or that it was ever heard by it. How, then, can the cases of Smith v. Smith and McQueen v. Fletcher apply, or even furnish an analogy, when in each the order confirming the returns was produced and made the judgment of the court? The only proof of a judgment is the production of the record.

It may be that positive proof of the existence of the judgment being furnished and the loss of the record established, the court might admit secondary evidence of its contents. But there is not only no proof here of the existence of the judgment or order confirming the return, but no proof of the loss of any record of it, where it should properly be. The fact that the Court of Equity was held at Darlington for the Circuit in 1861, and the loss of some records belonging to that district, is no evidence that a cause belonging to Marion was filed there or recorded on the minutes of the court for Darlington. The presumption would be that not only the records would be separate, but that the separate officers of the respective districts would have the custody of their own papers, as the law made it their duty to have.

It is a novel proposition, to say the least of it, that the death of the counsel having the case in charge is evidence that there was a judgment. Such a proposition shocks the judgment of every one looking to its consequences. But supposing there was a judgment, what was it? No one of the commissioners says what was to be paid to M. W. Brown by James A., or his sister, Mrs. Rugg.

M. W. Brown swears that no provision was made for him by the commissioners, but one of them, S. C. James, requested him to release, which he refused to do.

R. N. Brown and James A. Brown both

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prove that by the *return James A. was to pay M. W. Brown $1750, the excess over his share; and yet the Circuit judge finds $1562.33, the amount of the judgment, and orders it to be paid or the land sold. But this is not all. Could there have been a confirmation of the return with the pleadings in the shape they are proven to be?

1. Three of the defendant's distributees were minors, a blank order, not signed, appointing their guardian ad litem.

2. The consent of these infant defendants to the issuing of a writ of partition.

3. An order for a writ of partition to issue to Thomas Eaddy, Ezra Eaddy, Dr. Thomas R. Bass, I. R. Timmons and J. T. Bostick.

4. The evidence of the commissioners that neither of the three first named acted, but the two last, with two others (strangers to the record), undertook to divide the lands.

Can it be pretended that on this showing the Court of Equity of this state, in 1861, or any court of competent jurisdiction, would have confirmed such a return? To presume such a thing would be to stamp the ministers of justice with gross ignorance or recklessness, and affords a good reason why a gentleman of Mr. Dargan's experience, capacity and character did not have the return confirmed or made of record.

Messrs. Johnson & Johnson, for respondent.

The first question in this case is, was there, in 1860 and 1861, any division made of the tract of land described in the complaint, amongst the heirs-at-law of Mary E. Brown, by the Court of Equity?

As a question of fact, it has been decided in the affirmative by his Honor Judge Townsend, and this court will not reverse his finding unless the evidence is overbearing that his decision was wrong. It is not sufficient that this court, on the same evidence, might have come to a different conclusion. Rice 232; 1 S. C. 325.

The judge is fully supported by the evidence. The competency of the parol evidence is sustained, and the imperfection of the

pleadings can in no way affect the validity of the partition. 4 Rich. Eq. 152; Rice 232.

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*July 30th, 1879. The opinion of the court was delivered by

McIVER, A. J. To sustain the Circuit decree in this case, it is necessary that this court should be satisfied that a partition of the real estate of the late Mrs. Mary E. Brown has been made, under the order of a court of competent jurisdiction, pursuant to the provisions of the act of 1791. Until this is established the statutory lien set up by the plaintiff cannot arise. Such a lien is a creature of the statute, and unless it is made to appear that partition has been made under that statute, such lien can have no existence. For, while it may be very true that the parties themselves may make a valid partition, by the terms of which one of them may be required to pay to another a sum of money for equality of partition, yet, certainly, such an agreement cannot give rise to the statutory lien sought to be set up in this case, but the amount thus agreed to be paid would be like any other debt arising from a promise to pay, which may or may not be secured by a lien, according as the parties may agree.

As we do not agree with the Circuit judge in the conclusion which he has reached, inasmuch as we do not think there was any legal evidence that a partition was ever made by the Court of Equity, this is the only matter necessary to be considered, for, until a partition by the order of a court has been established, the other questions discussed cannot properly arise. It is not pretended that there was any direct evidence whatever of any judgment or final order for the partition of the land in question, either by record or by parol. No such record was produced, and no witness testified that any such record had ever existed. The court below, however, inferred the existence of such a judgment from fragments of a record which were introduced, supplemented by parol testimony. The record evidence introduced is thus stated by the Circuit judge: "The original bill filed by M. W. Brown and R. N. Brown against A. J. Rugg and wife and others, in which are described the lands of Mary E. Brown, with a prayer for a partition of the same among her heirs-at-law, is before the court. The original bill was filed on the 29th of August, 1860. The original sub. ad res., with the return of the sheriff and a copy of the will of S. S. Anderson, is on exhibit and produced with the will. A written con-

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sent of three of the *parties for a writ of partition, the order of the commissioner in equity, dated November 20th, 1860, for the writ to issue, and an unsigned order for the appointment of a guardian ad litem for the infants, are also produced. These papers constitute all the recorded evidence in relation to the partition. No writ of partition, return of the commissioners or order confirming the same, has been found, after diligent search in the public offices, or in the office or among the papers of J. A. Dargan, the attorney who was employed to institute the proceedings for partition. No copies of these papers can be found in the record books, either in the offices in Darlington or Marion counties." To this it may be added that it appears from the evidence as presented in the brief that the sheriff's return on the sub. ad res. shows that only one of the defendants, J. A. Brown, was personally served, a copy being left at his residence for G. M. Brown, who was a minor at that time; and the only other defendant mentioned in the return is D. W. Brown, also a minor, as to whom the return is, "cannot find D. W. Brown in my district, or that he has any dwelling place therein." An acceptance of service is endorsed upon the sub. ad res., signed by A. J. Rugg, "for self and wife," the latter probably being a minor at the time, as her name is embraced among the infant defendants named in the "unsigned order for the appointment of a guardian ad litem for the infants." It also appears that this order is not only "unsigned," but it does not contain the name of the person to be appointed, a blank being left apparently for that purpose. The written consent for the writ of partition purports to be signed by Mary P. Rugg and G. M. Brown, one of whom was certainly, and the other probably, a minor at the time. Again, the order of the commissioner in equity for the writ of partition requires that it shall be directed to five persons named therein, while the parol evidence introduced shows that only two, not a majority, of those persons acted in making the division of the lands, assisted by two other persons whose names nowhere appear in any order or other part of the record introduced. It should also be added that while there was testimony as to the destruction of the records in Darlington, there was no such testi-

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mony as to those in Marion, where the *lands in question are situated, and where the records of any proceedings for partition properly belong.

Now, while the cases of Smith v. Smith, Rice 232, and McQueen v. Fletcher, 4 Rich. Eq. 152, upon which the Circuit judge bases his conclusion, may be sufficient to establish the proposition that where the record of the judgment in partition or final order confirming the return of the commissioners is introduced, that it shall be sufficient to warrant the conclusion that all the previous proceedings were regular, and that the missing portions of the record may be supplied by parol evidence, yet those cases do not support the conclusion reached by the court below, for, in both of those cases, the final order confirming the return of the commissioners was in-

troduced, showing that the court had rendered judgment, while in this case no such evidence has been introduced. But when we are asked to infer the existence of a judgment or final order, of which there is no evidence, either by record or by parol, because of the fact that certain portions of a record, looking to such judgment or final order, are introduced, even though supplemented by the parol evidence offered in this case, the proposition assumes a very different shape and cannot command our assent. It may admit of grave doubt whether such an inference would be warranted, even if the portions of the record which were introduced, supplemented by the parol evidence introduced in this case, showed that all the previous proceedings were entirely regular up to the time when the commissioner in equity granted the order for the writ of partition, the last piece of record evidence which was introduced, and that all persons interested in the subject matter of the suit were properly made parties. But in this case the portions of the record which were introduced do not show that the previous proceedings were regular, or that the necessary parties were properly brought before the court. The sheriff's return shows that only one of the defendants was properly served with process, although it does appear that another, who, however, was only a party in right of his wife, did acknowledge service. The acceptance of service, signed by A. J. Rugg, "for self and wife," was, certainly, not sufficient to make her a party, especially if she was, as we are bound to presume she was,

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a minor at the time, for she is named *in the order drawn for the appointment of a guardian ad litem as one of the infant defendants, and there is nothing to show that she afterwards, and before the acceptance of service was signed, attained her majority. There is no evidence that a guardian ad litem had ever been appointed for the infant defendants, or, if appointed, there is no evidence to show that the person so appointed accepted the office, or appeared in the case as such. This, of itself, was a fatal defect, quite sufficient to negative the idea that a Court of Equity would have rendered judgment or granted a final order. For, while the cases of Bulow v. Witte, 3 S. C. 308, and Walker v. Veno, 6 S. C. 459, do announce the proposition that, under the former system of equity procedure, to make an infant a party defendant it was not necessary that he should be served with process of subpœna, or that an answer should be filed by a guardian ad litem for him; they both recognize the necessity of his appearing by a guardian ad litem, for, in both of those cases, a guardian ad litem had not only been duly appointed, but it appeared from the record that such guardian had consented to act, had appeared in the case and consented to the orders sought to be set aside, and this was regarded as sufficient. But in this case nothing of the kind appears upon the record, and, on the contrary, from what does there appear, it would seem that no guardian ad litem had ever been appointed. The only evidence upon the subject is that contained in the parol testimony of Robert Brown, where, in speaking of the division of the land, he says: "D. W. Brown and George M. Brown were minors at the time, and George J. Myers acted as their guardian ad litem in division, but when, or by what authority he was appointed as such, or whether, in fact, he ever was so appointed, or ever appeared in the case, he does not pretend to say." Again, the parol evidence shows that only two of those to whom the writ of partition was directed to issue acted in making the division of the lands, while it nowhere appears how or by what authority the other two persons who acted with them took upon themselves the performance of such duty. It will not do to say that the order of the commissioner in equity for the writ of partition to issue is sufficient to authorize the presumption that everything was regular up to that time, especially

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in the face of *the serious defects and irregularities just pointed out, for it must be remembered that, while by the act of 1840, (11 Stat. 157), the commissioner in equity was authorized to grant writs of partition, yet the statute requires that "all such writs shall be made returnable to the next succeeding sitting of the court for the adjudication of the Chancellor." And it is well known that where writs of partition were issued under an order from the commissioner, the general, if not universal, practice was for the Chancellor to scrutinize closely all the previous proceedings, to see that everything was regular, and especially to see that all necessary parties were properly brought before the court; whereas, when the writ was issued under the order of a Chancellor, it was not regarded as necessary to go behind such order. So that it seems to us, instead of inferring from such portions of the record as have been produced, even supplemented by the parol testimony introduced, that these proceedings culminated in a final judgment, the more natural inference would be that the Chancellor, looking into the proceedings and discovering the irregularities and defects to which we have alluded, declined to grant the final order, and, therefore, that there was no such judgment in partition as would give rise to the statutory lien set up by the plaintiff.

From the view which we have taken of this case the question raised in appellant's argument as to whether a statutory lien can arise where land is assigned to one or more of the parties who are required to pay something to the others to equalize the partition, or whether such lien can only be created where the land is ordered to be sold for the purpose of making partition, does not properly arise, and has not, therefore, been consid-

ered. The plaintiff, in his complaint, demands judgment in the alternative, first, for a foreclosure of the statutory lien, but "if the court is not satisfied that a legal partition was made of the lands of Mary E. Brown, then that the interest of the plaintiff in said lands, of which Coney is in possession, both as heir-at-law of his mother and as assignee of his father, be set apart to him in severalty," &c.; but as that part of the complaint could not well be considered or adjudicated by the court below, under the view taken by that court, and, as it may be worthy of consideration whether all the parties necessary to such adjudication are now before the

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*court, we do not propose to consider any of the questions which might arise in that aspect of the case, but to refer all such questions to the Circuit Court.

It is therefore ordered that the judgment of the Circuit Court be set aside, and that the case be remanded to that court for further proceedings, with leave to the plaintiff to apply to the Circuit Court for such amendments as may be deemed necessary to enable him properly to litigate any rights which he may claim to have to a partition and account for rents and profits.

Judgment reversed.

WILLARD, C. J., and HASKELL, A. J., concurred.

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(Case No. 753.)

WILLIAM THORPE v. J. G. THORPE and J. R. ABNEY.

(April Term, 1879.)

[1. *Evidence* ⇐135.]

On a question of fraud, evidence of other transactions is only admissible as tending, by way of inducement, to unravel the intent of the transaction directly in issue, and where too remote in itself and unsustained by other evidence, it should not be considered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 405; Dec. Dig. ⇐135.]

[2. *Fraudulent Conveyances* ⇐166.]

While a mortgage given to secure a valid existing debt may hinder or delay other creditors of the mortgagor, it does not do so within the meaning of the statute, where there is no agreement or understanding on the part of the mortgagee by which, for valuable consideration, his debtor was induced to give the preference, to the injury of other creditors, nor any knowledge by the mortgagee of an intended fraud in the transaction, or collusion therewith.

[Ed. Note.—Cited in Gerald v. Gerald, 28 S. C. 444, 6 S. E. 290.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 519; Dec. Dig. ⇐166.]

[3. *Fraudulent Conveyances* ⇐118.]

That the creditor was a brother, and had shown kindness to the debtor in other matters, does not justify the conclusion that the debtor may have made the preference with a view to his own ultimate benefit.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 379; Dec. Dig. ⇐ 118.]

[4. *Equity* ⇐409.]

It is the duty of the judge of the Court of Common Pleas to determine by his own judgment all questions of fact as well as of law arising in an equity cause. The report of a referee to whom all the issues in such a case were referred, like that of a former commissioner, or the verdict of a jury upon issues ordered out of chancery, is subject to exception, and merely aids the judge in reaching his judgment.

[Ed. Note.—Cited in Meetze v. Charlotte, C. & A. R. Co., 23 S. C. 16.

For other cases, see Equity, Cent. Dig. § 921; Dec. Dig. ⇐409.]

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*Before Cooke, J., at Charleston, December, 1877.

This was an action brought by plaintiff to foreclose a mortgage upon a house and lot in the city of Charleston, executed by defendant Joseph G. Thorpe; and John R. Abney, who claimed the property under sheriff's deed, was made a party defendant.

Joseph G. Thorpe, a citizen of Graniteville, S. C., borrowed $1000 from his brother, William Thorpe, a citizen of Pennsylvania, July 25th, 1870, and gave his sealed note, payable at twelve months. In May, 1875, an action was commenced in Edgefield county against D. L. Turner, a former Probate judge, upon his official bond, and against J. G. Thorpe and others, the sureties thereto. In February, 1876, J. G. Thorpe executed a mortgage to his brother upon the lot in dispute, to secure the payment of this note. On March 26th, 1876, judgment was obtained at Edgefield against D. L. Turner, J. G. Thorpe, and others, for $3548.90. A transcript of this judgment was sent to Charleston, and, under it, the lot in that city was sold as the property of J. G. Thorpe in August, 1876, by the sheriff of Charleston county. At that sale notice was given of this mortgage, which had been duly recorded in that county, March 29th, 1876. John R. Abney was the purchaser.

This is the mortgage here sought to be foreclosed, and (J. G. Thorpe not answering,) John R. Abney resists the foreclosure, and claims the property to be his absolutely, upon the ground that the mortgage was fraudulent, and made to delay, hinder and defeat the just claims of the creditors of the defendant, and particularly the plaintiff in the suit against Turner and others.

All the issues of law and fact were referred to James Aldrich, Esq., special referee, to hear and determine. In his report, the referee states the pleadings and the facts, much of which has no bearing upon the points of the case decided by this court. The report continues:

J. G. Thorpe has not only failed to answer the complaint herein, but is a most willing

witness in favor of plaintiff, and a most unwilling witness for John R. Abney. Indeed, to obtain his testimony he had to be called by John R. Abney, and in his evidence he speaks of the proceedings in the case of

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State, ex rel. *Abney, v. Turner and himself, as an attempt to rob him of his property. Again, J. G. Thorpe was the agent of the plaintiff in all his transactions, including even the management of the suit against himself, to the very payment of the fees of the plaintiff's attorney. See the testimony of plaintiff generally; that of J. G. Thorpe and D. S. Henderson. Plaintiff is bound by whatever J. G. Thorpe did as his agent. Bump on Fraud. Con. 203.

Even where the creditor is not aware of the debtor's intention to delay, hinder or defeat the claims of another creditor, but learns enough to excite a suspicion of that fact, or accepts the preference, or the fruits of it, after he has learned that such intention existed in the mind of the common debtor, he will not be allowed to retain the preference, nor can one avail himself of the fraud of another. Bump on Fraud. Con. 200; [Johnston v. South Wester Rail Road Bank] 3 Strob. Eq. 263; [Farr v. Sims] Rich. Eq. Cas. 122 [24 Am. Dec. 396].

While relationship between the parties (and here they are brothers) is not a badge of fraud that a secret trust existed, still "they are the persons with whom a secret trust is likely to exist. The same principle applies to all persons with whom the debtor has a confidential relation. [Here the debtor was the agent of the creditor.] Any relationship which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate, explain or give color to the transaction." Bump on Fraud. Con. 54, 55.

"In deciding upon the bona or mala fides of such a transaction, much importance is always attached to the fact that the security was taken, not as a pledge for money borrowed at the time, but for an antecedent debt." [Schmidt v. Gatewood] 2 Rich. Eq. 162.

Here the mortgages of May, 1875, were given to secure a debt alleged to have been contracted in May, 1873, and the mortgage in dispute was given in 1876, to secure a debt contracted in 1870.

"The omission of the grantee to testify or to produce the debtor, or any other important witness, is the ground for an unfavorable presumption, and frequently exercises an important influence upon the final determination of fraud."

Here the wife, son and daughter of plain-

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tiff, and the wife of *J. G. Thorpe, were important witnesses, and were not produced by grantee, plaintiff. They saw plaintiff pay to J. G. Thorpe the $1000 for which the note in dispute was given, and yet they do not testify.

Where a judgment confessed is impeached by a creditor for fraud, it is a circumstance entitled to considerable weight where the transaction is of a doubtful character that it was confessed pending the creditor's suit. [Farr v. Sims] Rich. Eq. Cas. 410 [24 Am. Dec. 396].

I take it the same is applicable to mortgages. In this case the mortgage of 1876, the one involved herein, was given but a few weeks prior to the judgment in that case, and it reached Charleston for record but a week or two before the transcript in the Abney case reached the same point. There seems to be a method in this chance course of action.

I will briefly state some of the facts which indicate fraud: Plaintiff was a workman at $15 per week. If he worked all the time he made $780 per year, and it would require his entire earnings of nearly eight years to make a loan of $6000; and, allowing him but $280 per year to support himself and family, it would take his saving of twelve years to make the loan. $5000 of this money was sent in a registered letter (so J. G. Thorpe says) all the way from Pennsylvania to Graniteville, and yet no receipt, post-office registry, no witness even pretends to prove this remarkable transaction, save J. G. Thorpe, the debtor and agent, who kept them in his possession and had the mortgage foreclosed upon his own property. I never read of a case similar to this transaction. Again, J. G. Thorpe would give the mortgages and record them at his discretion. Again, when the $6000 mortgages were drawn by H. T. Wright, the $6000 note which they were given to secure was not shown to him.

The $1000 mortgage of 1876 is in J. G. Thorpe's handwriting.

I will now leave this class of evidence, and it is by no means exhausted, and examine the positive testimony as to the mala fides of the transaction.

Plaintiff says: "I knew that the property (this is dispute) was advertised for sale before it was sold, and I told J. G. Thorpe to go ahead, foreclose the mortgage and save the property." Plaintiff was not anxious to

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get his money, but wanted the mort*gage foreclosed for what? To "save the property," and J. G. Thorpe was the man selected to "save the property."

Plaintiff says J. G. Thorpe had the custody of the mortgage now in dispute all the time until it was handed to an attorney to foreclose, and that the mortgage was, in fact, given without his knowledge, and voluntarily. The agent of J. G. Thorpe, who gave notice of this mortgage at the sale in

Charleston under the Abney execution, also bid upon the property.

Now I shall look over J. G. Thorpe's testimony. He says: "I had been sued on Turner's bond, and I gave the mortgage to William Thorpe, my brother, to secure him. I had a right to prefer a creditor." "I did not know that judgment was to be rendered against me at March Term, 1876. I was on the jury here in Aiken at that time. I asked you [G. W. Croft] how long a mortgage had to be recorded in. Croft's answer, sixty days. I said that I thought when a mortgagee was out of the state he had longer than sixty days. Croft's answer, no. The next day I told Croft that I had sent the mortgage to be recorded."

J. G. Thorpe was asked why he had not recorded the mortgage of 1875, which included his Aiken property as well as this in dispute, but which was recorded in Aiken only. "It would hurt the sale. * * * I put it in the first mortgage, intending to record it in Charleston, but changed my mind because of the sale."

If this is not proof plain of a benefit allowed by plaintiff to J. G. Thorpe, and that J. G. Thorpe did exercise his powers to delay, hinder and defeat other creditors, I don't know what is. J. G. Thorpe says that he got the $5000 on May 18th, 1873; it was all spent by the following fall, and can't tell where it went, except in vague generalities. "I don't remember that I mentioned to Mr. Wright about being sued on the Turner bond." In this he is contradicted by H. T. Wright, Esq., who says J. G. Thorpe mentioned the suit both before and when he drew the mortgages. "I knew the court was to meet in Edgefield in March, and apprehended danger. I gave my brother the mortgage to protect him."

Here J. G. Thorpe in substance contradicts his statement that he did not know judgment was to be rendered against him in

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*March, 1876; he did not knew but apprehended danger. "I did not send this mortgage to be recorded until I heard of the judgment at Edgefield."

Here he contradicts both his other assertions as to knowledge of the judgment.

"I had an understanding that I was to live on the premises and pay rent after the sale." This alludes to the Aiken property. "I renewed the $5000 note of my own accord, because I knew of the suit."

H. T. Wright, Esq., says: "J. G. Thorpe, at both Graniteville and Johnston's, told me that he was indebted to his brother, and that he wanted to protect him—to fix it so that his brother could be protected; that he did not want his property to go to the Abney suit. Thorpe said his object was not only to protect his brother, but also to protect his property from the Abney suit." This is too plain for comment. G. W. Croft, Esq., in answer to what J. G. Thorpe said was the conversation between them at the Aiken court in March, 1876, says that J. G. Thorpe told him that "he would make a mortgage and send it to Charleston and have it recorded; and Thorpe is undoubtedly mistaken when he says that he told me he had a mortgage written. I am very positive of this."

This is most important, because the mortgage in dispute purports to have been executed three or four weeks prior to the date of this conversation.

This is all the discussion of the law and facts I shall make, and, after a careful and pains-taking consideration of the great mass of testimony, I feel convinced that the $6000 note and the two mortgage given to secure it are pretensive and fraudulent, and that the mortgage, the cause of this action, was intended to delay, hinder and defeat the creditors of J. G. Thorpe, and particularly the judgment in the case of State, ex rel. Carey M. Abney, v. D. L. Turner and J. G. Thorpe. I have grave doubts but that this mortgage was intended only to defeat the Abney judgment, and that plaintiff knew all the facts.

I was requested by the attorney of plaintiff to decide as to the validity of the note of 1870 for $1000, given to secure the money said to be borrowed, and which this mort-

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gage was given to *secure. I might reply as the court did in the cases of Fryer v. Bryan, 2 Hill's Eq. 56; Dickinson v. Way, 3 Rich. Eq. 412, and Bowie v. Free, 3 Rich. Eq. 403, that "a court is not bound to disentangle a web of fraud, to ascertain if any good material be mixed in it;" but I will do as requested, though I am not certain but that my decision will be an obiter dictum.

The note must stand, not so much from the evidence in favor of it, but because there has been no strong evidence against it. It has not been successfully impeached.

My conclusions of the facts are that the mortgage, the subject of this action, was given to hinder, delay and defraud the creditors of J. G. Thorpe, especially the judgment in the case of State, ex rel. Carey M. Abney, v. D. L. Turner and J. G. Thorpe, and that the same is null and void.

That the note is valid. My conclusions of law are that said mortgage must be and hereby is set aside and made of no effect, the same being void because of fraud.

That no judgment can be given as to the note, because this action is for foreclosure of the mortgage only. It has no demand for general relief, hence the complaint as to the note must also be dismissed, but without prejudice to the plaintiff's right to proceed therein in any manner as he may be advised.

That the complaint be dismissed, and the costs of this suit to be paid by the defendant, J. G. Thorpe, and the plaintiff, William Thorpe.

The letters referred to are as follows:

"Philadelphia, Pa., June 20th, 1874.

"Dear Brother:—I have contracting. I want all the money I have loaned paid to me as soon as possible; if I cannot get the money right away, I want it secured by a mortgage of your property. My family is all well, and they send regards to you all.

"Yours, a faithful brother,

"Wm. Thorpe."

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*"Graniteville, S. C., July 3d, 1874.

"Dear Brother:—Yours of June 20th was duly received and particularly noticed, and in answer will say that I am willing to give a mortgage on all I have got to secure you in the payment of the money I borrowed from you. If I do not sell the two houses at auction this month or fall in Charleston, I will certainly give you a mortgage to secure the payment of the note for $1000 I gave you in July, 1870. I know I promised to pay it several times before, but Mr. Leitch has tried to sell the two houses so often at auction, and failed to sell them, that I have been disappointed so often and could not help it. I will send you more interest as soon as I can, and you can credit it on the back of the note, as you did the other. I have nothing more of interest to write, only we are all well and hope this may find you all the same; and with best wishes I remain as ever

"Your affectionate brother,

"J. G. Thorpe."

The mortgage in dispute remained in possession of J. G. Thorpe until July, 1876, when he turned it over to D. S. Henderson, Esq., Mr. Henderson having shortly before received a letter from Wm. Thorpe, saying it would be turned over, and instructed that it be foreclosed.

To this report of the referee exceptions were filed by the plaintiff as follows:

1. That the referee erred in finding as matter of fact that the mortgage, the subject of this action, was given to hinder and delay the creditors of J. G. Thorpe, and especially the judgment in the case of Abney v. Turner, and that the same is null and void.

2. That the referee erred in not finding as matter of fact that said mortgage was given as a bona fide preference to a creditor who held a valid, subsisting and meritorious debt.

3. That the referee erred in finding, as matter of law, that said mortgage must be set aside and made of no effect, the same being void because of fraud.

4. That the referee erred in not finding, as a matter of law, that said mortgage was valid, having found that it was given to secure a valid debt, and that the mortgage was really

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executed, *though the effect of said transfer was to delay, hinder or defeat a creditor, yet the preference is valid in law; and even if the mortgage was given "for the express purpose of defeating an execution," yet it is valid, the debt being bona fide.

5. That the referee erred, as matter of law, in not giving judgment against the defendant and in favor of the plaintiff, as against J. G. Thorpe for the debt and costs by default, and as against Abney for the costs of trial; for, no matter what is the prayer, the judgment must conform to the facts proven.

6. That said report is in many other respects inconsistent and contrary to the law and the evidence.

On the 21st of December, 1877, the exceptions to the report of the referee were heard at Charleston before his Honor Judge Cooke, and on the same day his Honor announced his decision reversing the findings of fact and conclusions of law of the referee, and afterwards, on the 9th day of January, 1878, filed the following decree:

This cause came on to be heard before me at Charleston, at the present fall term, upon the report of the special referee, James Aldrich, Esq., to whom had been referred all the issues, the testimony taken by him, the pleadings and the exceptions filed to said report by the plaintiff.

The action is for the foreclosure of a mortgage upon the property hereinafter mentioned, found by the referee to be executed on the 17th of February, 1876, by the defendant, J. G. Thorpe, and delivered to the plaintiff. Said mortgage was given to secure a note for $1000, borrowed money, signed by said defendant, J. G. Thorpe, and made payable to the plaintiff. The referee finds, as matter of fact, that the said note is, and was, at the time of the making of the mortgage, a valid and subsisting debt, but that the said mortgage was given to hinder and delay the creditors of J. G. Thorpe, and especially the judgment in the case of State, ex rel. Abney et al., v. Turner and Thorpe, (under which the defendant, Abney, claims title by deed subsequent to the recording of the mortgage, the said judgment also having been filed in Charleston county subsequent to said recording,) and that the same is null and void.

The exceptions, taken together, raise two

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objections to the *report: First, that the referee having found that the debt was valid and subsisting as matter of law, he should have found the mortgage, given to secure said valid debt, valid and binding; and, second, that the referee was not warranted by the weight of the testimony in his finding that the mortgage was given to delay, hinder and defeat the creditors of J. G. Thorpe. After hearing argument from Mr. Henderson in support of the exceptions, and Mr. Croft, contra, and upon full consideration of the case, I am constrained to sustain said exceptions.

The debt being valid and subsisting, and the mortgage, the incident thereof, being ful-

ly perfected by signature, delivery and record, it follows, as a matter of law, that the same is valid, and as a preference it could only be vacated in the court of bankruptcy, if contrary to the act of congress in such case made and provided.

This disposes of the report, and settles the case in favor of the plaintiff; but, upon a review of the case, I am satisfied that the referee is wrong in his finding of fact that the mortgage is fraudulent, null and void, and said finding is set aside as contrary to the testimony.

It is therefore ordered and adjudged that the said exceptions, as above set forth, be sustained, and the said report, as above indicated, be, and the same is hereby set aside, with costs for the plaintiff, to be taxed by the clerk—the plaintiff's costs, as allowed by law, to be paid out of the sale of the property; the defendant, John R. Abney, the answering and contesting defendant, to pay the referee's fee and all other costs of the action.

In furtherance of this decree, it is adjudged that the mortgaged premises described in the complaint be sold at public auction in the county of Charleston, by the sheriff of said county, upon the following terms, for cash: said sale to be on sale-day, in February next, or some convenient sale-day thereafter, after due legal notice; that the said sheriff execute to the purchaser or purchasers a deed of the premises sold; that, out of the moneys arising from said sale, after deducting the amount of his fees and expenses on such sale, the said sheriff do pay to the plaintiff or his attorney the sum of $1432.60 now due on said note, and dollars for plaintiff's

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costs, (the clerk authorized *to fill said blank,) with interest on $1432.60 from this date; that he hold the surplus money, if any there should be, subject to the further order of this court; that he make a report of such sale to this court at its next sitting; that, should there be deficiency as shown by said report, that the defendant, J. G. Thorpe, pay the same to the plaintiff, leave being hereby given for issuance of execution therefor.

It is further ordered and adjudged that the defendants, and all persons claiming under them, be forever barred and foreclosed of all right, title, interest and equity of redemption in said mortgaged premises so sold, or any part thereof.

The following is a description of the mortgaged premises:

[Then follows a description of the premises.]

Thompson H. Cooke.

Charleston, S. C., December 21st, 1877.

On the 16th of January, the defendant, Abney, served the following exceptions to the decision of Judge Cooke, to wit:

Take notice, that the defendant, J. R. Abney, excepts to the decision of his Honor Judge Cooke herein, filed on the 9th day of January, 1878, and will move the Supreme Court to reverse said decision on the following grounds, to wit:

1. That his Honor the presiding judge had no jurisdiction to hear exceptions to the report of the referee herein, and his decree is therefore null and void.

2. Because his Honor erred in holding as a matter of fact that the mortgage was not given with the fraudulent intention of defeating the judgment in the case of State, ex rel. Carey M. Abney et al., v. D. L. Turner et al.

3. Because his Honor erred in not sustaining the conclusions of fact as found by the referee, adjudging the mortgage mentioned in the complaint to have been given mala fide, and with the fraudulent intention to hinder and delay the claims of the creditors of J. G. Thorpe, and particularly the judgment in the case of State, ex rel. Carey M. Abney et al., v. D. L. Turner et al.

4. Because his Honor held that, inasmuch as the referee found the note valid, it followed as a matter of law that the mortgage was also valid, for it is respectfully submitted

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that such ruling *is not the law, but is in direct conflict to the adjudicated cases in this state.

5. Because the decree of his Honor the presiding judge is against the evidence, and contrary to law.

Messrs. G. W. Croft and G. D. Bryan, for appellant.

1. If the debt is valid, does it follow, as a matter of law, that the mortgage is valid and bona fide; or, may not the mortgage be made mala fide and with the fraudulent intent of hindering and defeating the right of a creditor, notwithstanding the debt intended to be secured is valid, and therefore null and void? Bump on Fraud. Con. 197, 483; 4 S. C. 257; 2 Bail. 324; Rich. Eq. Cas. 410; 9 Rich. 106.

2. It is contended that the referee's conclusion as to the facts is the same as the verdict of a jury, and his findings must stand unless they are clearly against the weight of evidence. Code, § 296; 6 S. C. 312.

3. The evidence before the referee was sufficient to support his findings of fact. They disclosed several badges of fraud. Bump on Fraud. Con. 43–57, 202, 203; 1 Hill 16; 10 Rich. 72; Rich. Eq. Cas. 4, 10, 122; 2 Bail. 328. His conclusions should be sustained. 6 S. C. 140, 310.

Mr. D. S. Henderson, for respondent.

As to first exception, see Code, § 296. As to fourth exception, see Rice Eq. 78; 10 Rich. Eq. 413. The security may be void when debt is valid, but only when the facts show an intention of aiding the common debtor. Rich. Eq. Cas. 410; 9 Rich. 110; Bump on Fraud. Con. 186. The facts do not sustain referee's conclusion of law, and the Circuit ju lge

properly overruled the finding. 5 S. C. 142; 4 S. C. 249; 2 Hill Ch. 32; Bump on Fraud. Con. 563. And this reversal should stand, notwithstanding the rule laid down in 6 S. C. 140; 6 S. C. 90, 379.

Mr. Croft, in reply.

The Circuit judge had no power to reverse the referee's report. See Code, § 296, as interpreted in 41 How. Pr. 11. Objection to jurisdiction never comes too late. Code, § 171.

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*July 30th, 1879. The opinion of the court was delivered by

HASKELL, A. J. This was an action brought to foreclose a mortgage of real estate given by J. G. Thorpe to William Thorpe, to secure a pre-existing debt. After the mortgage had been recorded the land was levied on and sold by the sheriff under a lien junior to that of the mortgage. The mortgagor made no answer. The purchaser at sheriff's sale, however, having been made a party defendant, filed his answer, in which he charges that the mortgage and the note it was given to secure, were given in fraud and to hinder, delay and defeat the claims of creditors of the mortgagor. He prays, therefore, that the note and mortgage be set aside as null and void. By an order of the court, all the issues in the action were submitted to a referee. The referee, in his report, finds the note to be a valid and subsisting debt; but he finds that the mortgage "was given to hinder and delay the creditors" of the mortgagor, "and that the same is null and void." His conclusion of law is that the mortgage must be "set aside and made of no effect, the same being void because of fraud." The report, so far as it relates to the mortgage, is not confirmed by the Circuit judge, who decides that the evidence is insufficient to establish fraud or to otherwise affect the mortgage, and foreclosure in the usual form is ordered. The appeal is from such judgment. The evidence which we are obliged to examine in an appeal from the finding of facts in an equity case can be much reduced by inquiring into its relevancy. So much as relates to what is called the $6000 note and the mortgage to secure it, is only admissible as tending, by way of inducement, to unravel the intent in the transactions directly in issue, and is too remote unless sustained by other evidence. That much, therefore, of the evidence need not be separately considered. As regards the $1000 note and mortgage, which are the cause of action, the validity of the note is admitted. There is evidence that the debt had been for some years past due and unpaid, and that the holder of the note, in 1874, urged payment, and that the maker promised to pay as soon as he could sell certain real estate then in the hands of a broker, or, if he failed to sell, that he would secure the note by mortgage. The land is the same which is now in question.

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Further, there is no evi*dence of any promise or agreement or understanding on the part of the mortgagee, by which, for valuable consideration, his debtor was induced to give security or preference to the injury of other creditors. Nor is there evidence of any fraud in this transaction by which other creditors have been injured; but, even if there had been fraud as to the other creditors on the part of the mortgagor, there is no evidence of any knowledge of the same, or collusion therewith on the part of the mortgagee. It is difficult to perceive more than the facts that the debtor, J. G. Thorpe, being sued as surety on the bond of a public officer, and apprehending judgment, sought to secure his own creditor, who happened to be his brother, and, to do so, executed a mortgage which he had promised nearly two years before. An effort is made to cast doubt upon the letters which were produced in evidence to prove that J. G. Thorpe had promised this security in 1874, but we are unable to perceive any force in the objection, even if the evidence were much more important to the case. It only strengthens what could have stood without it. Such measures as were pursued by J. G. Thorpe amount merely to a preference. It is entirely settled that such preference is lawful; and while, practically, it may hinder or delay some of the creditors, it does not hinder, delay or defraud creditors in the sense in which those words are used in the statute. Maples v. Maples, Rice Eq. 300. And while a preference to secure a valid debt may, under some circumstances, be impeached, one of the essential grounds is that the preferred creditor has conspired with the debtor at the expense of the other creditors. Bird v. Aitken, Rice Eq. 73. We perceive no evidence of such fact in the preference now in question. There is no merit in the ground that because the creditor was a brother, and had shown kindness to the debtor in other matters, that the debtor may have made the preference with a view to his own ultimate benefit. Cureton v. Doby, 10 Rich. Eq. 411 [73 Am. Dec. 96]. The referee does not place his conclusion distinctly upon such ground; but that impression seems to have influenced his mind. It is not, however, the report of the referee which is before us on appeal, but the judgment of the court, which, in our opinion, is fully sustained by the evidence.

The other question to be decided is,

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whether the Court of *Common Pleas has jurisdiction to hear exceptions to the report of a referee of the whole issue. The appellant relies upon Section 296 of the code and Perry v. Sullivan Manufacturing Company, 6 S. C. 312. The case cited does not consider the question of jurisdiction, and we deem it unnecessary to enter into an inquiry as to the whole force and effect of Section 296

of the code. The Court of Common Pleas is clothed with equity jurisdiction. Const., Art. IV., § 16. And in all cases which come within that classification, the judge, in the exercise of his chancery powers, is obliged to determine, by his judgment or decree, all questions of fact as well as of law. There is no difference between the report of a referee in an equity case now and that of a master, commissioner or referee, under the former practice. The report comes up subject to exceptions, and stands for confirmation by the judge. It may be confirmed in whole or in part, or entirely rejected, and the judgment be entered up accordingly. The judge is not more bound by the finding of a referee in a chancery case than by the verdict of a jury, where feigned issues are sent over from the chancery side to the law side of the court. He is not bound by the finding of fact in either mode, but is merely aided in arriving at the conclusion on which his judgment must rest. The action cannot be determined except by a judgment of the court in the exercise of its equity power, and that judgment can only be rendered by a judge of that court. See Sloan v. Westfield, 11 S. C. 445; Charlotte, Columbia and Augusta Railroad Company v. Earle et al., 12 S. C. 53.

The judgment is affirmed. Motion refused.

WILLARD, C. J., and McIVER, A. J., concurred.

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12 S. C. 168

(Case No. 754.)

MARY A. FARROW et al. v. JOHN D. FARROW et al.

(April Term, 1879.)

[1. *Wills* ⇐634.]

Devise to A in trust for the use and benefit of J. F. during his life, and at his death to be equally divided between his wife, E. F., and the children he may leave living, share and share

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alike; *held*, that E. F. *took a vested, transmissible interest, which, at her death before J. F., passed to her legal representatives.

[Ed. Note.—Cited in Blount v. Walker, 31 S. C. 29, 9 S. E. 804; Woodley v. Calhoun, 69 S. C. 292, 48 S. E. 272.

For other cases, see Wills, Cent. Dig. § 1495; Dec. Dig. ⇐634.]

[2. *Set-Off and Counterclaim* ⇐41.]

Bond given by A for purchases made at an estate sale cannot be set off against the distributive share of his wife in such estate.

[Ed. Note.—Cited in Kennedy v. Badgett, 19 S. C. 594; Turbeville v. Flowers, 27 S. C. 337, 3 S. E. 542.

For other cases, see Set-Off and Counterclaim, Cent. Dig. § 79; Dec. Dig. ⇐41.]

Before Kershaw, J., at Spartanburg, March, 1878.

Thomas Farrow died, leaving a last will and testament. The only question arising thereunder is as to the construction of so much thereof as is stated in the opinion of this court. After the death of John W. Farrow, four of his children leaving issue surviving, and his wife, Emma, having died before him, but after the death of Thomas Farrow, Dr. Samuel Farrow being dead also, proceedings were had in the Court of Equity, instituted in 1862, for the partition of this property. Three children survived John W. Farrow, and they, together with the husband of one of them, filed this bill against D. B. Clayton et al., but who the others were nowhere appears. D. B. Clayton seems to have been the husband of one of the daughters who predeceased John W. Farrow. Nor does it appear whether the order for partition determined the interest of the parties to the cause. The court ordered a sale. L. M. Littlefield, the husband of Maria A. Littlefield, who was one of J. W. Farrow's surviving daughters, purchased some of the property sold and gave his bond to the commissioner in equity for the amount of his purchases. Some of the other purchasers having paid some money into court, the question arose as to its proper distribution.

F. M. Trimmier, Esq., clerk and referee, reported that Mrs. Maria A. Littlefield was entitled to a share of this money in court, and that the legal representatives of Mrs. Emma Farrow were also entitled to a share. The surviving children of John W. Farrow excepted to this report, upon the ground that the legal representatives of Emma Farrow were not entitled to a share; and the legal representatives of Emma Farrow excepted, upon the ground that Maria Littlefield's share should be applied to the debt due by her husband.

The Circuit decree is as follows:

This case was heard upon exceptions to report of referee.

It appears to me evident that Mrs. Emma

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Farrow took no *transmissible interest in the estate. It was part of the trust that at the death of John W. Farrow, the property was to be divided between certain persons, Emma Farrow being one.

Before the time for the division arrived she had died. The division, under these circumstances, is to be made as if she had not been named in the will. The will conveyed personal property and real estate to the trustee, "in trust for the uses and purposes hereinafter mentioned." * * * "To be held by the said Samuel Farrow, in trust for the use and benefit of my son, John W. Farrow, during his life, and at his death to be equally divided between his wife, Emma Farrow, and the children he may leave living, share and share alike." The legal estate was in the trustee, to be transmitted from them at the termination of the life of John W. Farrow, by division among the ultimate objects of his bounty. At that time the trustee was to di-

vide the property among the persons then entitled.

Emma Farrow not then being in esse, the trust could only be fulfilled by a division among the children of John W. Farrow then living.

The exception of John D. Farrow and Maria A. Littlefield is sustained; those of Mary Farrow and M. C. Farrow are overruled.

It is ordered that the report of the referee be recommitted, and that the same be made to conform to the principles of this decree.

From which decree the defendants, Mrs. Mary A. Farrow and M. C. Farrow, by their attorney, gave notice of appeal upon the following grounds, viz.:

1. Because his Honor the presiding judge erred in decreeing that Mrs. Emma Farrow "took no transmissible interest in the estate."

2. Because it is error in his Honor the presiding judge to decree in this case "the legal estate was in the trustee," and that at the death of John W. Farrow, the life tenant, the "trustee was to divide the property among the persons then entitled," and that "Emma Farrow not then being in esse, the trust could only be fulfilled by dividing the property among the children of John W. Farrow then living."

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*3. Because it is error in his Honor the presiding judge to overrule the exceptions taken by Mrs. Mary A. Farrow and M. C. Farrow to referee's report in above-stated case.

Mr. John Winsmith, for appellants.

First ground of appeal. Bl. Com., tit. Remainders; 4 Kent Com., tit. "Vested Remainders;" 2 Wash. on Real Prop., ch. IV., § 20.

Second. Bouv. L. Dict., tit. "Trustee," § 3; 2 Bl. Com. 332; 2 McC. *252.

Third. 4 Ves. 15, 18; 3 Ves. 617; 9 Ves. 87, 174; 2 Kent 135; 2 Ves. 675; 10 Ves. 578; 1 Hill Ch. 324.

Messrs. Simpson & Simpson, for respondents.

No part of this estate ever vested in Mrs. Emma Farrow; the legal estate was in the trustee. 3 S. C. 77; Hill on Trust. *386; Harp. Eq. 281; 1 Hill Ch. 324; 1 Jarm. on Wills 751, 752, 762, 771. It was not testator's intention. 4 S. C. 76. A parallel case is found in 5 Rich. Eq. 20.

Mrs. Littlefield is entitled to her share. 1 Spears Eq. 142; Dud. Eq. 55; 2 Hill 644; 2 S. C. 337.

August 4th, 1879. The opinion of the court was delivered by

HASKELL, A. J. Thomas Farrow, by will, devised "to Dr. Samuel Farrow, in trust for the use and purposes hereinafter mentioned," certain property, real and personal, "all of which is to be held by the said Samuel Farrow in trust for the use and benefit of my son, John W. Farrow, during his life, and at his death to be equally divided between his wife, Emma Farrow, and the children he may leave living, share and share alike." The wife, Emma Farrow, survived the testator, but predeceased her husband. Three children were alive at the death of John W. Farrow. The appellants are legal representatives of Mrs. Emma Farrow. It is held by the Circuit judge that Emma Farrow took in the property no transmissible interest; that the legal estate was in the trustee, and that it was part of the trust, that, at the death of John W. Farrow, the property should be divided among certain persons, of whom Emma

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Farrow was *one, and that no interest could vest until the arrival of the time fixed for division.

We take a different view of the will. We think that the uses and purposes of the trust are confined to the lifetime of John W. Farrow, and are, first, to allow John W. to enjoy the property during his life, and, second, to protect the estate for the remaindermen. It is a well-recognized principle that "the legal estate, limited to the trustee, shall not be carried further than the complete execution of the trust necessarily requires." Lewin on Trusts *250. Thus, "if an estate be devised to A and his heirs, in trust, to pay the rents to B for his life, and, on his death, the testator devises the estate to C in fee, here the legal estate for the life of B is in the trustee, and the legal estate in the remainder is vested in C." Id. *250.

The only question is whether an estate in remainder vested in Emma Farrow on the death of this testator, or was it contingent upon the event of her surviving John W. Farrow. Where the estate is in trust for one for life, "and at her death to the use of or in trust for some ascertained individual, and on an event that was certain, it would certainly be a vested remainder." Williman v. Holmes, 4 Rich. Eq. 481. The rule, as thus expressed, applies strictly to the case before us, even upon the assumption that grammatical construction would permit the expression of trust to extend beyond the lifetime of John. It seems to be thought, however, that the division of the property, after the death of John, is a part of the trust. The language does not sustain such a view; but if it did, then the testator has himself done the work by saying "to be equally divided," and has thus left nothing for the trustee to do. The same language occurs in the case of Wilson v. McJunkin, 11 Rich. Eq. 527, but there it was not even contended the words "at her death to be equally divided" made the remainder contingent; the point was made, but upon different grounds. The devise was of real and personal property, in trust for the use of N., "for and during the term of her natural life, and at her death, to be equally divided amongst her children in fee simple." It was held that the estate vested in remainder in

each child of N., whether living at the death of N. or not. The reasoning applies fully to

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the case be*fore us. Emma Farrow was a person in being, and ascertained at the time the limitation was made, and the event was certain. The interest, therefore, vested in her, dependent as to its quantity upon the number of children John might leave living at the time of his death. It is thus stated upon the assumption that the division is to be made per capita, as that is all for which the appellants contend. The interest thus vested is transmissible, and passes to the representatives of Emma Farrow.

The other appeal is not well taken. The marital right of the husband does not attach to the undivided interest coming to his wife. It must have come into possession. Verdier v. Hyrne, 4 Strob. 464. The note held against the husband for the purchase of part of the property sold under order of the court, cannot, therefore, be set off against the claim held by the wife. Roberts v. Adams, 2 S. C. 337.

The case is remanded for further proceedings in conformity with the views herein expressed.

Judgment modified.

WILLARD, C. J., and McIVER, A. J., concurred.

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12 S. C. 173

(Case No. 756.)

THE SOUTH CAROLINA RAILROAD COMPANY v. JAMES BARRETT.

(April Term, 1879.)

[1. *Pleading* ⊂⊃430.]

In an action by a principal against his agent, charging violations of a parol contract, the plaintiff, without objection from defendant, introduced in evidence a bond executed by such agent prior to the alleged breaches, conditioned for the faithful performance of his duties as such agent. *Held*, that the defendant had waived the right to make afterwards the objection that there was a variance between the pleadings and the facts proven. McIver, A. J., dissenting.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1441; Dec. Dig. ⊂⊃430.]

[2. *Reference* ⊂⊃58.]

A referee may, after the hearing before him, permit the plaintiff to amend the complaint, for the purpose of conforming the pleadings to the facts proven. In this case, such amendment was not necessary. McIver, A. J., dissenting, and holding further that, even if amendment was proper, the defendant should have had opportunity to answer.

[Ed. Note.—Cited in Tarrant v. Gittelson, 16 S. C. 235; Crane, Boylston & Co. v. Lipscomb, 24 S. C. 438; Dunbar v. Port Royal & A. Ry. Co., 36 S. C. 116, 15 S. E. 357, 31 Am. St. Rep. 860; Richardson v. Wallace, 39 S. C. 223, 17 S. E. 725.

For other cases, see Reference, Cent. Dig. § 90; Dec. Dig. ⊂⊃58.]

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*Before Thomson, J., at Aiken, April, 1878.

The case is fully stated in the opinion of the court, and in the dissenting opinion of Associate Justice McIver.

Mr. J. P. Carroll, for appellant.

Mr. D. S. Henderson, for respondent.

September 18th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The action is in the nature of indebitatus assumpsit, for wrongful misconduct of the defendant, as the agent of the plaintiffs, in giving credit for freight on goods delivered to certain parties, in the place of demanding payment upon said delivery, as by the contract and duty of defendant as such agent, he was bound to do, and seeking to charge such amount against the defendant. The answer alleges that, at the time of the delivery of said goods, without demanding freight thereon, the plaintiffs were indebted to the parties to whom the goods were so delivered, in an amount exceeding the amount of freight due.

The cause was referred by consent, and judgment was given for the plaintiffs. Certain exceptions to the rulings of the referee, that have been passed upon and overruled by the Circuit Court, are brought up by the present appeal.

The defendant moved for a nonsuit, on the ground of a variance between the pleadings and the proofs. The facts out of which such exception arises are that, on the trial, the plaintiff offered in proof a bond, executed by the defendant with sureties, prior to the transactions stated in the complaint, conditioned for the due observance of the duties of his office as such agent, and stating the character of such duties. No objection appears to have been made to such proof on the part of the defendant, and it must be regarded as primarily the proof of the terms of contract between the parties relative to the matters alleged in the complaint.

Whether the defendant could have, by his

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objection, excluded *the bond, or put the plaintiff to demanding an amendment of his complaint before introducing such proof, need not be considered, as no such objection appears to have been made. Having failed to object to the introduction in evidence of the bond, all objection on the ground of variance between the pleadings and proofs in that respect was waived, and that question could not be opened upon a motion for nonsuit. The only ground for a nonsuit was that the bond did not set forth an agreement sufficient to constitute a cause of action, or that a breach thereof could not be legally inferred from the evidence; but no such ground of motion appears to have been presented to the referee. The defendant not having objected to the evi-

dence, it was the duty of the referee to proceed with the hearing. S. P. Manufacturing Company v. Thew, 5 S. C. 10.

Another objection is, that the referree permitted the plaintiff to amend by setting forth the bond in his complaint. It is not distinctly stated, but must be inferred, that this amendment was made after the hearing before the referee for the purpose of conforming the pleadings to the facts proved. Such an amendment is allowed by Section 196 of the code, and is designed to meet the case of a variance between the pleadings and the proofs as a means of exhibiting on the record the issues actually tried, when there has been a departure of the proofs from the original pleadings.

There was no error in allowing such amendment, nor was it necessary that such amendment should be made in order to enable plaintiffs to obtain judgment.

The appeal should be dismissed.

HASKELL, A. J., concurred.

McIVER, A. J. Being unable to concur in the conclusion reached by a majority of the court in this case, it is but proper that I should indicate the grounds of my dissent. To do this intelligibly, it will be necessary to make a brief statement showing the nature of the case, and the facts developed on the trial as gathered from the record presented here.

The cause of action, as stated in the original complaint, was the alleged breach of parol contract entered into in April, 1873,

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*whereby the defendant was appointed the agent of the plaintiff, at Bath, by one of the terms of which the defendant undertook and promised not to deliver any goods or articles brought to that place by plaintiffs until the freight due thereon was paid; and the breach alleged was that defendant, "at divers times and on divers occasions before the 19th day of October, 1875," did deliver such goods and articles to a certain consignee without requiring the freight to be paid, and that the defendant has never accounted to plaintiff for such freight. The issues in the actions were referred to a referee for trial. It would seem, though the facts are very meagerly stated in the brief, that the plaintiff put in evidence, without objection from defendant, the bond of defendant set out in the brief, which seems to be a bond for the faithful performance of the duties of the office of agent.

This bond bears date July 1st, 1873, and was signed by two other persons as sureties, and it does not contain any provision binding the obligors to make good any defaults committed prior to its date.

Whether any other evidence, and if so, what, was offered does not appear. The defendant moved for a non-suit, upon the ground that the only contract proven was that evidenced by the bond, and as that was not alleged in the complaint the action should be dismissed. The motion was overruled by the referee, upon the ground that under the provisions of the code "the pleadings can be amended so as to conform to the facts as proven," and his ruling as sustained by the Circuit judge. It would seem, however, that the referee did not then grant an order that the complaint should be then amended and the defendant allowed an opportunity to answer such amended complaint, but that he then proceeded to render his decision, in which he says "the pleadings may be so amended as to conform to the proof." Accordingly, after exceptions to the report had been filed, the plaintiff's attorney served upon the defendant's attorney a notice that he would, "at the hearing of this cause, upon the exceptions filed, present to the Court of Common Pleas of this county the amended complaint herewith annexed, as in compliance with the requirement of said report in regard to the variance between the pleadings and proof herein."

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*The report of the referee was filed January 4th, 1878, but at what particular time the exceptions thereto were filed does not appear; manifestly, however, from the terms of the notice above quoted, before the notice of the amended complaint was served, which was on February 2d, 1878. The amended complaint alleges the bond as the cause of action.

From this statement it is clear that two separate and distinct contracts were set up against the defendant—one a parol contract, embracing the period between April and July 1st, 1873, upon which the defendant alone was liable, the other a contract by specialty, embracing the period after July 1st, 1873, upon which two other parties were liable, jointly and severally, with the defendant. To maintain the action on the first contract, which was the one alleged in the original complaint, it was necessary not only to prove such contract, but also to prove a breach of it during the time it was in force, between April and July 1st, 1873, and of this the bond certainly furnished no evidence whatever. In fact it only served to show that such a contract had been put an end to by merger. So that it is clear to my mind that there was an entire failure of proof, not only as to the contract sued upon but as to its breach.

It is said, however, that under the liberal provisions of the code, in regard to amendments, that the referee was justified in allowing the amendment. I am always disposed to give such a construction to the provisions of the code as will tend to simplify the pleadings in an action, but there certainly is a limit beyond which we should not go, and too great liberality, in this respect, will not only encourage careless and slovenly pleading, but will oftentimes defeat the ends of justice. To say that a party may bring

his action upon one contract, and be allowed to recover upon another, which he has been permitted to prove without objection at the trial, is, in my judgment, a dangerous stretch of liberality. For aught that appears, in this very case, it may be that the defendant had one defence to the parol contract, commencing in April and ending July 1st, 1873, which was set out in the original complaint, and a totally different defence to the specialty contract commencing July 1st, 1873, which was proved by the bond offered in evi-

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dence. The fact that the bond was *received in evidence, without objection from defendant, cannot alter the case, for he might very well have thought that, though this evidence was irrelevant, and therefore, objectionable, its admission could do him no harm, as so far from proving the fact in issue—the parol contract—upon which the action was brought, it rather tended to show that such parol contract was limited to a very short period of time. As is said in Pom. on Rem., § 557, p. 603, upon the authority of Johnson v. Moses, 45 Cal. 515, in speaking of the rule upon this subject: "When the complaint sets forth a contract, and, on the trial, the plaintiff proved, without objection, a materially different one, and was, thereupon, non-suited, the non-suit was sustained; the court adding that the admission of the evidence, without objection, made no difference with the operation of the rule."

These two contracts are certainly materially different—one acts upon parol evidence, the other upon evidence, in writing, under seal; one embraces a particular period of time, the other embraces a different period; on the one the defendant is alone liable, while on the other he is jointly and severally liable with two other persons; and upon one the action, as the law then stood, would have been barred in six years, while on the other the statutory period was twenty years. It seems to me, therefore, that this was a case of entire failure of proof, and not a case of mere variance between the allegations and the proofs, and that under the rule, as stated by Pomeroy, §§ 553, 554, pp. 598-600, no amendment was allowable.

It was argued that there was really no need for an amendment, and that, in fact, the so-called amended complaint did not set out any different contract from that set out in the original complaint, and, therefore, the judgment below is not liable to any objection. Whether this be so may well be questioned, inasmuch as it is very certain that in the original complaint no mention whatever is made of the bond, and the only contract alluded to is that resting in parol, made when defendant was first appointed agent in April, 1873, while in the amended complaint the only contract mentioned is that evidenced by the bond made July 1st, 1873, and it is for the breach of that contract that damages are asked, as appears from the words "that not-

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with*standing his obligation and bond, as aforesaid, but in violation of the conditions of same," &c. But even were this so, and the amended complaint be regarded as based upon the parol contract alone, then there was no evidence of any such contract, the only evidence adduced upon that subject being the bond, which certainly did not prove the parol contract.

But even if the amendment were allowable, it does seem to me that the defendant should at least have been allowed the opportunity of answering the amended complaint, for, as I have heretofore suggested, it might be that his defence to the action on the contract, evidenced by the bond, was different from that to the action on the contract resting only in parol; whereas by the course pursued in this case the defendant who has been sued upon one contract has judgment rendered against him upon another contract, which, by amendment to the pleadings, has been inserted as the cause of action, which he has had no opportunity of answering. For, although the Circuit judge does say that to the amended complaint there is no answer, an expression well calculated to convey the impression that defendant had neglected to answer, yet, from what is above stated, it is very obvious that such was not his intention, for the defendant never had any opportunity of answering the amended complaint; or, at least, if he had answered, such answer could not have been considered, and, therefore, would have been of no avail, for no amendment was made until after the referee had filed his report finding judgment against the defendant, and after exceptions thereto had been filed, as is shown by the terms of the notice from the plaintiffs' attorney that he would, "at the hearing of this case, upon the exceptions filed, present to the Court of Common Pleas of this county the amended complaint hereto annexed," and at that stage of the case it is difficult to conceive of what avail an answer to the amended complaint would be, as the hearing then would necessarily be upon the exceptions to the report, and no new issues which might be raised by an answer to the amended complaint could have been considered.

I think, therefore, that the judgment of the Circuit Court should be set aside and a new trial ordered.

Appeal dismissed.

12 S. C. *180

*(Case No. 758.)

THE STATE v. LOUISA PITTS.

(April Term, 1879.)

[1. *Criminal Law* ⟸1069.]

The changes made by the code of procedure in the methods of appeal, do not affect criminal causes. In such cases there should be a report of the Circuit judge, unaccompanied by a statement of counsel, unless the agreement of counsel made in good faith is submitted as a substitute for such report. But query: Whether the solicitor, by his admissions, can so bind the state as to prevent this court from interfering in the interests of justice; and whether the report of the Circuit judge can be modified by agreement of counsel?

[Ed. Note.—Cited in State v. Dodson, 14 S. C. 619; State v. Richardson, 98 S. C. 151, 82 S. E. 354.

For other cases, see Criminal Law, Cent. Dig. § 2694; Dec. Dig. ⟸1069.]

[2. *Larceny* ⟸40.]

Prior to 1868, a conviction could be had upon an indictment for larceny alleging the property to be in the husband, when the goods were the clothing of the wife.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102–126, 160; Dec. Dig. ⟸40.]

[3. *Husband and Wife* ⟸116.]

Under the constitution of 1868, Article XIV., Section 8, a married woman may acquire separate property by gift from her husband, but the mere use and enjoyment by her of personal property purchased by the husband, does not establish her right to a separate estate therein.

[Ed. Note.—Cited in Battle v. Columbia, N. & L. R. R., 70 S. C. 341, 49 S. E. 849.

For other cases, see Husband and Wife, Cent. Dig. § 398; Dec. Dig. ⟸116.]

[4. *Larceny* ⟸73.]

A prisoner should not be convicted of stealing goods which belonged to a married woman, under an indictment charging them to be the property of her husband; and when they were purchased by the husband and used by the wife, it is for the jury to say whether the wife had acquired a separate property therein.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 196; Dec. Dig. ⟸73.]

Before Aldrich, J., at Laurens, February, 1879.

This was an indictment for grand larceny. The goods stolen were a silk dress and other articles of ladies' clothing, laid in the indictment as the property of John T. Duncan. The silk dress was bought by John T. Duncan for his first wife, who died in 1855; the other articles were purchased by him for his present wife. The goods were stolen July 21st, 1878. Verdict—guilty. Defendant appealed. Counsel for appellant prepared a statement of the case for the appeal court; the solicitor not accepting it, prepared his statement. The two were submitted to the Circuit judge, who adopted the solicitor's statement. Subsequently counsel signed the following paper:

We agree on the following statement, and consent that it [this case] be heard on this statement and brief filed:

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*The defendant's attorney asked his Honor to charge as a matter of law, that prior to the adoption of the constitution of 1868, the paraphernalia of a married woman consisted of clothing and jewels, and in these she had a separate estate; that since the adoption of the present constitution, a married woman has a separate estate in her clothing and all other property, and the marital rights of her husband cannot attach; and if they believed the clothes stolen were the property of Mrs. John T. Duncan, the prisoner should be found not guilty. His Honor Judge Aldrich refused so to charge, and defendant's counsel excepted. His Honor sentenced the defendant in open court to one year's imprisonment in the penitentiary, and afterwards, through a clerical error, wrote it two on the indictment.

Messrs. Pope & Watts, for appellant.

Mr. B. W. Ball, solicitor, contra.

September 19th, 1879. The opinion of the court was delivered by

WILLARD, C. J. This case originally came up for hearing on a report from the Circuit judge. This report, as set forth on the record, was accompanied by conflicting statements of the proceedings, made by the respective counsel. A defect being found in the statement, permission was given to the counsel for the defendant to procure a further statement of the case. Finally a statement was produced, as part of the record in the cause, agreed to by the counsel for both parties. The proper mode of bringing up an appeal to this court on exceptions taken in a criminal case, is by a report of the Circuit judge.

Such was the practice before the adoption of the code, and that has made no change in the mode of procedure, in that respect, in criminal cases.

The provisions of Part II. of the code are expressly confined to "civil actions in the courts of this state" (Code, § 8), criminal proceedings being excluded from that class (§ 5.) The changes that have been made by the code in the method of appeal in civil causes are made in the second part of the code, and do not affect criminal causes.

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*When a criminal case comes up on a report of the Circuit judge, it should not be accompanied by any statements of the counsel that are not intended by the Circuit judge to be embodied in and form part of his report. This, of course, does not apply to the grounds of appeal in that class of cases.

When counsel agree upon a statement of the case, as a substitute for a report of the Circuit judge, only those matters that are so agreed upon will be considered, and unless the good faith of such agreement is successfully impeached, the parties in the cause will be concluded by such statement.

We do not intend by this to imply that the solicitor for the state can, at his discretion, bind the state by his admissions, under all circumstances, so that the court cannot interfere in the interest of justice; but as no abuse of the authority of the solicitor appears in the present case, the authority of this court in exceptional cases need not be considered.

In the present case the appeal originally came up upon the report of the Circuit judge, and was sought to be amended by the agreed statement of counsel. We do not deem it necessary to raise any question as to the right of counsel in a criminal cause to modify, by an agreement between themselves, the case as reported by the judge—no such question having been suggested by counsel on either side. It appears to us that the report was defective, and as the case is a criminal case, and as it would lead to delay to require the statement of counsel to be submitted to the Circuit judge for his remarks, we do not feel bound to consider that question at the present time.

The indictment was for larceny of clothing, and the property therein was laid in John T. Duncan. The evidence tended to prove that part of the property alleged to have been stolen consisted of clothing of a deceased wife of Duncan, who died in 1855, and the residue of the clothing of his present wife.

It does not appear when Duncan was married to his present wife. The larceny was alleged to have occurred July 21st, 1878. The requests to charge, as stated in the agreed statement of counsel, contains three propositions. The first proposition is, "that prior to the adoption of the constitution of 1868, the paraphernalia of a married woman

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consisted of clothing and jewels, *and in this she had a separate estate." This proposition is immaterial, and no regard need be paid to the question whether it is strictly accurate.

There is no doubt that before the adoption of the present constitution a conviction could be had upon an indictment for larceny alleging the property in the goods to be in the husband, when the goods were the clothing of the wife. The question of the nature and extent of the wife's paraphernalia had no bearing on that question.

The second proposition is, "that since the adoption of the present constitution a married woman has a separate estate in her clothing and all other property, and the marital rights of her husband cannot attach." This proposition is inaccurate.

It is true that under the constitution she may have a separate estate in her clothing and all other property, and the marital rights of her husband cannot attach to such separate estate: but the question whether in point of fact she has such separate estate depends on whether such property was acquired in the manner prescribed by the constitution as the means requisite to create in her such separate estate.

Article XIV. of the constitution, Section 8, provides that "the real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her the same as if she were unmarried; provided that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors." It is clear that a wife can acquire, as her separate estate, real and personal property by gift or grant from her husband, for, in the first place, her power to acquire is in terms unlimited as to the person from whom she may so acquire, and in the second place the proviso necessarily implies that such acquisition may be directly from her husband. It must therefore appear, either by proof or a proper presumption, that either expressly or by implication such an act of acquisition has occurred. Such an act implies the transfer to the wife of real or personal property, with the intention that

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title *thereto should pass to and vest in her, in order that the character of a separate estate should be imposed upon it as intended by the constitution.

The second proposition is defective in assuming, as matter of law, that the mere fact that a wife is in the use and enjoyment of clothing or other personal property is sufficient to establish her right to a separate estate therein.

The third proposition is to the effect that "if the jury believed the clothes were the property of Mrs. John T. Duncan, the prisoner should be found not guilty." This proposition was improperly refused. The fact that Mr. and Mrs. Duncan bore towards each other the relation of husband and wife may have been calculated to raise a presumption that he had such a possession of the articles alleged to have been stolen as to warrant the allegation made in the indictment, yet that would give rise to a question of fact which the judge could not decide.

It was for the jury to determine what was the fact, under proper instructions, as to the rule of presumption in such cases.

There was therefore error in the refusal to charge the third proposition embraced in the requests to charge in behalf of the prisoner.

As there should be a new trial it is unimportant to examine the effect of a discrepancy between the terms of the sentence pronounced in open court and that recorded.

There should be a new trial.

New trial granted.

McIVER and HASKELL, A. J.'s, concurred.

12 S. C. *185

*(Case No. 759.)

M. S. McINTYRE, Executrix, and DUNCAN McINTYRE v. H. McCLENAGHAN, Administrator, et al.

(April Term, 1879.)

[1. *Limitation of Actions* ⟸102.]

An agent appointed by creditors, under the act regulating assignments for the benefit of creditors, is a trustee, and for assets of the assigned estate coming to his hands, however received, the statute of limitations does not commence to run in his favor until the trust is terminated.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 499; Dec. Dig. ⟸102.]

[2. *Assignments for Benefit of Creditors* ⟸313.]

An assignee under that act, by purchasing claims of creditors of the assigned estate, became entitled to the rights of such creditors against the agent.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 918; Dec. Dig. ⟸313.]

[3. *Limitation of Actions* ⟸48.]

A note of the agent, payable to such assignee January 1st, 1859, was barred by the statute of limitations before May 6th, 1871. Per Townsend, Circuit judge, and Willard, C. J.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 259–265, 351; Dec. Dig. ⟸48.]

[4. *Executors and Administrators* ⟸465.]

For the assets of the assigned estate in the hands of such agent, his executrix is liable to account; their disposition is not a matter affecting her interests.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1990–1992; Dec. Dig. ⟸465.]

[5. *Assignments for Benefit of Creditors* ⟸314.]

Presentation of the claim against the assets of a law firm, of which the agent was a member, does not prevent the establishment of the claim against the individual estate of the agent.

Haskell, A. J., dissented from the judgment of the court; the grounds of his dissent not stated.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 925; Dec. Dig. ⟸ 314.]

[This case is also cited in Stackhouse v. Wheeler, 17 S. C. 95, as to facts.]

Before Townsend, J., at Marion, July, 1877.

This was an action instituted by M. S. McIntyre (formerly McClenaghan), the widow of John C. McClenaghan and executrix of his will, for a settlement of his estate. John C. McClenaghan, during his lifetime, was an attorney-at-law, and a member of the law firm of McClenaghan & Fairlee. Under the assignment of Dillon & Russ, Caldwell & Robinson were preferred creditors. The fifty-dollar note mentioned in the decree was made by J. C. McClenaghan on June 7th, 1858, payable on January 1st, 1859, to "E. T. Stackhouse, assignee of J. W. Dillon."

The other matters are fully stated in Judge Townsend's decree, which is as follows:

This is a proceeding to marshal the assets

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of the estate of *John C. McClenaghan, deceased. In compliance with an order of the court directing creditors to establish their claims, E. T. Stackhouse and Robinson & Caldwell appeared before W. W. Harllee, Esq., special referee, for this purpose.

The referee heard testimony relating to the claims, and has submitted a report, in which judgment against the creditors is recommended. To this report the creditors, Stackhouse and Caldwell & Robinson, file exceptions. These suggest the questions for the consideration of the court. It appears that the testator, McClenaghan, was an agent appointed by the creditors of Dillon and Dillon & Russ, who had made an assignment for the benefit of creditors.

E. T. Stackhouse and one McCormick were appointed assignees under the assignment. Certain funds came into the hands of McClenaghan, as the agent, and E. T. Stackhouse, as assignee and the owner of all the claims of the creditors of Dillon and Dillon & Russ, by purchase and compromise, except those of Robinson & Caldwell, presents this claim for the amount now claimed to be in the hands of the executrix. The plea of the statute of limitations was interposed as a bar to the recovery, and this has been sustained by the referee. It is contended by the creditors presenting the claims, that McClenaghan, as agent, was a trustee, and that his trusts were continuing, technical trusts, only cognizable in equity, and the statute is not applicable. This is the main question in the case.

Was McClenaghan, as agent, a trustee? He was appointed under the provisions of the act of 1828. The first section of the act provides that creditors may name and appoint an agent or agents to act in their behalf, jointly with the assignee or assignees appointed by the assignor. In the second section, the assignees are required to call the creditors together and have the agent or agents appointed by them, and in the meantime are inhibited from making any sales or transfers of the assigned property; and in case of their refusal or neglect to do so within the time prescribed, the agent or agents are authorized, under the order of the court, to take possession of and sell the assigned property. The third section gives equal power and authority to the agent or agents with the assignees, to sell and dispose of the

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*property assigned, and to distribute and pay the proceeds according to the intent and provisions of the deed of assignment. The remaining sections prescribe the duties of the assignees and agents. What is the purpose of the appointment of the agents under the act? This question is answered in the case of Miller v. Sligh, 10 Rich. Eq. 251, by the Chancellor delivering the opinion of the court.

There is no controversy as to whether an assignee is a trustee, and his trusts of such a continuing technical character as is alone cognizable in equity, and not subject to the operation of the statute of limitations. This fiduciary character is impressed upon him by the law in analogy to that relation created by the third section of the act of 1759, declaring that the persons to whom assignments are made by an insolvent debtor shall be trustees for all and singular the creditors. Cannot the same fiduciary relation be created by analogy in the case of the agents appointed by the creditors under the act of 1828? The act of 1759 relates to assignments made by insolvent debtors, while that of 1828 refers to those made by unfortunate debtors not in custody. These acts constitute parts of a system of legislation adopted for the relief of debtors. They should be construed in pari materia, as authorized by writers in laying down rules for construction, if the acts are to be considered together. Why, then, by the same analogy, should not the agents by law be held and declared to be trustees equally with the assignees?

In the case of Miller v. Sligh, before cited, the court says that the "general tenor of the statute is to create a joint authority of agents and assignees over the subjects of their trusts." The inference plainly deducible from the decision in this case is, that the agents were regarded as trustees as well as the assignees, and all would have been held liable alike, if joint dereliction of duty had been established. The act of 1828 provides that the agents shall have all the powers of the assignees in certain contingencies. If they are thus invested by law, they certainly partake of the fiduciary character of a trustee, because the assignee is declared to be such. The mere assumption of their powers cannot make them trustees; and it would seem that it was intended by the act that they should become trustees eo instanti on

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their appoint*ment by the creditors. So that they would be trustees when authorized by the court to act as assignees.

The whole duty of the assignees is to collect the debts due, sell the assigned property, distribute and pay it out, make reports, and pay over any residue to the debtor. In all these acts the agents are required and permitted to participate. They are authorized to receive moneys, hold them as the custodians of the creditors, and to exercise equal power with the assignees. There is no reason, then, why the agents as well as the assignees should not be declared and held to be trustees. It frequently happens that the agents are the active managers of an assigned estate. To make them trustees for the creditors is equally as important and necessary as to constitute the assignees such. The purpose of the act in providing for the appointment of the agents was to give the creditors a voice in the management of the assigned property. The debtor appoints the assignees, and the creditors the agents, and they act jointly and have equal powers; and I can conceive of no valid reason why the one should be declared trustees and the other not.

But the referee bases his judgment on this question on the decision in the case of Salas v. Cay, Mortimer & Co., 12 Rich. L. 558. The doctrine it announces is that "where there is an assignment for the benefit of creditors, the assignee should sue alone for the recovery of the assets; the agent should not be joined with him in the action." The reason of this rule is briefly stated in the case to be that "the assignment conveys the assignor's interest to the assignee. The appointment of the agent is subsequent; he is merely appointed as a sort of custodian for the creditors." But notwithstanding the legal title to the property is in the assignees, yet the statute confers a power upon the agents, and is full of provisions directing them to act jointly with the assignees in selling the property and distributing the proceeds; and actually provides, in certain contingencies, that the agents shall act as assignees, and translates title to them. Everything else can be done by the agents, except to bring action; and the subsequent appointment of them necessarily is the reason of this. I do not regard the want of power in the agents to join with the assignees in bringing actions

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as conclu*sive of the question whether they are trustees or not. The referee says the right to receive on the part of the agent depends upon the right to sue. The statute confers the right to receive after the action is brought by the assignees. Without this authority, the position of the referee might be maintainable.

The referee further says that it is as to the sale and disposition of the property assigned that the agents are empowered to act with the assignees. In the case of Miller v. Sligh, the court says the statute empowers the agents not only to sell the property, but to act jointly with the assignees in distributing its proceeds. It would seem also that they could act jointly in distributing the proceeds arising from an action brought by the assignees. It is further ruled by the referee that the assignees and agents are required to make deposits in a certain bank. The statute directs that it can only be drawn out by them jointly; thus giving to the agents authority equal with that of the assignees over all funds collected, no matter from what source or in what way. It is also stated by the referee that the choses in action belonging to the assigned estate were lodged with McClenaghan as attorney, except those turned over by the retiring assignee, McCormick. It appears that such was the case; but after suits brought and judgments obtained, he realized the money and took possession of it

as agent, as indicated by his report made to the creditors in 1860. He exercised the power here of collecting moneys in judgments obtained in the name of the assignee; and these are now the subject of controversy. The referee holds, under all the circumstances, that the testator does not occupy the position of one in whom was vested a technical continual trust, only enjoyable in equity, and that Stackhouse had the right, at any time, to bring action against him; especially after 1862, when all the rights of the creditors of the assigned estate vested in him by virtue of assignments made. There is a controversy as to whether Stackhouse is the assignee of all the claims. It appears that he is not of those of Robinson & Caldwell. The referee, however, concludes that these claims are paid by operation of law, or in some way, by reason of their being preferred, and money sufficient for their payment being in the hands of the assignee. Suppose Stackhouse were the

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assignee *of all the claims of creditors, he stands in their shoes, and sustains the double character of assignee under the deed and creditor. As the trustee, he has the right to recover from the agent, if there are funds of the assigned estate in his hands. This is the character in which he presents his claim.

I feel constrained, though with hesitation, to differ in judgment with the referee, and conclude, as matter of law, that J. C. McClenaghan, the testator, was a trustee, and that his trusts were technical continuing trusts, such as are cognizable only in equity, and not barred in four years by the statute of limitations. If it was a technical trust as to the claims between these parties and McClenaghan, it was not within the statute of limitations. But "if the trustee does an act which imports to be a termination of the trust; if he has a settlement which is intended to be in full; if he settles as to part, and claims the residue in his own right; if he denies the trust in the presence of the cestui que trust, these acts, or any of them, will so far disturb and dissolve the strictly fiduciary relation between the trustee and the cestui que trust, as that the statute of limitations will commence to run from the date of such acts. This doctrine is fully supported by authority." Long v. Cason, 4 Rich. Eq. 63, Colburn v. Holland, 14 Rich. Eq. 213.

Was any act done by McClenaghan in his lifetime which imported to be a termination of the trust? The testimony does not disclose any such. He had no settlement which was declared or intended to be in full. He never openly denied his trust character or openly asserted an adverse holding. In 1860, when he made his report, acknowledging the possession of trust funds, he admitted the rights of the cestui que trust. From the testimony, I can discover no act or declaration on his part, while living, that indicated a purpose, on his part, to discharge or throw off his trust, so as to free him from accountability under it for the money in his hands. So long as he lived, the relation of trustee and cestui que trust existed, and the trust was not within the statute of limitations.

Was the trust executed at any time during the life of the trustee? In 1860 the assignee and agents were required by the creditors to submit a report showing the funds in hand

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belonging *to the assigned estate. A distribution of them among the creditors was contemplated. This was prevented by a threatened suit from some of the creditors who had not accepted under the assignment. This state of things caused the creditors to direct the assignee and agents to loan out the funds pending the litigation. No settlement was then made, and none ever has been since. The creditors are still unpaid, and there has been no final accounting under the deed of assignment. The trust was not executed by the agent in turning over the fund to the assignee, or by its payment to creditors entitled to receive it. The trusts under the deed are not yet executed. So that, in this view of the case, the statute has not yet had any currency as against the assignee or the agents. But the referee says that E. T. Stackhouse purchased all the claims against the assigned estate, and from that period, which is fixed as 1862, the statute commenced to run, because Stackhouse had the right to maintain action against the agent. As a fact, Stackhouse did not buy all the claims. Those of Caldwell & Robinson were not assigned to him. Let it be assumed that he did. Thus he became the creditor or assignee of all these claims, and was substituted in the stead of the original cestui que trust, and enjoyed all the rights they did as against the agents. He sustained the double character of assignee and cestui que trust so far as the agents were concerned. If the original cestui que trust could not be barred by the statute of limitations, clearly Stackhouse, standing in their shoes, could not be, after his purchase in 1862. These purchases by Stackhouse did not end the trust. The agent did not turn over the funds in his hands so as to end his trust. He still held them, and so far as Stackhouse and the other creditors were concerned, he continued to occupy the position of a trustee. The death of McClenaghan, in 1863, could not terminate the trust. The fund in his hands passed into the possession of his executrix, who was his sole legatee and devisee likewise.

From books and papers of her testator, she must have been cognizant of the existence of the trust. In 1869 she had express notice of it when the claim for the fund was formally preferred. The will provides for the payment of all the debts of the testator, and this claim for trust funds, was to be also dis-

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charged. The *trust then continued to exist

after his death, and his executrix was accountable for the funds equally with the testator as trustee. [Parks v. Noble] 9 Rich. Eq. 85.

As the testator, J. C. McClenaghan, by virtue of his agency under the deed of assignment, was a trustee, and his technical trusts have never been ended by any act of his, by an execution of them, or in any other way, I conclude that the claims of E. T. Stackhouse, as creditor, have not been barred by the statute of limitations. Nor have the claims of Robinson & Caldwell. I concur in judgment with the referee, that the note of fifty dollars is nothing more than a simple money demand; but is it barred by the statute?

But let it be assumed that McClenaghan was not a trustee, whose trust was technical and continuing as agent for the creditors, are not these creditors still entitled to a recovery of their claims? He held the funds as agent, as evidenced by his own admission. The claims were collected, the proceeds reported or had by him as agent, and the relation of attorney and client after this act no longer existed. If he held the funds as agent for the creditors, there was an implied trust created by operation of law, and the statute would not begin to run until after demand. This doctrine is announced in the case of Lever v. Lever, 1 Hill Eq. 67. In such cases there is no live act until a failure to pay on demand, and hence until then the statute has no currency. In the case of Salus v. Cay, Mortimer & Co., the court held that the agents are the custodians for the creditors. If so, McClenaghan was a bailee holding funds for others, and until demand made no cause of action occurred and the statute did not run. There was no demand made upon him in his lifetime. But the referee holds that the rule depends upon the continuance of the relation, and necessarily ceases when such relation is dissolved; the relation of principal and agent and attorney and client is dissolved by the death of one of the parties, because the confidence reposed is personal and the substratum of the relation is gone. The rule might be different as to the bailor and bailee, under some circumstances. Where the relation of principal and agent is dissolved by the death of either party, the trust may continue and be capable of execution by the represen-

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tatives of the deceased *party. Authority may be confirmed by will or otherwise for this purpose. The executrix of McClenaghan is directed by the will to pay all his debts. This fund went into her possession with other property with her knowledge. With the authority conferred under the will she continued to hold it as trust funds, and to act in the stead of the testator in the further execution of the trust. It would seem, then, that demand upon her was necessary to give currency to the statute of limitations. None was ever made upon her until 1863. From that period the four years necessary have not elapsed so as to furnish a bar to the recovery of the funds. But suppose the relation, whatever it was, subsisting between McClenaghan and the creditors, was dissolved by his death, even then the statutory period has not elapsed. The agent died in 1863. At that time the statute of limitations in this state was suspended, and continued to be until December 21st, 1866. The complaint in this case was filed on May 6th, 1871. The executrix was protected from suit for nine months after December 21st, 1866. From the period at which the statute commenced to run in 1867 to the time of filing the complaint, was not four years, and therefore the creditors are not barred by the statute of limitations. The referee says the stay law has been declared unconstitutional as to debts existing antecedently to its enactment, and there was no suspension of the statute as to the claims of these creditors. It might be a question whether the debt in this case did not arise, or at least the cause of action accrue, after the first act in 1861. But the discussion of this question is unnecessary. In this state the suspension of the statute is not considered an impairment of a contract. And in regard to these claims it can be held that the statute was suspended.

Objection was urged against the form in which the claims of Stackhouse were presented. Two accounts have been filed—one against McClenaghan & Fairlee; and the other against J. C. McClenaghan as agent. These are not proof of the facts of the case. It appears that McClenaghan, by his own admission, held the funds as agent, either as an express trustee or implied as bailor, and not as an attorney. These claims, therefore, are presented against him as agent, and it is for

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the court to determine *in any view of the case, whether his estate is now liable for the funds received by him. If the estate is liable to account for the funds so received by him, there can be no doubt of the right of E. T. Stackhouse to recover. He occupies the position of a creditor by reason of the assignments made to him. As he compromised the claims, he is entitled to be reimbursed out of the funds to the extent of what he actually paid and interest. Farrar v. Farley, 3 S. C. 11. If he recovers more money from the estate than he is entitled to receive, his trusts have not yet been executed, and he can be called to an account under the deed of assignment by any other creditors or the debtor. His trust still continues. He is now the proper custodian of this fund, if it is recoverable from the estate of McClenaghan. The executrix has no right to hold it, or to question the right of Stackhouse, as assignee and creditor to receive it.

The claims of Robinson & Caldwell have not been extinguished in the way indicated by the referee in his report. They are en-

titled to recover out of the estate of J. C. McClenaghan the amount of principal and interest due them. E. T. Stackhouse will be entitled to judgment for the balance found to be in the hands of the executrix or of the court, after the payment of the claims of Robinson & Caldwell, exclusive of the $50 note, which is not barred by the statute of limitations.

The view the court takes of the character that McClenaghan and his executrix sustained as express trustees, justifies the conclusion that interest on the fund is recoverable. As there seems to be some doubt about the true amount of trust funds held by John C. McClenaghan, it is deemed advisable to refer this question again to the referee to ascertain what it is, including interest. When this is done and commissions are allowed, the claims of Robinson & Caldwell will first be deducted from this amount, and E. T. Stackhouse will be entitled to a judgment for the residue.

It is adjudged and ordered, That the exceptions to the referee's report, in so far as they have been considered in this decree, be sustained, and that E. T. Stackhouse and Robinson & Caldwell are entitled to judgment against the executrix of J. C. McClena-

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*ghan, deceased, for the amounts respectively, to be ascertained in the manner herein indicated.

It is further ordered, That the special referee do hear further testimony with a view of ascertaining the true amount of the trust fund, including interest now in the possession and custody of the executrix of John C. McClenaghan, deceased; and that he allow judgments in favor of E. T. Stackhouse and Robinson & Caldwell against her for the amounts to which they are respectively entitled, according to the directions heretofore given.

It is further adjudged and ordered, That the plea of the statute of limitations, as to the $50 note held by E. T. Stackhouse, be sustained.

The plaintiffs appealed upon the following grounds, assigned as errors:

1. In that the judge held that John C. McClenaghan, as agent of the creditors of J. W. Dillon and of Dillon & Russ, was a trustee, and that his trusts were technical continuing trusts, such as were only cognizable in a Court of Equity and not subject to the bar of the statute of limitations.

2. In that the judge held that E. T. Stackhouse, one of the assignees of J. W. Dillon and of Dillon & Russ, by the purchase of the claims of creditors of said assignor, "stood in the shoes of the creditors," and was protected from the operation of the statute of limitations to the same extent they would be had they not sold their claims.

3. In that the judge held that the claims of Caldwell & Robinson were subsisting claims, though the evidence showed that E. T. Stackhouse, in April, 1860, had in hand an amount of money, which was, by the terms of assignment, applicable to their payment, and which was more than sufficient for that purpose, and though Caldwell & Robinson did not prove their claims before the referee.

4. In that the judge held that the claims of Caldwell & Robinson were still subsisting claims, when the evidence showed that one of them had been paid by the notes of J. W. and E. R. Bethea, and the balance of the same had been paid by J. W. Dillon on the —— day of ———, A. D. 1868; and that the other claim had been partly paid by E. T. Stack-

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house, and that *he had relieved D. W. Bethea, one of the joint makers, from all liability for the balance due on same.

5. In that the judge held that there was any amount due by J. C. McClenaghan, or his estate, to the assigned estate of J. W. Dillon and of Dillon & Russ, there having been no settlement or accounting between the assignee and the agents of creditors, as it is submitted should have been done, before the claims could be properly proved in this cause.

6. In that the judge held that the claims now set up by E. T. Stackhouse, against the estate of John C. McClenaghan, for money received by him as agent of creditors, could be sustained, though in November, 1871, he proved the same claims against McClenaghan & Fairlee, as attorneys-at-law.

7. In that the judge held that the estate of J. C. McClenaghan is liable for interest before demand made for payment of principal.

8. In that the judge held that the death of J. C. McClenaghan, in March, 1863, did not give currency to the statute of limitations, supposing him to have been either a trustee and not entitled to its protection, or an agent and not entitled to its protection till after demand made.

9. In that the court held that if the statute of limitations ran, that E. T. Stackhouse, assignee, and the creditors, had four years and nine months after the 21st of December, 1866, within which to bring their suits.

10. In that the judge reversed the report of the special referee, which, it is respectfully submitted, was error.

Messrs. Johnson & Johnson, attorneys for appellant.

Mr. J. G. Blue, attorney for respondent.

September 24th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The principal question is whether the demands against the estate of McClenaghan, made by E. T. Stackhouse, are barred by the statute of limitations.

The facts out of which the question arises are that Stackhouse and McCormick were the

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assignees of Dillon, an insolvent *debtor, and

McClenaghan and Sellers were appointed agents under the act regulating assignments of debtors (6 Stat. 365), and a committee in behalf of creditors was also appointed. McClenaghan was an attorney-at-law, and certain choses in action were placed in his hands for collection by the assignees, which do not appear to have been accounted for. The demands of all the creditors interested under the assignment, except those of Caldwell and Robinson, who were preferred, have been purchased, and are now held by Stackhouse. McClenaghan is dead, and his executrix is now called upon to account for so much of the assigned estate as came into the hands of her testator, as already stated. The statute of limitations is interposed as a defence to this demand.

It is contended, on the one hand, that McClenaghan was a trustee of an express trust, as it regarded all the assets of the assigned estate that came into his hands while acting as agent for the creditors, and that his executrix being charged with the execution of such trust to the extent of accounting for all such assets, she cannot take advantage of the bar of the statute; on the other hand, it is contended that the only demand against the estate of McClenaghan, existing under the circumstances already briefly stated, arises upon a simple contract obligation incident to the relation of attorney and client, existing between the assignees and McClenaghan as it regards the choses in action placed in his hands for collection, and, as such, is barred by lapse of four years after maturity.

It cannot be doubted that McClenaghan, as agent, was a trustee of a power under the deed of assignment to be exercised for the benefit of creditors. The statute must be regarded as a part of the assignment made under it, and all the powers and responsibilities conferred and imposed by the statute upon the agents appointed by creditors have the same efficacy as if expressly created by the deed of assignment. Assuming the view taken in Salas v. Cay, 12 Rich. 559, and Miller v. Sligh, 10 Rich. Eq. 247, to be conclusive, and it is clear that McClenaghan, by accepting the appointment of agent, became bound to an active participation in the disposition of the assigned estate. He was bound to inform himself of the condition of the assets

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and of the *indebtedness of the estate, and to protect and apply the assets. If it be conceded that the legal title to the assigned estate remained exclusively in the assignees, yet it is clear that the legal powers of the agents and the assignees are equal as it regarded the control of the assigned estate. This ample power of control over this disposition of the estate was placed in the hands of McClenaghan as a trust for the benefit of creditors, and equity regards the depositaries of such powers, whether coupled with the legal title or without it, as chargeable with responsibilities of the same nature, and of a strictly fiduciary character.

It remains, then, to consider, in the next place, what position an agent, under the act, occupies as it regards creditors, where, for any reasons, assets of the assigned estate, subject to distribution, come into his hands.

There can be no doubt that in such a case the agent is chargeable, in equity, as a trustee, with liability to account for such assets. If, as must be concluded, he is liable to account in the character of a trustee for the mode in which his powers as agent are exercised, it would follow that such an accounting would draw after it responsibility in the character of trustee for the assets in his hands. It matters not, under this view, from what source or by what authority the agent came into possession, for the nature of his powers and responsibilities are such that he could not acquire possession of such property by any means that would give less or different responsibilities than those imposed by the nature of his office. It is, therefore, unimportant to notice the circumstances under which McClenaghan became possessed of such estate, or by whom or for what immediate purpose they were placed in his hands, so far as it concerns the nature of his liability to creditors.

From the foregoing it must be concluded that McClenaghan was liable to the creditors, under the deed of assignment, to account, in equity, for the choses and their product in his hands at the time the demands of all those creditors, except Caldwell and Robinson, were assigned to Stackhouse. The right of Stackhouse to stand in the place of creditors, whose claims he purchased, is not questioned by any party entitled to question it, and must be deemed perfect.

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*The representative of McClenaghan has no interest to contest it. Such being the case, no reason exists why Stackhouse should not have acquired all the right, legal and equitable, of his assignors, and, among others, the right to pursue the assets in the hands of McClenaghan as a trust. The fact that, as assignee, he had a more restricted right of procedure against McClenaghan, did not prevent his acquiring a more full remedy by succeeding to the rights of the creditors. Nor did the fact that Stackhouse united in himself the characters of assignee and of cestui que trust, having a beneficial interest as to part of the entire beneficial interest, have the effect to terminate the trust.

The claims of Caldwell and Robinson were entitled to participate in the execution of the trust, and the trust could not be considered as fully executed until those claims had been satisfied.

It must, therefore, be concluded that the trust is subsisting, and that Stackhouse, through it, is entitled to pursue the assets in question. This disposes of the question of

the statute of limitations as affecting the claims for the assets that came into the hands of McClenaghan while acting as agent, and not fully accounted for. The conclusion of the Circuit Court, sustaining the statute of limitations as against the note of E. T. Stackhouse, falling due January 1st, 1859, is free from error.

The third and fourth grounds of exception to the decree are immaterial. The question of the liability of the estate of McClenaghan is the only one in which the plaintiffs are concerned. As to the disposition of those assets, under the assignment, the executrix of McClenaghan has no concern. The powers of the agency of McClenaghan ceased at his death, and the executrix has no further duty than to account for what was due from McClenaghan.

The fifth ground of exception is disposed of by what has already been said. Nor is the fact alleged in the sixth exception at all material. Had it appeared that the amount now claimed had been satisfied out of the estate of McClenaghan & Fairlee, that fact might be available, but it does not appear in the case.

It does not appear that the interest account of McClenaghan has yet been stated, nor, in-

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deed, that the accounting is complete *as to the principal sum due, for a further hearing is ordered by the decree upon additional testimony.

As the decree does not fix the principles upon which the computation of interest should be made, it must be premature to consider that question at the present time.

The decree should be affirmed and the appeal dismissed.

Appeal dismissed.

McIVER, A. J., concurred; HASKELL, A. J., dissented.

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(Case No. 760.)

G. M. WALKER, Cashier, v. THE STATE of SOUTH CAROLINA. F. J. PELZER v. THE SAME. EDWARD SEBRING v. THE SAME. THE BANK OF CHARLESTON N. B. A. v. THE SAME. THE W. L. I. CHARITABLE ASSOCIATION v. THE SAME. F. J. HERRON v. THE SAME.

[BOND DEBT CASES.]

(April Term, 1879.)

[1. *States* ⇐184.]

The Court of Claims constituted under Joint Resolution No. 99, of March 22d, 1878, was not limited to an investigation of the inquiry whether the bonds surrendered in exchange for consolidation bonds were issued in accordance with the provisions of the statutes authorizing their issue, but it was empowered and directed to inquire into the validity of certain specified bonds and stocks issued under the authority of the consolidation act, and whether they were obligations binding upon the state.

[Ed. Note.—For other cases, see States, Cent. Dig. § 172; Dec. Dig. ⇐184.]

[2. *Constitutional Law* ⇐½, New, vol. 4 Key-No. Series.]

The constitution of 1868 has been, since its adoption, the fundamental law of this state, and the acts of assembly passed in pursuance thereof, have as full force and validity as any laws upon the statute book.

[3. *States* ⇐168.]

The legal principles applicable to an action upon negotiable bonds apply, in like manner, to actions upon the coupons of such bonds.

[Ed. Note.—For other cases, see States, Cent. Dig. § 160; Dec. Dig. ⇐168.]

[4. *Bonds* ⇐118.]

Coupon bonds are, to all intents, negotiable securities.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 138; Dec. Dig. ⇐118.]

[5. *States* ⇐162.]

States issuing negotiable securities incur the same responsibilities which attach to individuals and corporations in like case.

[Ed. Note.—Cited in Ehrlich v. Jennings, 78 S. C. 272, 58 S. E. 922, 125 Am. St. Rep. 795; State ex rel. Ray v. Blease, 95 S. C. 418, 79 S. E. 247.

For other cases, see States, Cent. Dig. § 153; Dec. Dig. ⇐162.]

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[6. *States* ⇐168.]

*The holder of state bonds and coupons is presumed, in the absence of proof to the contrary, to have taken them under-due for a valuable consideration, and without notice of any objection to which they were liable.

[Ed. Note.—Cited in Hand v. Savannah & C. R. Co., 17 S. C. 256; State ex rel. Ray v. Blease, 95 S. C. 418, 79 S. E. 247.

For other cases, see States, Cent. Dig. § 160; Dec. Dig. ⇐168.]

[7. *Bonds* ⇐130.]

Bonds issued by a state through its duly authorized officers under the authority of its laws, professing upon their face that the conditions imposed by the statute authorizing their issue have been complied with, are valid obligations of the state in the hands of bona fide purchasers, although such conditions were not complied with, or although in their issue gross frauds were perpetrated by the agents of the state. Cases considered.

[Ed. Note.—Cited in Jones v. City of Camden, 44 S. C. 323, 23 S. E. 141, 51 Am. St. Rep. 819; Ehrlich v. Jennings, 78 S. C. 272, 58 S. E. 922, 125 Am. St. Rep. 795; State ex rel. Ray v. Blease, 95 S. C. 418, 79 S. E. 247.

For other cases, see Bonds, Cent. Dig. § 222; Dec. Dig. ⇐130.]

[8. *States* ⇐157.]

To be a valid obligation of the state the bond must be issued under the authority of a statute which is free from constitutional objections.

[Ed. Note.—For other cases, see States, Cent. Dig. § 148; Dec. Dig. ⇐157.]

[9. *Statutes* ⇐21.]

No debt could be created by the consolidation act (15 Stat. 518), as it was not passed by two-thirds of both branches of the general assembly, nor submitted to a vote of the people.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 22; Dec. Dig. ⇐21.]

[10. *States* ⟸149.]

Under an act entitled "An act to authorize a state loan to pay interest on the public debt," approved August 26th, 1868, the governor was authorized to borrow, on the credit of the state, on coupon bonds, within twelve months from its passage, "a sum not exceeding one million dollars, or so much thereof as he may deem necessary to pay interest on the public debt." *Held*, that the governor was not restricted by the act to the issue of $1,000,000 in bonds, but to the issue of such an amount of bonds as would realize $1,000,000 in money.

[Ed. Note.—For other cases, see States, Dec. Dig. ⟸149.]

[11. *States* ⟸148.]

Held further, that after there had been one issue of bonds under this act of the legislature, there was no authority for another and subsequent issue under the same act.

[Ed. Note.—For other cases, see States, Cent. Dig. § 143; Dec. Dig. ⟸148.]

[12. *States* ⟸113.]

Under an act of the general assembly, approved August 26th, 1868, (14 Stat. 17), the governor was authorized to borrow, on the credit of the state, on coupon bonds, within twelve months from its passage, a sum not exceeding $500,000, or as much thereof as he may deem necessary, to redeem the bills receivable of the State of South Carolina; and it was provided "that an annual tax in addition to all other taxes shall be levied upon the property of the state, sufficient to pay the interest on the loan hereinbefore authorized." *Held*, that the debt thereby created was for an extraordinary expenditure of the state government within the meaning of the constitution.

[Ed. Note.—For other cases, see States, Cent. Dig. § 112; Dec. Dig. ⟸113.]

[13. *States* ⟸113.]

In Section 7, Article IX., of the constitution —"for the purpose of defraying extraordinary expenditures, the state may contract public debts"—the word "extraordinary" is used in contra-distinction to the word "ordinary," or annual expenses of the state government, which includes current interest on the public debt. Per McIver, A. J. Willard, C. J., concurring, holds further, that annual expenses, may under certain exigencies, assume the character of extraordinary expenditures. Haskell, A. J., holds, that "extraordinary" means everything that is not "ordinary," as defined in the constitution.

[Ed. Note.—Cited in Robertson v. Tillman, 39 S. C. 306, 17 S. E. 678.

For other cases, see States, Cent. Dig. § 112; Dec. Dig. ⟸113.]

[14. *States* ⟸113.]

The state was authorized in 1868, under the

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new constitution, to borrow *money on coupon bonds to pay past-due interest and floating indebtedness existing at that time.

[Ed. Note.—For other cases, see States, Cent. Dig. § 112; Dec. Dig. ⟸113.]

[15. *States* ⟸152.]

This act providing for a loan to redeem bills receivable complied with the requirement of Section 7, Article IX., of the constitution, that "every such law shall levy a tax annually, sufficient to pay the annual interest of such debt," there being then upon the statute book a general act regulating an annual assessment and collection of taxes. Morton, Bliss & Co. v. Comptroller-General, 4 S. C. 430.

[Ed. Note.—For other cases, see States, Dec. Dig. ⟸152.]

[16. *Constitutional Law* ⟸116.]

A contract valid under the laws of the state as expounded at the date of the contract, cannot be affected by any subsequent decision of the courts altering the construction of such laws.

[Ed. Note.—Cited in Herndon v. Moore, 18 S. C. 355; McLure v. Melton, 24 S. C. 567, 58 Am. Rep. 272.

For other cases, see Constitutional Law, Cent. Dig. § 278; Dec. Dig. ⟸116.]

[17. *Courts* ⟸90.]

A decision of this court upon a constitutional question not only affects the case before the court, but stands as an authoritative construction of the clause of the constitution thereby interpreted, and is conclusive upon other cases involving the same question.

[Ed. Note.—Cited in Whaley v. Gaillard, 21 S. C. 561.

For other cases, see Courts, Cent. Dig. §§ 313–321, 351; Dec. Dig. ⟸90.]

[18. *States* ⟸145.]

Bonds of the state issued in payment of outstanding bills receivable for which the state had received value, are valid and binding obligations, even though such bills should be considered bills of credit. The constitution of the United States does not prohibit a state from paying bills of credit.

[Ed. Note.—For other cases, see States, Cent. Dig. § 141; Dec. Dig. ⟸145.]

[19. *Statutes* ⟸21.]

The provision in Section 7, Article IX., of the state constitution, that no law creating a public debt "shall take effect until it shall have been passed by the vote of two-thirds of the members of the general assembly," &c., means two-thirds of the members present, a quorum voting. Morton, Bliss & Co. v. Comptroller-General, 4 S. C. 430; County of Cass v. Johnston, 95 U. S. 360 [24 L. Ed. 416].

[Ed. Note.—Cited in ex rel. McWhirter v. Town of Newberry, 47 S. C. 428, 25 S. E. 216; Smith v. Jennings, 67 S. C. 328, 45 S. E. 821.

For other cases, see Statutes, Cent. Dig. § 22; Dec. Dig. ⟸21.]

[20. *States* ⟸117.]

Bills of the Bank of the State of South Carolina—a corporation created by the state, and of which it was the only stockholder—issued under the express authority of the state for its sole benefit, and to the payment of which the faith of the state was pledged, are "evidences of indebtedness" within the meaning of the provision in Section 10, Article IX., of the constitution, that "no scrip * * * shall be issued except for the redemption of stock, bonds, or other evidences of indebtedness previously issued." And bonds issued in exchange for such bank bills do not create a new debt.

[Ed. Note.—For other cases, see States, Cent. Dig. § 116; Dec. Dig. ⟸117.]

[21. *States* ⟸113.]

"An act to authorize a loan for the relief of the treasury," approved February 17th, 1869, which provides that money not exceeding a specified sum may be borrowed "for the relief of the treasury of the state," violates the constitutional limitation, Section 7, Article IX., that "for the purpose of defraying extraordinary expenditures, the state may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein." (1.) In that it purports to create a debt which was not for the purpose of defraying extraordinary expenditures; and (2.) In that the debt is not authorized for some single object distinctly specified therein. And bonds resting upon the authority of that act, and all

consolidation bonds issued in exchange for such bonds, are not valid debts of the state. Haskell, A. J., dissenting.

[Ed. Note.—Cited in Herndon v. Moore, 18 S. C. 344.

For other cases, see States, Cent. Dig. § 112; Dec. Dig. ⟸113.]

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[22. *Statutes* ⟸125.]

*An act entitled "An act to provide for the appointment of a land commissioner and to define his powers and duties," and which provides for the appointment of a land commissioner, defines his duties and authorizes the issue of bonds for the purpose of raising money with which to purchase lands, to be re-sold again on credit to citizens, is in compliance with Section 20, Article II., of the constitution, which requires that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." Morton, Bliss & Co. v. Comptroller-General, 4 S. C. 430; San Antonio v. Mehaffy, 96 U. S. 312 [24 L. Ed. 816].

[Ed. Note.—Cited in State v. Town Council of Chester, 39 S. C. 317, 17 S. E. 752.

For other cases, see Statutes, Cent. Dig. § 189; Dec. Dig. ⟸125.]

[23. *Statutes* ⟸39.]

The constitution providing in Section 7, Article IX., that no law creating a public debt "shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the general assembly, to be recorded by yeas and nays on the journals of each house respectively," no such law would be valid unless a record of a two-thirds vote by yeas and nays affirmatively appeared upon the journals of both houses.

[Ed. Note.—Cited in State ex rel. Lindsey v. Tollison, 100 S. C. 173, 84 S. E. 821.

For other cases, see Statutes, Cent. Dig. § 42; Dec. Dig. ⟸39.]

[24. *Statutes* ⟸21.]

But where it appears upon the journals of the house of representatives that the bill did not receive such vote on its third reading in that body, but did upon its final passage by the house after its return from the senate with amendments, the house journal shows a substantial compliance with the constitutional requirement.

[Ed. Note.—Cited in State ex rel. Lindsey v. Tollison, 100 S. C. 176, 84 S. E. 822.

For other cases, see Statutes, Cent. Dig. § 22; Dec. Dig. ⟸21.]

[25. *States* ⟸157.]

An act permitting the exchange or conversion of outstanding bonds and stocks into new bonds, authorizes no new debt, and such conversion bonds issued not in exchange for outstanding obligations, were issued without authority of law, and are void even in the hands of a bona fide holder.

[Ed. Note.—Cited in Whaley v. Gaillard, 21 S. C. 562, 572, 580.

For other cases, see States, Cent. Dig. § 148; Dec. Dig. ⟸157.]

[26. *States* ⟸153.]

Whether a state debt shall be contracted by sale of its bonds, or by their deposit as collateral security for its loan, are not prescribed in the constitution, and are therefore left to the discretion of the legislature.

[Ed. Note.—For other cases, see States, Cent. Dig. § 145; Dec. Dig. ⟸153.]

[27. *States* ⟸151.]

The registration of bonds required by the constitution, Section 14, Article IX., to be kept by the state treasurer, is not a condition precedent to their issue, but a direction of duty upon the state treasurer.

[Ed. Note.—For other cases, see States, Cent. Dig. § 144; Dec. Dig. ⟸151.]

[28. *States* ⟸168.]

The state having issued new or consolidation bonds in exchange for outstanding bonds and stocks, at the rate of fifty cents on the dollar, the burden of proof is upon the state in every case to show that the consolidation bonds in question rest upon invalid vouchers.

[Ed. Note.—For other cases, see States, Cent. Dig. § 160; Dec. Dig. ⟸168.]

[29. *States* ⟸147.]

The consolidation act, which authorized the issue of new bonds, at the rate of fifty cents on the dollar, for outstanding bonds and stocks specified by class and amounts, to such persons as would accept the exchange, did not purport to impart validity to securities invalid under the constitution, nor was it a composition by the state with its creditors. Per Willard, C. J.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 142, 156; Dec. Dig. ⟸147.]

[30. *Constitutional Law* ⟸52.]

[The fact that an act of the legislature, providing for the payment of certain bonds, assumes that they are valid obligations, does not preclude the courts from inquiring into their validity.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 72; Dec. Dig. ⟸52.]

[31. *States* ⟸157.]

[Bonds issued under the act of 1873, entitled "To reduce the volume of the public debt and provide for the same," are valid obligations of the state, except (1) such as were issued in exchange for bonds issued under the act "to authorize a loan for the relief of the treasury," or for the coupons of such bonds; (2) those issued in exchange for the second issue of bonds under an act "to authorize a state loan to pay interest on public debt," or their coupons; (3) bonds that were issued in exchange for conversion bonds, which were issued in exchange for either of the two classes of bonds last mentioned.]

[Ed. Note.—For other cases, see States, Cent. Dig. § 148; Dec. Dig. ⟸157.]

[32. *States* ⟸157.]

[Any consolidation bond resting only in part on prior invalid bonds or coupons is void only to the extent to which it does so rest, and is a valid obligation of the state as to the balance.]

[Ed. Note.—For other cases, see States, Cent. Dig. § 148; Dec. Dig. ⟸157.]

[33. *States* ⟸157.]

[Any consolidation bond resting wholly on any prior invalid bond or coupon is wholly void.]

[Ed. Note.—For other cases, see States, Cent. Dig. § 148; Dec. Dig. ⟸157.]

[34. *Bills and Notes* ⟸337.]

[Cited in Walker & Trenholm v. Kee, 14 S. C. 145; Citizens' Trust & Savings Bank v. Stackhouse, 91 S. C. 461, 74 S. E. 977, 40 L. R. A. (N. S.) 454, to the point that mere suspicion that title of negotiable instrument may be defective does not impair the title of the holder.]

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856–863; Dec. Dig. ⟸337.]

[35. *States* ⟸66.]

[Cited in Carolina Nat. Bank v. State, 60 S. E. 473, 474, 38 S. E. 629, 85 Am. St. Rep.

865, to the point that a public officer cannot bind the state except by statutory authority.]

[Ed. Note.—For other cases, see States, Cent. Dig. § 68; Dec. Dig. ⟸66.]

[This case is also cited in Robertson v. Tillman, 39 S. C. 299, 17 S. E. 678; and distinguished therefrom.]

Before Court of Claims, May, 1879.

In the constitution adopted for South Carolina in 1868, under the authority of the acts of congress generally called the reconstruction acts, the following provisions occur:

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*Article II., Section 14. * * * A majority of each house shall constitute a quorum to do business. * * *

Article II., Section 20. Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title.

Article II., Section 26. Each house shall keep a journal of its own proceedings, and cause the same to be published immediately after its adjournment, excepting such parts as, in its judgment, may require secrecy, &c.

Article IX., Section 3. The general assembly shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever it shall happen that such ordinary expenses of the state for any year shall exceed the income of the state for such year, the general assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year.

Section 4. No tax shall be levied except in pursuance of a law which shall distinctly state the object of the same; to which object such tax shall be applied.

Section 7. For the purpose of defraying extraordinary expenditures, the state may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the general assembly, to be recorded by yeas and nays on the journals of each house respectively; and every such law shall levy a tax annually, sufficient to pay the annual interest of such debt.

Section 10. No scrip, certificate, or other evidence of state indebtedness, shall be issued except for the redemption of stock, bonds, or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this constitution.

Section 14. Any debt contracted by the state shall be by loan on state bonds of amounts not less than fifty dollars each, on interest payable within twenty years after the final passage of the law authorizing such debt. A correct registry of all such bonds shall be kept by the treasurer in numerical

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order, so as *always to exhibit the number and amount unpaid, and to whom severally made payable.

No question is made, in any of these cases, as to the validity of any of the bonds or stocks of the state issued prior to 1868; their validity is conceded.

The first act authorizing a public debt passed by the government instituted under this new constitution of 1868, was approved August 26th, 1868, and is entitled "An act to authorize a loan to redeem the obligations known as the Bills Receivable of the State of South Carolina." 14 Stat. at L. 17. It authorized the governor to borrow, on the credit of the State of South Carolina, on coupon bonds, within twelve months from the passage of this act, a sum not exceeding $500,000, or as much thereof as he may deem necessary to redeem the bills receivable of the State of South Carolina; and that an annual tax, in addition to all other taxes, shall be levied upon the property of the state, sufficient to pay the interest on the loan hereinbefore authorized, at the times when such interest shall fall due. These bills receivable were issued under the authority of an act of the legislature of December 21st, 1865, and were receivable for all taxes due the state. This act was passed in both houses, by a two-thirds vote of the members present in each, a quorum voting, but not by a two-thirds vote of the entire number of members qualified.

On the same day was passed another act, (14 Stat. 18), entitled "An act to authorize a state loan to pay interest on the public debt." It authorized the governor to borrow on the credit of the state, &c., "a sum not exceeding $1,000,000, or as much thereof as he may deem necessary to pay interest on the public debt;" and it contained the same provision as to the annual tax as the act to redeem bills receivable.

The next act in date was ratified September 15th, 1868, and is entitled "An act to close the operations of the Bank of the State of South Carolina." It provided, among other things, for the issue of bonds in payment and redemption of bills of the bank of the state, but made no provision for an annual tax levy. The character of these bank bills is suffi-

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ciently stated in the *opinion of the court. They have been repeatedly recognized as debts binding upon this state.

Next follows "An act to authorize a loan for the relief of the treasury," approved February 17th, 1869. 14 Stat. 182. It authorized the governor to borrow, within twelve months from its passage, a sum not exceeding $1,000,000, or as much thereof as may be deemed necessary, for the relief of the treasury of the state." The loan was to be effected by a deposit of the bonds herein authorized, as collateral security for loans by the

financial agent of the state, in the city of New York, in accordance with the directions of the governor, attorney-general, comptroller-general and treasurer, or by the sale of said bonds at the highest market price, but not less than for a sum to be fixed by them. And an annual tax levy was provided in the same terms as in the act to redeem bills receivable.

The conversion act, entitled "An act to provide for the conversation of state securities," approved March 23d, 1869, (14 Stat. 241), simply authorized the issue of coupon bonds in exchange for outstanding state stock, and of state stock in exchange for outstanding coupon bonds. None of the special provisions required by the constitution in cases of the creation of a public debt, were complied with.

Next followed "An act to authorize the financial agent of the State of South Carolina, in the city of New York, to pledge state bonds as collateral security and for other purposes," approved March 26th, 1869. 14 Stat. 258. It authorized the financial agent of the state in New York, to pledge bonds of the state, then or hereafter in the possession of the state as collateral security for state loans; and the time within which the loans authorized under the act to redeem bills receivable, and under the act to pay interest on the public debt, might be negotiated, was extended twenty-four months from the passage of those acts.

"An act to provide for the appointment of a land commissioner, and to define his powers and duties," was approved March 27th, 1869. 14 Stat. 275. Section 5 provided: "The treasurer of the state is hereby authorized and directed to issue to the land commissioner bonds of this state in the sum of $200,000, with coupons attached, if, in the opinion of

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the said advisory board, so *much be necessary, bearing six per cent interest. * * * The faith and credit of the state is hereby pledged to the payment of the principal and interest of said bonds, and a sufficient amount of taxes is hereby levied to pay the interest accruing on said bonds annually." The manner in which the necessary record of yeas and nays on the passage of this bill by the house was made, is stated in the opinion of the court. A further issue of $500,000 in bonds was authorized under an amendatory act of March 1st, 1870, (14 Stat. 385), in the same terms as Section 5, above recited.

On December 18th, 1869, an act was passed authorizing interest on all outstanding bonds and stocks (except those issued in aid of the rebellion) to be paid in coin. 14 Stat. 303. On March 1st, 1870, an act entitled "An act to provide for a sinking fund and the management of the same," appointed certain officers a commission with power to sell any real or personal property of the state, not in actual use or held in trust, the proceeds to constitute a sinking fund, to be invested in the purchase of state securities. 14 Stat. 388.

Several objections were urged in the answers and proven, against the validity of several of the bonds issued under the authority of these acts of the legislature. No correct registry of these bonds, by number and amount, was kept by the state treasurer. The only registration made was that the financial agent of the state in New York had so many bonds, numbers, of which, in the gross, were accurately kept.

Loans were effected in New York upon a hypothecation of bonds of the several classes, very many of which were pledged after September 21st, 1871. These hypothecated bonds included bonds under all of the above-recited acts, and also bonds purchased under the sinking fund act, and bonds in which were invested the proceeds of the sale of agricultural land scrip, issued to the state by the United States government, in trust for an agricultural college.

In September, 1868, $1,000,000 in bonds were issued under the authority of the act of August 26th, 1868, and were designated upon their face as "loan to pay interest on the public debt." In the summer and fall

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of 1869 a second $1,000,000 in *bonds were issued under the authority of this same act, and were designated as "issued under act approved August 26th, 1868." R. K. Scott, governor of the state at that time, testified: "It was not my intention that more than $1,000,000 of these should be out, but the whole $2,000,000 did go out and did become a part of the public debt; $500,000 of them were returned, and I destroyed them in the presence of Mr. Parker, D. H. Chamberlain, Dr. Neagle and others; the $500,000 had been replaced by conversion bonds." It also appeared in evidence that $50,000 were subsequently destroyed.

It also appeared that the limits in amount fixed in the acts to pay interest on public debt, to redeem bills receivable, and for relief of the treasury, were larger than the outstanding demands provided for required. The first and second issue of bonds to pay interest on the public debt, amounted to $2,000,000, of which $550,000 being retired and canceled, left outstanding $1,450,000. Under the act to redeem bills receivable, $500,000 were issued. Under the act for the relief of the treasury, $1,000,000 in bonds were issued. Under the two land commission acts, $700,000 were issued. Under the conversion act, $5,965,000 were sold, or used as collateral security for loans, and not issued in exchange for surrendered securities. Other conversion bonds were properly issued in exchange for outstanding securities.

An act entitled "An act relating to the bonds of the State of South Carolina," generally called the validating act, was approved March 13th, 1872. 15 Stat. 278. It re-

cited: "Whereas, bonds or obligations of this state have been issued from time to time to a large amount, in accordance, as was supposed by the officers issuing the same, with the authority and provisions of certain acts of the general assembly, including—[here followed an enumeration of all the above-recited acts;] which said bonds are fully and particularly stated and set forth in a report made by the treasurer of this state to the general assembly, dated October 31st, 1871; and whereas, doubts have arisen whether said issues were in strict conformity to the provisions of the said several acts under which they were respectively issued; and whereas, it was the true intent and meaning of the several

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acts *above set forth, that such issues of bonds or obligations should be made in the manner in which the same have been made, as aforesaid; and whereas, also, doubts have been raised as to the validity of some of the bonds mentioned in the said annual report of the state treasurer for the fiscal year ending with October 31st, 1871, although money has been borrowed by, or realized out of, said bonds, on account of this state; and whereas, the credit of this state has been affected thereby:

"Section 1. Be it enacted, &c., That the said bonds and obligations issued on behalf of this state, as mentioned and set forth in the report of the treasurer of this state to the general assembly, dated October 31st, 1871, were duly and lawfully issued, in conformity with the true intent and meaning of the several acts of the general assembly hereinbefore set forth by their respective titles.

"Sec. 2. That the acts of the officers of this state, authorized under the provisions of the laws of this state and of the several acts hereinbefore referred to, to the extent of all issues of bonds or obligations enumerated and set forth in the said report of the treasurer, be and are hereby in all things ratified, confirmed and established.

"Sec. 3. That each and all of the bonds named in said annual report, &c., be, and the same are hereby declared to be, legal and valid bonds of the State of South Carolina, for the payment of which the faith, credit and funds of the state have been and are hereby pledged; provided, that no bonds be included which are not registered in the treasury at the time of the passage of this act, as provided for by Section 14 of Article IX. of the constitution, relating to finance and taxation.

* * * * * * *

"Sec. 7. That neither the sum or sums realized from any sale or sales of any of the bonds of this state, nor the manner of sale of any of the bonds of this state, shall in any manner affect or impair the validity and obligation thereof."

The other sections of this act need not be copied here. The act was not passed by a two-thirds vote.

The report of the state treasurer, dated

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October 31st, 1871, *referred to in the validating act, sets out the debt of the state under the above-recited acts as follows:

Under act of	August 26th, 1868.....	$ 500,000
"	August 26th, 1868....	1,250,000
"	September 15th, 1868..	1,189,400
"	February 17th, 1869..	899,000
"	March 23d, 1869.....	7,255,500
"	March 27th, 1869.....	200,000
"	March 1st, 1870.....	500,000

After the date of this report, and before the passage of the consolidation act below mentioned, several of these bonds were exchanged for conversion bonds under the act of March 23d, 1869.

The irregularities, illegalities and frauds connected with the issue of state bonds from 1868 down to the close of 1871, were fully set forth in a report made to the general assembly by a joint committee of the two houses in December, 1871.

The following additional article was duly ratified, and became a part of the constitution, on January 29th, 1873:

"Article XVI.—To the end that the public debt of South Carolina may not hereafter be increased without the due consideration and free consent of the people of the state, the general assembly is hereby forbidden to create any further debt or obligation, either by the loan of the credit of the state by guaranty, endorsement or otherwise, except for the ordinary and current business of the state, without first submitting the question as to the creation of any such new debt, guaranty, endorsement or loan of its credit to the people of this state at a general state election; and unless two-thirds of the qualified voters of this state, voting on the question, shall be in favor of a further debt, guaranty, endorsement or loan of its credit, none shall be created or made."

Such is the financial legislation of the state under the reconstruction government of the state down to the compromise measure of December 22d, 1873, generally called the consolidation act. It was as follows:

"An act to reduce the volume of the public debt and provide for the payment of the same.

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*"Section 1. Be it enacted, &c., That the state treasurer is hereby authorized and required to receive from the holders willing to surrender the same—[here follows a statement of the amounts outstanding, with the date and title of the acts under which issued, which is omitted, so far as it recites the debt contracted prior to August, 1868, after which, reduced to figures, it continues]—the certificates of stock issued under act of March 23d, 1869, redeemable in 1888, amounting to $64,000; the bonds of the state issued under the

act of August 26th, 1868, amounting to $1,197,000; the bonds issued under the act of August 26th, 1868, amounting to $484,000; the bonds issued under the act of September 15th, 1868, amounting to $1,189,600; the bonds issued under the act of February 17th, 1869, amounting to $856,000; the bonds issued under the act of March 27th, 1869, amounting to $124,000; the bonds issued under the act of March 1st, 1870, amounting to $343,000; the bonds issued under the act of March 23d, 1869, redeemable in 1888, for the purpose of exchange of any of the certificates of stock or bonds above enumerated, said fact being ascertainable from the treasurer's registry of bonds and stocks converted, amounting to $1,577,500; and shall thereupon, in exchange for and in lieu of said bonds and stocks so surrendered issue to said holders other coupon bonds or certificates of stock as they may desire, equal in amount to fifty per centum of the face value of the bonds or certificates of stock so surrendered, and that the bonds known as conversion bonds, amounting to $5,965,000, and which were put upon the market without any authority of law, be and the same are hereby declared to be absolutely null and void."

Section 2 provided for a like surrender of coupons, and the remaining sections of the act pledged the faith of the state to the payment of these consolidation bonds, declared that an annual levy of two mills should be made to pay the interest, which declaration should be considered as a part of the contract, and regulated the issue, registration, and so forth.

Soon after the passage of this act the consolidation of the existing debt of the state commenced, most of the creditors accepting its terms and receiving new or consolidation bonds in lieu of the securities surrendered

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by them to the state treasurer. *Many of the consolidation bonds questioned in these proceedings were issued in exchange for detached coupons, which it was alleged were not due by the state: (1) such as were detached from bonds which were never issued; (2) such as matured prior to the issue of the bonds to which they belonged; (3) such as matured at a time when the state treasurer's report showed that interest had been paid; (4) such as were cut off by the financial agent from bonds passing through his hands and fraudulently issued.

In April, 1877, the government of South Carolina passed under the control of a political party opposed to that which had controlled the state for the nine preceding years. The legislation which was had, looking to an investigation and determination of the bonded debt of the state, the organization of the special Court of Claims, with its powers and duties, and the submission by the state to its jurisdiction, and the character of these proceedings, are fully set out in the opinion of the court.

In March, 1878, the general assembly, on joint ballot, elected the Hon. A. P. Aldrich, judge of the second circuit, Hon. Thomas Thomson, judge of the eighth circuit, and Hon. J. H. Hudson, judge of the fourth circuit, members of the Court of Claims. At their first meeting Judge Aldrich was elected president of the court.

Hon. Henry Meetze, of Lexington, and Hon. Y. J. Pope, of Newberry, were elected by the general assembly associate counsel, who, together with the attorney-general, represented the state in the proceedings.

The judges of the Court of Claims filed each an opinion. Omitting such statements of facts as are above stated, and extracts from authorities, they are as follows:

THOMSON, J. Suits were brought in the above case and others on coupons of bonds consolidated under the act of assembly, A. D. 1873, alleging they were not paid according to their obligation.

Answers were filed in all the cases, containing numerous grounds of defence.

In a number of the cases, "the defences, how-

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ever, were *nominal." The plaintiffs proved their ownership of the bonds and traced from the bonds their ownership of the "canceled bonds, coupons and certificates of stock" which had been in their possession or in those from whom they derived their right. In such cases judgments were given for the plaintiffs.

But defences were made to bonds by far the largest in number and amount, alleging they were obnoxious to one or more of the charges of illegality contained in the specifications of Schedule No. 6 of the bond commission's report.

The case above stated, and more, were issued upon coupons of bonds regarded as subject to the objections made by the bond commission, and trial was had of them as test cases.

The pleadings—testimony taken in New York—parol testimony and numerous documents, with arguments of counsel, were submitted to the court in said cases.

It may be proper to state briefly the legislation which established the Court of Claims and brought these cases before it. By a joint resolution, passed on March 21st, A. D. 1878, the legislature provided a mode of ascertaining the debt of the state, and of liquidating and settling the same. A. A. 1877, p. 669.

This joint resolution was, it seems, the result of a prolonged discussion in the legislature upon the report of a commission appointed to investigate the indebtedness of the state under a joint resolution approved June 8th, A. D. 1877. A. A. 1877, p. 318.

This commission was raised to make a complete and thorough investigation of certain matters, amongst them, "whether there

is in the state treasurer's office on file, as vouchers, canceled bonds, coupons, and certificates of stocks of the issues described, issued in accordance with law and authorized to be consolidated by the act above recited to the amount required by said act, and with power to the commission, should it appear in the course of the investigation that any of said bonds, certificates of stock or coupons have been illegally or otherwise improperly issued, to report the same, together with the evidence upon which the illegality or non-conformity to law rests."

Acting under said authority, the commission made their report, and found that $5,184,062 of bonds were issued in accordance

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*with law, and authorized to be consolidated under the act of A. D. 1873.

They further reported there were vouchers remaining in the judgment of the commission not issued in accordance with law, and authorized to be consolidated, amounting to $3,608,717.

The controversy was in relation to the vouchers for $3,608,717, called in the joint resolution of June, A. D. 1877, "canceled bonds, coupons and certificates of stock;" whether these were issued in accordance with law, and authorized to be consolidated.

The vouchers—"canceled bonds, coupons and certificates of stock"—objected to in the report of the bond commission, are fully set forth therein. Schedule No. 6 appended to the report, describes with minuteness the securities issued as alleged not in accordance with law.

The question as to the validity of these vouchers was submitted to the Court of Claims, according to the resolution set forth below.

It is obvious that an important and primary inquiry is, what is the power of this court? or what is the duty required by the legislature at its hands?

The Court of Claims is special in character and possesses the powers of a Circuit Court only in relation to the subjects designated in the resolution and submitted to it. The powers of the court are defined by the enactments creating it, and outside of which it has no authority to act. These powers cannot be extended by implication, nor can the court assume constructive powers—"powers not literally given or necessarily consequent upon those so given." McKenzie v. Ramsay, 1 Bail. 457.

And inasmuch as the court exists only by legislative authority, reference must be had thereto to ascertain both the extent of power and the objects to be accomplished.

The resolution provides (first section) that said court shall "have jurisdiction to hear and determine any case or cases made up or brought to test the validity of any of the consolidated bonds, coupons and certificates of stock, or any of the various classes of them, mentioned in the said report of the bond commission as resting on vouchers not issued in accordance with law, and authorized to be

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consolidated by the act of the general *assembly, approved December 22d, 1873, entitled "An act to reduce the volume of the public debt, and provide for the payment of the same;" and also as not issued in accordance with law, and further designated in Schedule 6 of the said report."

That which is plain needs no interpretation. The validity of the consolidation bonds, coupons and certificates of stock, or any of them, as resting on vouchers not issued in accordance with law and authorized to be consolidated by the act of assembly of A. D. 1873, is to be tested.

At the close of the same section, as if to place the intent beyond doubt, are added the words: "And also as not issued [that is, the canceled bonds, coupons and certificates of stock] in accordance with law, and further designated and described in Schedule 6 of the said report," viz., the report of the bond commission.

Upon a reference to the report, 9th page, the following language is found: "The remaining $3,608,717 of these vouchers, in the judgment of the commission, were not issued in accordance with law and authorized to be consolidated by the act above recited." Then follows an enumeration of the evidences of public indebtedness, called by the bond commission "vouchers," applied to eleven classes of securities. Can there be a doubt that the vouchers referred to in the resolution are the securities called vouchers in the report?

With equal clearness the meaning of the legislature may be learned from Section 9 of the resolution, which declares that a case or cases are to be heard and determined in said court "to test the validity of the said consolidation bonds and coupons and certificates of stock mentioned in Schedule 6, bringing before the court the various classes of vouchers which, it is alleged in the report of the said commission, impair the validity of the said consolidated bonds, coupons and certificates of stock, or any of them."

What is the meaning in the largest sense which, according to the common use of language, is to be given to the sections of the said resolution? They ought not to be extended beyond their ordinary sense in order to comprehend a case within their object; for that would be to give effect to an intention not expressed. Broom Leg. Max. 276.

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*When the jurisdiction is sharply defined and in so many words, what place can there be for the exercise of constructive powers? In regard to the grant of power here expressed, the rule that the express mention of one thing implies the exclusion of another, may fitly apply. Broom Leg. Max. 278.

In connection with the consolidated bonds, the only matters mentioned are the vouchers.

The question is not whether the consolidated bonds, coupons and certificates of stock are valid, but whether they are valid as issued in accordance with law, and authorized to be consolidated by the act of the general assembly, or as stated in the ninth section of the resolution, "to test the validity of the said consolidated bonds, coupons and certificates of stock, bringing before the court the various classes of vouchers which, it is alleged, impair the validity of the bonds, coupons and certificates of stock."

For the Court of Claims to hold that the act of A. D. 1873 is conclusive, by compromise or otherwise, of the validity of the bonds, coupons and certificates of stock, because the securities to be consolidated are enumerated in the first section of the act, is an end of the case.

Such a question could be made before a court of general jurisdiction. This question is not submitted by the resolution to the Court of Claims, nor does it touch the point presented by the first and ninth sections. The plain intention of the resolution is to ascertain if the various public securities set forth in the first section of the act of A. D. 1873, called vouchers in the report of the bond commission, were issued in accordance with law, and authorized to be consolidated by the act. If so, then the consolidated bonds and certificates of stock, taken in exchange for the vouchers and resting on them, were to be held and adjudged valid debts. If these vouchers were adjudged not issued in accordance with law, then the bonds and certificates of stock resting on them were to be so held in view of the resolution, and were not authorized to be consolidated—despite their consolidation by the act of A. D. 1873.

By the resolution of June 8th, 1877, the bond commission is directed to make a complete investigation. First. Of the entire amount of consolidated bonds issued under the

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act of A. D. 1873, *with particulars thereof. Second. Whether there is in the state treasurer's office, on file as vouchers, "canceled bonds, coupons and certificates of stocks of the issues described, issued in accordance with law, and authorized to be consolidated by the act above recited, to the amount required by the said act," A. D. 1877, p. 319.

Two inquiries are, by the second paragraph of Section 2, imposed upon the commission. The First, as to the vouchers, if they are of file in the treasurer's office. Second, as to the amount required by said act; that is, the amount specified therein upon recital.

Keeping in mind these instructions given to the commission, with those given to the Court of Claims, by the resolution of March 22d, 1878, in Sections 1 and 9, can there be a doubt of the duty or service to be rendered by this court; namely, an examination of the vouchers exchanged for consolidated bonds?

It is evident the legislature of A. D. 1876 and 1877 did not conceive itself bound by the former action of the same body, and felt itself at liberty to go behind the legislation of its predecessor. The propriety of this is not before the court.

That the above construction is to be placed upon the resolution, is otherwise clear. Why should the legislature refer to a special tribunal the question to test the validity of the bonds and certificates of stock, if the validity of these securities was regarded as established by the act of A. D. 1873? Why designate to the court, if the bonds and certificates of stock were valid debts under said act, the futile inquiry, if they were valid debts as resting on vouchers or securities which were invalid as not being issued according to law? The report of the bond commission assails the validity of the consolidated bonds and certificates of stock, upon the ground that they rest upon insufficient or invalid securities, securities which were not debts, and this position is not changed or enlarged by the resolution which creates the Court of Claims, and refers to the report.

This view of the jurisdiction and power of the Court of Claims disposes of the several propositions of the plaintiffs. The second affirms: "The consolidation act creates a contract between the state and every holder of

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her debt accepting the terms thereof, *whereby, in consideration of mutual advantages, a composition of their claims was made, which is final and conclusive."

No opinion is expressed, nor intended to be, of the force and effect of this proposition. It is enough to say the question presented is outside of the resolution, and not found in its words or intent, without departing from the ordinary meaning of language.

It is manifest that the third proposition of the plaintiffs—"Because the state, by her action otherwise, has precluded herself from denying the obligation of any of the debt recognized as valid in the consolidation act" —comes within the reasons above stated, and cannot be considered by the court.

The first proposition of the plaintiffs, that "the consolidated bonds are coupon bonds, payable to bearer, that is to say, negotiable instruments in the hands of bona fide holders for value before maturity," is not within the scope of the resolution, but may be modified to express the real question.

The proposition, stated affirmatively, is, that the vouchers, that is, "the canceled bonds, coupons and certificates of stock," in exchange for which consolidation bonds and certificates of stock were taken, were issued in accordance with law, and authorized to be consolidated by the act of 1873, and (the vouchers) also as issued in accordance with law, and further designated and described in Schedule 6 of said report (bond report.)

It becomes necessary to consider the contract between the state and the parties to whom the canceled bonds, coupons and cer-

tificates of stock were sold or transferred, in which way the state is made a party, and how such contract is to be construed.

The state, proposing to borrow money, offers its obligations for acceptance, not to one or two persons, but to capitalists of every country. The terms of obligation and discharge are expressed by an act of assembly.

This act is no secret document, but a high and public record. The party, too, acting for the state with whom the lender is to treat, is pointed out. All this is necessary and becomes fixed, not flexible, like a contract between citizens; but the offer simply is submitted for consideration, awaiting acceptance or rejection; and here, also, the agent

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for the state is without any discretion *such as the act confers. His power is special, and he cannot modify or enlarge his instructions.

The lender thus has it in his power, by referring to the legislation of the state, to understand the exact terms of the offer, the agent with whom he has to deal, and the result of his acceptance. He should bear in mind that upon a deviation from the legislative offer, which no one, unless empowered, can assent to, the state is not bound. In a word, a bond issued under an act of assembly is so connected with it as to make substantially one contract. A bond of the state, issued without legislative sanction, is a nullity.

A state as a borrower of money may become bound as an individual, though not responsible in the same mode. But it is to be remembered that there can be no equality between the state and its officer and agent who acts as under a mandate. An individual is liable to the extent of the power apparently conferred on his agent; but the government is liable only to the extent of the power actually conferred. Pierce v. United States, 1 N. & H. 270.

This principle is specially applicable to the over-issue of bonds under cover of the act of 1868, to raise funds to pay interest on the public debt. In relation to these bonds issued for payment of interest on the public debt, it appears that the first issue under the power conferred by said act was for $1,000,000. The purpose of this issue as expressed was to procure a loan to pay interest on the public debt. On the face of the bonds of the first issue the title of the act is set forth in full, the date of the act also being stated in the body of the bond. Waiving the question whether more bonds than amounted to $1,000,000 on their face could be issued until $1,000,000 was realized from their sale, it is apparent that there was an unauthorized excess of issue in number and amount. The issue of the second $1,000,000 of bonds was made under the same act, the bonds similar in every respect, except that instead of the title of the act being inserted in the bond, there was substituted for it the words, "Issued under an act approved August 26th, 1868."

There is no disputing the fact that bonds were issued purporting to be under this act,

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which produced more than $1,000,000. *This appears from the act of A. D. 1873, which authorizes the funding of $197,000 more than the $1,000,000 authorized by the act of August 26th, 1868. Is the state responsible for this over-issue of the bonds for $1,000,000 on their face—or for the over-issue in excess of bonds necessary to be sold to produce $1,000,000? In either case there was a positive want of authority or power in the agents of the state to issue bonds beyond a certain number or for more than a certain amount. This is not the case of power irregularly exercised, but the total want of power. It is a radical defect of title, which will avail against a bona fide holder of the bonds.

The officers of the state issuing these bonds and selling them were agents for a special purpose, and could not bind the state beyond the power expressed. 2 Kent 325, note A; Wilkinson v. King, 2 Comp. 325; Hartop v. Honne, 3 Atk. 44.

A special agent has no discretion. All government agents (unless otherwise empowered) are special agents. Anderson v. Kornley, 21 Wend. 279; 2 Kent. 620, 621, note A; Gordon v. Buchanan, 5 Yerg. 71.

To say the least, the bonds over-issued as above are without authority of law. N. Y. & N. H. R. R. v. Schuyler, 34 N. Y. 30; De Vass v. City of Richmond, 18 Gratt. 362.

The conclusion is that the bonds of the second issue under the act of August 26th, A. D. 1868, in excess of $1,000,000, were not issued in accordance with law, and authorized to be consolidated by the A. A. 1873.

The question of greatest importance raised by the report of the bond commission, at least involving the largest sum of money, is that called "The Hypothecated Bonds and Coupons." The plan adopted by the officers of the state in the wreck of its credit was the common one of borrowing from Peter to pay Paul. Had the credit of the state been good and its bonds at par, slight loss might have resulted from this operation. But in this scheme not only must the agents effecting the exchange of credit be paid, but there was superadded a constantly increasing volume of debt, arising from the difference between the market and the par value of the bond, which the purchaser could claim. The multitude of South Carolina securities

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on the market was *so great or the credit of the state so low that in November, 1871, the Orr bonds, regarded as the best, sold for twenty-eight and one-half per cent. in New York. To continue the sale of the bonds at such rate was to bankrupt the state, and the policy was preferred of obtaining loans by a pledge of the securities.

The two acts of assembly of August 26th, 1868, gave no power to pledge the state bonds for loans. A. A. 1868, pp. 18, 19. This power was first given by the act of 1869, approved February 17th, (A. A., p. 182) as to the loan contemplated by this act, which was required to be made within twelve years from the time of its passage. By a subsequent act (March 26th, 1869, p. 258,) the power was given to pledge for loans all the bonds of the state in its possession, and extending the time for the loans for two years from August 26th, 1868. It may be inferred the value of these securities did not improve; probably it decreased. The financial agent could sell or pledge; yet, although the face value of the bonds pledged was nearly four times the amount of the loans, he never sold in relief of the pledged securities, the evidence showing increasing distrust of the collaterals as a sufficient indemnity.

These pledged bonds were never relieved or released, except in one or two instances, in small quantities, and were sold or otherwise disposed of by the pledgees, as appears by the testimony. Government bonds, payable at a future day, especially when the day is distant, have been a favorite mode of investment for those not actually engaged in trade or handling money itself. With the aged and trustees it is a preferred security, as it proffers safe and certain returns without supervision on their part. The reason is obvious. The community of men forming a state is surely safer than any single person of the commonwealth. When the faith, credit and funds of the state are pledged for the redemption of the principal when it becomes due, and for the payment of interest in the form of coupons in the meantime, the highest security is given. The honesty and wealth of the community are elements of increased security for the payment of the bonds. So, also, the permanence of government enters into the essence of government bonds, for a state undergoing changes, some of which may overthrow its form or existence in ten

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years, *can give no assurance for the payment of a bond at the end of twenty. In theory, at least, the bonds of a government should be always at par, as the credit of the whole state, when the property of all individuals is bound, should exceed the credit of any single member. It is obvious that when these bonds were used as collaterals there was a wide departure from their common use. Seldom have state bonds been used as a guaranty for the payment of doubtful obligations. Ought not the very use to which they were applied have been a warning that something was wrong?

The credit of a state is a sacred thing; should not be prostituted to every common purpose, and hawked about on 'change like the note of a huckster. Certainly the circumstances surrounding these bonds would have suggested a rigid scrutiny of their legal origin and of the power of the possessor to dispose of them. Objection is taken by the defendant that the bonds issued under the two acts of August 26th, 1868, could neither be sold nor hypothecated after the expiration of two years from the date of said acts. The act passed February 17th, A. D. 1869, limits the time for loans to twelve months, and authorizes hypothecation for loans. The act of March 26th, 1869, extends the time for negotiating loans under the acts of August 26th, 1868, to two years, and authorizes the pledging of bonds as security. These loans are: * * *

From this statement it appears that all the loans were made after August 26th, A. D. 1870, more than one year after loans were authorized to be made under the acts.

The act of March 26th, 1869, declares the financial agent is "authorized to pledge the bonds of the state, which the state now has or may hereafter have in its possession, as collateral security for state loans," with a proviso that in all transactions he shall conform to the provisions of the acts of August 26th, 1868.

It is to be observed that the power to hypothecate is connected with the loans. Hypothecation, however, was adopted as a mode of effecting the loans. The simple question, then, is, within what time do the acts authorize a loan and hypothecation?

The answer is given by the acts: Within

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two years from the *passage of the acts of August 26th, A. D. 1868, and one year from the passage of the act of February 17th, 1869.

It is needless to say that after the time limited by the acts the governor could not, under acts of August 26th, 1868, nor the governor, comptroller-general and treasurer, under the act of February 17th, 1869, negotiate state bonds, nor authorize the financial agent to do so.

It may be submitted, in reply to this, that time was not the essence of the contract. The law is otherwise. Green v. Biddle, 8 Whart. 34.

That time may not be of the essence of a contract is a principle of equity jurisprudence. In cases like the one under consideration, equity follows the law. Hipwell v. Knight, 1 Y. & Coll. 415; 2 Story, §§ 775, 776; 2 Kent 621, note e; Batty v. Carswell, 2 J. R. 48.

That time was regarded as an essential element of the contract is shown by the action of the legislature extending the time to effect the loans from one to two years. In plain language, a power of attorney was given to certain officers of the state to borrow money within twelve months or two years, and when not accomplished in that time their power ceased. It was not a power which these officers could exercise ex-officio.

There was a conferred power, special, from which they derived the right to act, which they could not modify, and from which they could not deviate.

It is deemed scarcely necessary to refer to the question of notice in relation to the contract contained in the acts. All the bonds refer to the acts under which they were issued in such unmistakable language as to give full notice of their provisions upon reference to them.

There is notice of another character affecting the bonds—not only that they were issued after the power had ended, but that those dealing with them were not bona fide holders without notice.

Governor Scott, at an early day, (in his message of November, A. D. 1871,) states the fierce warnings given by the press of the state, that the bonds in question would never be paid; that they were bayonet bonds, issued

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by a bogus legislature; warning capi*talists of New York they would not be paid; that the whole scheme was a job and a swindle, and that the bonds would never be recognized when property-holders and honest men had a majority in the councils of the state. A page of language of this character was inserted in his message—a public document.

Governor Scott says, further, that these warnings began in the press but ten days after the new government went into operation—July 17th, 1868. He declares, also, the action of the Taxpayers' Convention, in May A. D. 1871, and of the Charleston Board of Trade, had a most disastrous effect upon the securities of the state, and compelled a large and rapid increase of the public debt. He thus furnishes, in a public document, the notices against the bonds, and the effect of the warnings in New York.

Human credulity would far transcend human belief if it could be supposed that banks and bankers dealing in public securities could be ignorant of these expressions in regard to the bonds. The conclusion is that the loans and hypothecation of securities negotiated after the periods of time limited by the acts aforesaid, were not issued in accordance with law, nor authorized to be consolidated by the act of 1873.

The first act, providing for the appointment of a land commissioner, was passed March 27th, A. D. 1869.

The act establishes an office, and the officer was to be known as the land commissioner of the State of South Carolina. He was to be appointed by an advisory board, which consisted of the governor, comptroller-general, state treasurer, secretary of state and attorney-general.

The appointee was to give bond in the penal sum of $20,000 for the discharge of the duties of his office, and was to receive a salary of $2000.

To this land commissioner, who could scarcely think without the sanction of the advisory board, the legislature directed the treasurer to issue "bonds of this state in the sum of two hundred thousand dollars, with coupons attached." The plain intent of the act was that the bonds should be placed in the hands of the land commissioner; his duties involving purchases and sales of lands, the direction in the seventh clause of the act

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as to invest*ment of moneys from sales, to constitute a sinking fund for the redemption of the bonds, indicate a separate management, and that they were not to be merged in the general funds of the state.

Except the direction that the bonds were to be issued to the land commissioner, there is no direction as to their sale, nor any limit in the act of the time within which they could be sold.

The bonds issued under this act bear upon their face the words: "Issued under an act approved March 27th, 1869."

The next act in relation to the land commission was passed March 1st, A. D. 1870, for an issue of $500,000. These bonds were issued without limit as regards time, but the power of negotiating them was withheld from the land commission.

The bonds were to be negotiated by the advisory board, in such form and manner as the board should determine. The bonds issued under this act bear upon their face the words: "Loan under act approved March 1st, 1870."

On the 26th of March, 1869, the day before the passage of the first land commission act, the legislature, by act, authorized the financial agent "to pledge the bonds of the state which the state now has or may hereafter have in its possession, as collateral security for state loans," with the proviso "that in all the transactions he shall conform to the provision of 'An act entitled an act to authorize a loan to redeem the obligations known as the bills receivable of the State of South Carolina,'" ratified the 26th day of August, A. D. 1868.

There was by Section 2 of this act an amendment of the acts of August, 1868, extending the time for loans to two years.

Waiving the question whether, under the first act, any one could negotiate the bonds but the land commissioner, and consequently whether their hypothecation by the financial agent was not illegal, it seems plain that the pledging of the bonds issued under both acts is objectionable.

The bonds were impressed with all the restrictions attaching to other bonds pledged by the financial agent.

Neither the loans nor the hypothecation were made within two years—the time limited.

For the reasons stated above, in regard to the hypothecation of other bonds, the con-

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clusion is that the land bonds hypothe*cated were not issued in accordance with law, nor authorized to be consolidated under the act of assembly A. D. 1873.

The defendant objects that the coupons detached from bonds between June 10th, 1874, and June 24th, 1874, amounting to $331,996, have not been issued in accordance with law, nor authorized to be consolidated.

The testimony of Henry L. Tappan shows how coupons accumulated in the treasury until November, 1872. He says they were put away in the vaults of the treasury, and when he left the office, November 1st, 1872, they had not been disturbed.

James O. Ladd, in his testimony, says that while he was in the treasury "there were matured coupons clipped off from bonds sent to Kimpton. These coupons were put in packages and put away in the fire-proof vault, inside of the safe in the treasury. They were not canceled at the time. They were put away, and so remained uncanceled up to the time he left the office."

According to John L. Neagle's statement, he received, in the early part of A. D. 1873, from Niles G. Parker, about $100,000 of coupons for his action in and as his share for the funding of the coupons. His doubts were quieted by the assurance of Parker that the thing was all right.

He turned over to Y. J. P. Owens, for funding, a large part of the coupons—between $80,000 and $90,000. He again was disturbed about the character of the transaction, and having "ascertained that they [the coupons] were wrongfully in his hands, destroyed them, viz., the balance, about $12,000, within the last twelve months."

In the settlement with the financial agent, (Journal, House of Rep., 1872, 1873, p. 307,) it is stated the agent had returned to the state all coupons not paid, excepting on outstanding bonds owned by third parties or held as collateral as hereinafter mentioned.

The coupons of bonds owned by third parties would be the property of the owners of the bonds, and out of Kimpton's reach, unless upon payment. The proof is, the bonds and coupons pledged were never paid by Kimpton. The above facts corroborate the testimony of Parker, who states at length the scheme between Scott, Chamberlain, Nea-

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gle, Kimpton and himself to *fund the coupons through Owens or others. Aside from the testimony, nothing can be more significant of the transaction than the conduct of the parties engaged in it. There is no pretence that the state owed them who were then its present or late officers, or that they obtained the coupons in any business transaction. Why fund through another? They are dealing with tens of thousands in a manner so free, as to suggest the idea of "come easy, go easy." Does it accord with human conduct that Kimpton, who, after his settlement with the state, claimed a balance of thousands as due him, would have shared with others, without equivalent, valid securities that would have paid or secured him? Credat Judæus!

The conclusion is, that the said coupons were not issued in accordance with law, and authorized to be consolidated by the act of 1873.

No doubt the legislature intended, by a reference to a legal body, that the questions submitted should be considered in their legal aspect. The question for this court is not what the state should do, what steps policy suggests or good faith demands. In the view taken, these questions were not before the court. The simple question was, were the vouchers—that is, "the canceled bonds, coupons and certificates of stock"—"issued in accordance with law and authorized to be consolidated by the act of the general assembly, approved December 22d, 1873?" To this question the above conclusions are given as answer.

Any assumption from the foregoing views, that the consolidation bonds, issued under the act of 1873, are valid or invalid, in other respects would be gratuitous. The propositions on behalf of the bondholders, stated above, have not been considered with any purpose of their decision. The effect of the act of 1873, the acts of the state authorities, the vesting of rights under acts of assembly, though afterwards opened for consideration, with other questions in the interest of the bondholders, the constitutional point made in the answers, want of registration and the like, on behalf of the defendant, are all questions about which no opinion is expressed.

There is a class of cases, not many in number, which have held the owners of municipal

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bonds, which were subject to ex*ceptions, entitled to certain payments. These were instances where equitable principles prevailing and the corporations having received some value for their securities negotiated, refunded to the purchasers their money. The case of County of Armstrong v. Brinton, 47 Penna. 370, and others therein referred to, are examples. A suggestion is scarcely ventured if a settlement of the bonded debt could be thus effected. Yet, if practicable, it should satisfy any one but a speculating bondholder, and at the same time not be unjust to the state.

It is ordered, adjudged and decreed, That the "canceled bonds, coupons and certificates of stock," called "vouchers," in relation to which conclusions have been announced above in this opinion, were not issued in accordance with law, and authorized to be consolidated under the act of 1873. And that the consolidated bonds and certificates of stock exchanged for said "vouchers" to the extent and so far as the said consolidated

bonds and certificates of stock rest upon said "vouchers" for their validity, were not binding obligations of the State of South Carolina.

ALDRICH, J. My regular duties in the Circuit will prevent me, at this time, from presenting an extended opinion of the questions submitted to us, by the joint resolution creating the Court of Claims. I concur in the conclusions reached by Judge THOMSON, and although his reasoning is perfectly satisfactory to me, so far as it goes, yet I am disposed to go further and hold that this whole legislation was so gross a fraud on a helpless people, that it will be the greatest injustice to force the innocent taxpayer to pay the debts thus contracted by an usurping government without the warrant of constitutional authority, against which the taxpayers loudly and earnestly protested, and which so astounded the good faith of the commercial world that none but the most reckless speculators would engage in the disreputable transaction to utterly ruin a plundered state prostrate in the hands of her invaders.

The opinion of Judge HUDSON shows great research, and is prepared with care and ability, supposing these usurpers had the legal and constitutional right to impose these oppressive burdens, but as that lies at the very foundation of the question submit-

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ted, *I cannot acquiesce in it. Reserving the right to file a more extended opinion, I concur with Judge THOMSON.

Subsequently Judge ALDRICH filed a more extended opinion, as follows:

I was not able to prepare an opinion at the last meeting of the court for consultation, because I had not completed my Circuit business. As I did not think that my assignment to this court was intended to interrupt or delay my Circuit duties, I reserved the right to give my reasons in the future, when I had time to prepare the same, which I now propose to do.

Of all the questions that most distract the judicial mind, these semi-politico are the most embarrassing. There is always more or less feeling of party spirit, prejudice, or a popular pressure very hard to resist, interfering with the free exercise of sound reason, even in the clearest head and the best balanced mind, unconsciously warping the soundest judgment—not that the judge is less firm, less conscientious, but such is the constitution of the human mind that he finds it difficult to divest himself of the opinions, perhaps prejudices, that may have crept into his mind when the legislation on which he is called to pass was under discussion. I trust I will not be so influenced, as I had no expectation of being selected as a member of this court, and had not examined the questions previously to my selection.

The history of the financial legislation which called this court into existence has been so fully given in the clear and able judgments of Judges THOMSON and HUDSON, that I do not propose to encumber this opinion with a further reference thereto.

Why was the court selected? If the matter referred was a mere question of commercial law, the ordinary tribunals of the state were open for that purpose. Nay! Story, or any other writer on negotiable paper, would settle the controversy. The court then, as I take it, was clothed with much larger and broader powers than the mere consideration of negotiable securities; it was intended that we shall go to the very bottom of these transactions, and see if authority was vested in the legislature creating this indebtedness to bind the state, or to pledge her faith and credit.

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*It is a court of conscience as well as a court of law; it is bound to preserve the honor and good faith of the state, at the same time to see that the bona fide holders of her securities are protected in their rights, while the innocent taxpayers, on whom the burden of payment will fall, are not oppressed by the assumption of an indebtedness not authorized by law.

In the first place, I hold the provisional government of President Johnson, and the reconstructed government inaugurated under military rule, are both extra-constitutional, and, if it be true, as decided in the Tennessee case, that the state never lost her entity by the act of secession, then South Carolina at the close of the war was the same state, under her old constitution, that she was when she attempted to escape from the Union; and both the provisional government of President Johnson and the reconstructed governments of Scott, Moses and Chamberlain are usurpations. The conventions adopting the constitutions of 1865 and 1868 were not called and elected as directed by the fundamental law, and all of the subsequent legislation is not binding on the state, except so far as she chooses to acquiesce therein.

That this political usurpation was well understood not only here, but all over the political and commercial world, is abundantly proved. The very first act of this usurpation startled the civilized world. The military order directing the election of delegates to the constitutional convention of 1868, excluded nearly one-third of the property-holders of the state from the polls, thus disfranchising a large portion of the virtue, intelligence and property of the state, who were not represented in that convention.

In less than three years after the Scott administration went into office, so frightful were the taxes, so rapid was the increase of the public debt, so audacious was the spoliation of the public money, that the taxpayers in 1871 assembled in convention to enter

their protest against this spoliation and to record their notice to the world that they would not pay the debts then contracted and thereafter to be contracted by this usurping government. It is argued that this notice had no legal effect, it was the resolution of a mere "political mass meeting." whose actings and doings are not binding. It was the

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only mode left to *advertise the world against the open frauds and robbery then being committed. The supporters of the state, the taxpayers, had been defrauded of their constitution by these invaders and usurpers, and being unrepresented in the legislature, the virtue, intelligence and property of the state upon whom the burden of paying these debts must fall, seeing the fraud, feeling their inability to meet their payments, knowing that the usurpers were remorseless and without character, met in primary assembly in each county in the state, and elected their wisest and best men to represent them in that convention. So imposing was the body that the Scott administration found it necessary to yield to the pressure of their moral influence, and, to deceive them, actually perpetrated another fraud, by presenting false statements of the debts and financial condition of the state.

This in a manner allayed apprehension, and induced the convention to adjourn without applying a specific remedy. In a few weeks after the adjournment, it was discovered that the accounts and representations were false, and made for the purpose of deception. In addition to this, every newspaper in this state, and newspapers in all the states, heralded this spoliation, this open, barefaced robbery. In the city of New York, the theatre of these infamous transactions, a leading journal exposed the whole fraud, discovered by a prominent member of the taxpayers' convention then on a visit to that city, and who had been deceived by these false representations; correspondents from all parts of the Union to leading journals denounced it. Mr. Pike, in his "Prostrate State," published in the city of New York at the very time these bonds were being put upon the market, branded these usurpers as "political banditti." To say now that the speculators in this branded paper are innocent holders for value without notice, is a proposition that defies the most extravagant credulity.

If ever a fraud was made patent to the world; if ever a people were put upon their guard against peculation and open robbery, it was done in these cases. The notice was so universal that no one dealt in the bonds, coupons and certificates, except the wildest speculators, at a ruinous discount. I adjudge the question of notice as fully established.

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*I take it, then, that every purchaser that dealt in these securities took the risk of the speculation, and relied upon the courts to enforce the obligations under the strict rules of technical law, not regarding the great wrong committed against the state. It was speculating upon the miseries of a helpless people. Just see to what extremes men will go where interest calls! In all this discussion we have heard a great deal about the innocent holder for value; the credit of the state jeopardized; her faith and honor pledged; but not a word about the innocent taxpayer who had no voice, whose hands were bound, whose tongue was tied, and yet who is expected to pay these obligations against which he was protesting all the while, in the most earnest way left open to him, the press of the country. Our own people have become interested in a small degree in those securities, hence their claims.

Now, mark! The legislature who passed the consolidation act was of the same complexion as those who created the debt. In that very consolidation act they repudiated outright $5,965,000 of conversion bonds, and now we are told that this respectable body has pledged the faith and credit of South Carolina to pay the debt created by the act.

It surprises me to hear gentlemen whose state pride cannot be questioned, who are proud of our history and traditions, arguing with sincerity that the faith and honor of their state could be pledged by such a band of invaders and shameless robbers. I cannot, as a South Carolina judge, admit that it was ever possible for the faith and honor of my native state to have been in the keeping of the legislatures and administrations who created the indebtedness. To say that these men, so entirely destitute of public virtue or private character, who acknowledged $5,965,000 of fraudulent debt and repudiated it, who scaled down the honest indebtedness of the state incurred before the war, dollar for dollar, to fifty cents on the dollar, to give a show of integrity to the debts contracted by themselves since their usurpation of the state government, could pledge in the same act the faith and honor of South Carolina, is a reproach to her history and traditions.

But, suppose it be conceded for the sake

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of the argument that *the government creating this indebtedness is constitutional and had the authority to pledge the faith and credit of the state, while it may be admitted that if a state or municipal government or a corporation empower its officers to create a debt by issuing bonds, coupons and certificates, the holder for value is not bound to look into the regularity of the issue; yet it never has been contended that he could waive the necessity of inquiring into the authority. In Marsh v. Fulton, 10 Wall. 683 [19 L. Ed. 1040], it was held that the holder, though bona fide, for value without notice, was bound to look into the origin of the title.

And no case brought to the attention of the court controverts this sound law. If, then,

these acts were passed without constitutional authority, what becomes of these obligations? Were they not issued without authority of law and void ab initio? Were not the purchasers bound to look into the origin of the title? To argue that the consolidation act is not an act to create a public debt, because it is entitled "An act to reduce the volume of the public debt," is a mere play upon words. If the volume of the debt thus to be reduced was without constitutional authority, by what power of argument, reason or logic can it be maintained that the new debt to take its place is exempt from the constitutional restriction? If the original debt was void for want of authority, what healing power has a subsequent act afflicted with the same infirmity? Does it not still create a public debt? Is the character of the legislation altered by reducing the volume? It appears to me that the matter is so clear from the statement of the proposition that it is a waste of words to pursue the argument.

It is further argued that Morton, Bliss & Co. v. Comptroller-General settles the question, that it is the law of the land. I agree with Judge Hudson that the decision is the law of that case; but emphatically deny that it is binding in this or any other court, when that constitutional question comes to be considered. No judge, who has independence of thought or self-respect, is bound to stultify himself, or stifle his conscience, because an appellate tribunal has made a decision, the error of which is patent on its face.

But I do insist that two-thirds of a quorum

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is not the two-*thirds required by the constitution. To maintain that proposition, appears to me to be revolting to the good sense and the good conscience of every just-minded man. As a judge, I am sworn to preserve, protect and defend the constitution of the state. Can I, with that oath staring me in the face, adopt such a heresy and nullify the organic law?

Is the decision of the Supreme Court more binding on me than the constitution of the state? Is the creature more to be respected than the creators?

It is not necessary, here, to argue what the convention meant when it used the term two-thirds in the constitution. If it did not receive two-thirds of the representations, it was a fraud on the people. To say that because a different phraseology is used in different articles of the constitution warrants a different rule of construction as to each, is not supported by reason or authority. What is the theory of the constitution? That a certain class of legislation shall require a two-thirds vote. This decided majority is intended to protect the people against the passage of acts which the convention supposed would be oppressive. It was intended as well to call the attention of the citizens to the legislation proposed, and by the difficulty of securing so decided a majority, prevent legislation which might inconvenience the people of the whole state, or impose burdens hard to bear.

If this be so, is it not obvious that the whole purpose of the constitution is defeated, to say that two-thirds of a quorum, which is a minority of the representation, is the two-thirds contemplated. I mean not to criticise those who differ from me. Gentlemen equally conscientious and patriotic, take a different view, but every man must judge for himself in a matter of conscience, and thus judging, I announce that I cannot give force and effect to this decision.

It is further contended this act is a compromise, and the state, having obtained the benefit of the compromise, is bound, in good faith, to carry out its terms. The proposition, as I look at it, appears to me to be a very curious one. It is not denied that the administrations of Scott, Moses and Chamberlain, having piled up a frightful mountain of debt, which they saw it was impossible for the impoverished taxpayers to meet,

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and the payment of which *they knew would be resisted, for most of it they had stolen, having repudiated $5,965,000 of the debt acknowledged to be fraudulent; having scaled the honest debts of the state fifty cents on the dollar, to give a semblance of integrity to these suspicious debts which they put on a footing with the honest, have effected a compromise which the innocent and honest taxpayers, whom they have so mercilessly robbed, are bound, in good faith, to carry out, now that they have come to their rights! As a question of political economy and policy, this may be a very good settlement. This court has nothing to do with that. It is for the legislature to adopt a policy. But, as a question of law and conscience, I hold that the securities enumerated in the decision of Judge Thomson, are not valid obligations binding on the state.

And it is so adjudged and decreed.

Dissenting Opinion.

HUDSON, J. These are cases made up for the purpose of testing the validity of certain bonds of the State of South Carolina, known as consolidation bonds, issued under act of December 22d, 1873, "to reduce the volume of the public debt."

The plaintiff, in each of the nine several cases above, alleges, respectively, that he is the lawful owner and holder for value of the coupon sued upon, and of the bond to which the same belongs; that demand has been made upon the proper officers of the state for payment, which has been refused, and demands judgment against the state, &c. Defences are set up by the state in her answers to these several suits, which, when grouped together, may be classed as follows:

1. That a portion of the vouchers surrendered, and for which these consolidated

bonds were in part issued, had been by the financial agent clipped or detached from certain "relief of the treasury bonds" which were never issued, and never became a charge against the state. The coupons so detached, it is alleged, amount to over $9000.

2. That a portion of the vouchers surrendered, and for which some of the bonds in suit were in part issued, had been detached from certain conversion bonds, and in the process of conversion should have been attached to the certificates of stock in lieu of

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*which the conversion bonds were issued, and filed away with said certificates of stock as vouchers. The coupons thus detached amount to nearly $10,000.

3. That a portion of the vouchers surrendered, and for which some of the bonds in suit were in part issued, were coupons maturing on or before July 1st, 1871, and as the state paid the interest on the public debt up to that period, these coupons must have been paid. The amount of coupons thus maturing, and in exchange for which consolidation bonds were issued, is $486,025.

4. That a portion of the vouchers entering into some of these bonds sued on embraces coupons surrendered by Y. J. P. Owens, as agent, by Governor Scott, and L. N. Zealy, amounting to $331,996, which coupons had been clipped by the financial agent from bonds before being issued, and had been by him sent to N. G. Parker to be fraudulently consolidated, and were consolidated in fraud of the act.

5. That a portion of the vouchers surrendered, and in exchange for which some of the bonds in suit were in part issued, consisted of bonds and coupons in the hands of the financial a[illegible], which had been by him hypothecated a[illegible] the time allowed by law. The amount thus hypothecated is alleged to have been $2,166,039.

6. That a portion of the surrendered vouchers which enter into some of the bonds in suit consists of the second issue of bonds "for the payment of interest on the public debt," alleged to be fraudulent.

7. A portion of the vouchers represented in part in some of the bonds in suit are the land commission bonds, all of which are alleged to be fraudulent.

8. That a large number of the bonds which were consolidated, and which are in part represented in some of the bonds in suit, were never registered in the treasury, as is required in Article IX., Section 14, of the constitution.

9. That the consolidation act, in so far as it creates a public debt, in unconstitutional and void, because not passed by a two-thirds vote of each branch of the general assembly, recorded by yeas and nays.

10. That several of the acts under which

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some of the recon*struction bonds were issued (and which bonds were subsequently consolidated) were not passed by the requisite two-thirds vote of the general assembly, and were therefore void.

A great deal of evidence, oral and documentary, was introduced to substantiate the aforesaid facts alleged by the state in her defence.

We propose, first, to consider the question of the validity of the various bonds in suit upon the hypothesis that the allegations of fact by the state are true; in other words, as if a demurrer to the answers had been filed by the bondholders.

To arrive at a correct conclusion upon the issues, we will be greatly aided by a brief statement of the financial legislation of the state from the ratification of the present constitution until the present period.

When the first legislature under the new constitution assembled, they found an empty treasury, and a state debt exceeding, in the aggregate, $7,000,000, including the obligations known as the bills receivable and the liability of the state for the outstanding bills of the bank of the state, and excluding the debt contracted in aid of the rebellion, so called, which had been declared void.

All reflecting men foresaw that under the administration of ignorance and cupidity there would be mismanagement of the finances of the state, and the speedy result was the inauguration of a system of reckless extravagance and profligacy on the part of the state officials and legislature, which soon rendered bankrupt the treasury of the state and destroyed her credit. * * *

After the foregoing epitome of facts no further comment is necessary upon the reckless management of the state finances by those entrusted therewith. Rather in a spirit of desperation than otherwise they procured or suffered the sixteenth amendment to the constitution to be adopted, which ended this species of financial legislation.

At this point we pause to recur to the steps which were taken during this wild extravagance, to investigate the condition of the debt of the state and the management of her finances. For this purpose committees were

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appointed by the legislature from time *to time, and their reports, and the action of that body upon them, bear materially upon the great question before us.

That grave doubts as to the validity of a portion of the public debt existed is a well-known fact, and this fact is admitted in the preamble to the validating act of March 16th, 1872, the avowed purpose of which act was to cure all supposed defects and irregularities in the issue of certain classes of bonds therein specifically enumerated. That such was the legal effect of the act is expressly held in the case of Morton, Bliss & Co. v. Comptroller-General, 4 S. C. 430.

In 1871, because of the grave charges of illegality in the issuing of bonds under the vari-

ous acts of the legislature, the house of representatives appointed a committee "to inquire into the matter of the over-issue of state bonds," and on the 20th of December, 1871, a joint committee of the house and senate was appointed to examine the accounts of the state treasurer, comptroller-general and financial agent. The report of the first committee is to be found on page 867 R. and R., 1871–2, and the full report of the joint committee, covering over three hundred pages, is appended to R. and R., 1871–2.

These reports are full and unsparing, and evince a spirit of candor somewhat surprising, considering the active complicity of its authors in the profligate financial legislation of the period. Be this as it may, it is certainly true that these reports laid before the legislature and the people of the state an amount of information touching the financial affairs of the state little, if any, short of the light that is shed upon the subject by the able report of the bond commission in March, 1878.

By these very elaborate reports of December, 1871, the state authorities, the legislature and the people were made aware of the number of bonds issued under each act, and of all the alleged defects and irregularities in their issue, sale and hypothecation; a fact of the utmost significance in its bearing upon the issues involved in these suits, as will be seen hereafter.

On March 16th, 1872, a little more than two months after these very full reports, and in the face of these grave charges therein touching the irregularities of various

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classes of bonds, the *legislature passed the validating act, which declared all these various classes of bonds to have been duly and regularly issued.

One year subsequent to this significant act, the suit of Morton, Bliss & Co. v. Comptroller-General, was decided. In this suit nearly every objection—certainly, every substantial objection—now raised was then urged against the validity of the several classes of bonds, in lieu of which consolidation bonds at fifty cents on the dollar have since been issued. Every question was decided squarely against the state and in favor of the bondholders in that suit. It decided that the "bills receivable bonds," the "interest on the public debt bonds," the "relief of the treasury bonds," the "land commission bonds," were valid obligations of the state. The force and effect of this decision cannot be avoided by unfavorable criticism. Until overruled it is the law of the case, and rights acquired under it cannot be divested, even should it be now overruled.

But to defeat the practical operation of this judgment, the legislature, on December 22d, 1873, repealed the provision of law which required the comptroller "to give notice of the rate or per centum necessary to be levied upon the taxable property of the state." The operation of the writ of mandamus was thus avoided and the bondholders were baffled, being thus, to some extent, left in doubt as to what amount of her debt the state was liable for, and what remedies were available to them to enforce their demands.

In this state of the case, it being once more doubtful as to the ultimate determination of the question involved, and yet with full light before them, the legislature resolved to effect a final settlement of the bond debt of the state, and with this view, on the 22d of December, 1873, passed the "Act to reduce the volume of the public debt," commonly known as the "consolidation act."

This act rejects $5,965,000 of the conversion bonds as being illegal and void, and provides for the funding, at fifty cents on the dollar, of the entire remainder of the outstanding bonds and certificates of stock, and all outstanding coupons maturing and to mature on January 1st, 1874.

To preclude misunderstanding, the amounts

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of outstanding *bonds and certificates of stock issued under each act are carefully given in figures, and conform exactly to the report of the treasurer of date October 13th, 1873.

By this report it appears that the entire debt of the state, evidenced by bonds and certificates of stock, was.....	$15,851,627 35
The act declared void.....	5,965,000 00
Leaving a balance of.....	$ 9,886,627 35

Which, funded as directed at fifty per cent., gives $4,943,313.67, as the ultimate consolidated debt of the state, being less than one-third of the original amount, and much less than the bond debt and liabilities of the state at the date of reconstruction. In the spring of 1874 the act was put in operation. The funding began, but had not proceeded far when a committee was appointed by the legislature, of which Senator T. C. Dunn was chairman, "to ascertain what bonds of the state have been funded under the act to reduce the volume of the public debt, and what interest coupons have been funded under said act." The committee proceeded to New York and examined the financial agent and his books, and gathered from these sources all available testimony. The full and searching report of this committee is to be found in R. and R., 1874–5. In it are reiterated the substantial objections as to over-issue, irregular hypothecation, &c., of bonds and funding of coupons now raised, and the committee, we are told, urged the attorney-general to take steps to enjoin the treasurer and arrest the work.

The legislature took no steps to interfere and the attorney-general refused so to do, and, in his annual report, gave, as his chief reason for declining to act, that the matters were concluded by the decision in Morton,

Bliss & Co. In March, 1875, the legislature appointed a committee to prepare an address to the governor for the removal of Treasurer Cardoza for violating the consolidation act in sundry particulars, chief among which were that he had issued consolidation bonds in exchange for a large amount of bonds which had been issued in excess of the number authorized by the various acts; and had issued consolidation bonds in exchange for a large number of coupons of bonds maturing before July 1st, 1871, and of others which

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had been *clipped from the bonds as they passed through the hands of the financial agent, and before the bonds were put upon the market. See charges and specifications in House Journal, 1874–5, pp. 632–3–4.

Cardoza was heard through able counsel, viz., Hon. W. D. Porter, of Charleston, C. D. Melton, of Columbia, and the Hon. Leroy F. Youmans, the present attorney-general of the state. The whole subject was, by them, ably handled. The treasurer was acquitted of the charges of violating the act; the address failed, the intelligent white democrats, almost to a man, sustaining his action, and he was directed to proceed in his work of funding. He did proceed, and funded a much greater number after than he had done before, the public generally supposing that the act was thus established as a final adjustment of the debt.

The validity of the bonds which he issued in lieu of the securities then assailed, is now put in issue upon objections to the surrendered securities, which were then urged before the legislature, and overruled by that body, and chiefly by the vote of the real representatives of the taxpayers. It is a notable fact that the arduous labors of the bond commission, of six months' duration, have brought to light few new facts touching the bond debt of the state. In the reports of the committee of 1871, Senator Dunn's committee of 1874, and the proceedings in the trial of Cardoza, nearly all the irregularities are charged which are preferred by the bond commission. The whole ground is covered if we add thereto the record in Morton, Bliss & Co. The result of much debate in the legislature upon the report of the bond commission, was the reference of the vexed question of the validity of the consolidation bonds to this court.

By voluntarily submitting the question of her liability to the courts, the state has rejected the idea of repudiation, and declared her purpose to abide by the law. No more honorable course could have been adopted.

This narrative of legislation brings us to the questions at issue.

In the outset we remarked that, in the discussion of these questions, we are bound to accept the constitution of 1868 as the fundamental law of the land, just as much so as we did that of 1790, and all acts of the legis-

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lature from 1868 to 1876 as binding *upon us as were acts prior to the war, subject, and only subject, to the well-established rules of construction and interpretation.

It is worse than folly, in a legal argument or legal opinion, to hold that we have been living under a usurpation, and hence are at liberty to abide by such laws of that period as are pleasing, and to disregard such as are odious. It matters not how republican, how radical, how ignorant and how corrupt may have been the legislatures from 1868 to 1876 inclusive, nevertheless, the laws which they placed upon the statute books are none the less binding upon us until repealed, and rights acquired under them are as much to be protected by courts, as rights acquired under prior legislation. Any other doctrine would be fundamentally wrong, and fruitful of indescribable confusion and evil. Legislatures can make laws and repeal statutes. Courts can only administer them as they are, saving only the right to interpret them and to declare their binding efficacy.

Nor are we called upon to determine the constitutionality of the consolidation act. The legislature has accepted it as valid and binding, and the treasurer of the state is still engaged in carrying out its provisions. The state is unwilling to surrender its marked advantages. We are only required to determine the validity of certain classes of consolidation bonds which are assailed, not on account of the supposed unconstitutionality of the act, but because it is alleged that these bonds were issued in exchange for vouchers not enumerated in the act, or not designed by it to be consolidated. We have no hesitation in saying, however, that the act is constitutional. It does not pretend to create a debt, but "to reduce the volume of the public debt." It is a settlement and adjustment of the debt of the state, and, this being its intention, it was regularly enacted.

Under the joint resolution of March 22d, 1878, establishing this court, its jurisdiction is "to hear and determine any case or cases made up or brought to test the validity of any of the consolidation bonds, coupons and certificates of stock, or any of the various classes of them mentioned in the report of the bond commission, as resting on vouchers not issued in accordance with law, and authorized to be consolidated" by the consolidation act of December 22d, 1873, "and also as

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not issued in accordance with *law, and further designated and described in Schedule G of the said report."

Section 9 provides that cases be made up "to test the validity of said consolidated bonds and coupons and certificates of stock mentioned in said Schedule 6, bringing before the court the various classes of vouchers which, it is alleged in the report of the said commission, impair the validity of the said

consolidated bonds, coupons or certificates of stock or any of them."

The consolidation act of December 22d, 1873, is drawn with care. It specifies the various classes of bonds to be funded, and the amounts outstanding; and designates the bonds which are void, and not to be funded. The valid are separated from the void. The question of the validity of outstanding bonds is here definitely settled by the legislature. No discretion is left to the treasurer, but his duties are ministerial and compulsory. The act was passed by the legislature deliberately, and with full light before them. Before them were spread the various acts under which the bonds were issued; the journals of the legislature, the reports of the treasurer, comptroller-general and financial agent; the very full reports of investigating committees, to say nothing of the discussions in the public press, and they also had the benefit of the legal decision of the case of Morton, Bliss & Co.

It is no apology to say that the legislature was a body of illiterate men. The binding efficacy of an act is not to be measured by the intelligence of its authors. We hold, therefore:

I.

That every bond issued under act of December 22d, 1873, for vouchers and securities therein enumerated, is a valid obligation of the state, notwithstanding any defects, irregularities and illegalities to which the surrendered vouchers may be obnoxious. These are all waived and effectually cured by the act, and it is vain to say that the legislature had no power to do this.

The state is ex vi termini of the act estopped from questioning the validity of any bond issued in exchange for any of the securities enumerated therein. The law of estoppel, whether by matter of record or in pais, applies to states as well as to individuals. By this law the hands of a state are

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effectually tied, *and her mouth as firmly sealed, as if she were an humble person. But not only by the terms of the act is the state estopped, but she is likewise, by her other actions, precluded from denying the obligation of any part of the debt recognized in the consolidation act as valid, and it was with a view to make this appear, that we gave a brief statement of her acts authorizing the issue of bonds and the doings of the legislature in the work of investigating the state's finances.

That a state may be estopped from setting up as a defence, mere irregularities in the exercise of a power conferred on its agents, by its failure to repudiate promptly such acts when performed, or to restrain their performance in time to prevent mischief, has been definitely settled by repeated adjudication.

A leading case, in support of this doctrine, is that of Delafield v. State of Illinois, 2 Hill 175; 26 Wend. 192; 8 Paige 327. Did space permit, we would be pleased to cite extracts from the several learned opinions delivered in this case. Suffice it to say, however, that it was contended by Delafield, who had purchased from the agent of the State of Illinois $500,000 of her bonds, at less than par (they were required to be sold at par), that the conduct of the governor, auditor and fund commissioners amounted to a ratification of the sale. The force of this argument gave great concern to the learned judges who tried the cause, and caused them to hesitate; but they finally accepted the argument of the counsel for the state, and held that these officers were incapable of making or of ratifying such a contract; that this power rested solely in the legislature, which body had, with great promptness, taken the proper steps, through the courts, to annul the sale.

Had the legislature of Illinois withheld action, or acquiesced in the sale, and a fortiori, had it confirmed the sale, the title of Delafield would have become good. Or had the bonds passed from Delafield to a bona fide holder without notice, the liability of the state would have been fixed. From 1868 to 1872 the state officials of South Carolina issued bonds under the various acts of the legislature, and placed them in the hands of the financial agent. In the management of these bonds these officials and the legislature not only acquiesced, but the latter body, as

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*the representatives of the sovereign people, in the validating act declared their issue regular and the bonds valid; and again, in the consolidation act, recognized them as valid obligations of the state.

In 1874, shortly after the funding had been commenced, under act of December 22d, 1873, the legislature was informed by Senator Dunn's committee that a large number of bonds in the hands of Kimpton had been hypothecated after the time allowed by law, and hence should not be consolidated, and that quite a number of coupons, tendered or about to be tendered for that purpose, were not valid against the state. The legislature took no measures to prevent the consolidation, and the attorney-general declined to interfere.

In March, 1875, in deliberating upon the address for the removal of Treasurer Cardoza, who was charged with issuing consolidation bonds for the securities which are now impeached, on the same grounds for which they were then assailed, the whole subject underwent a full investigation before the legislature. The address for his removal was rejected by the vote of the wisest members of that body, and he was directed to proceed to consolidate the outstanding bonds and coupons, which, it is now alleged, should not have been consolidated. Accordingly he did proceed, and is-

sued in lieu of such vouchers a larger number of consolidated bonds than had been issued before; all holders of these securities being more willing to avail themselves of the act, because they regarded the result of this trial as putting all questions under the act as finally at rest. Taxes were promptly levied to pay the interest on the consolidated debt, and the interest was regularly paid up to January 1st, 1877.

In Garrett v. Van Horne, 7 Ohio St. 327; in Burroughs on Taxation, § 168, et seq., and in other authorities and cases, the doctrine is laid down that payment of interest by taxation on bonds irregularly issued precludes defences denying the power to issue.

Again, the state received and enjoyed the proceeds of the sale and hypothecation of these bonds now impeached. Doubtless her officials and her financial agent did squander and misappropriate much of the money thus raised on bonds, but this is a matter between the state and her officers and agents, and cannot and ought not to affect the holders for value of her securities.

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*The "reconstruction" bonds and stocks authorized to be consolidated amount to $5,385,-100; consolidated at fifty per cent. gives $2,-692,550. From the proceeds of the bonds sold and hypothecated the financial agent raised $3,402,127.39, which exceeds the whole consolidated reconstruction debt by $709,-577.39.

The consideration of these consolidation bonds was therefore good and valuable. Can the state, retaining the money, be admitted to impeach the bonds? A principal cannot repudiate the illegal acts of his agents and at the same time retain the benefit thereof. The state cannot now deny, nor could she at any time have denied, the right of her agent to pledge or to sell her bonds while holding on to the money raised thereon. An offer to return this money would be a condition precedent essential to any steps to repudiate or to annul the sale or hypothecation. This she has never offered, nor does she now propose to do so, and hence she must stand by these sales and pledges. So says the Supreme Court of the United States, in Pendleton County v. Amy, 13 Wall. 297 [20 L. Ed. 579].

The financial agent made a settlement with the state under and by virtue of an act passed for that purpose, and a balance was struck in his favor, showing over $134,000 to be due him, which was another significant act of acquiescence in and approval of his sales and hypothecation; and if he had any stolen coupons, clipped from bonds or otherwise, his right to them was recognized in this settlement.

By the consolidation act and its repeated endorsement and full acceptance, a final settlement and adjustment of all vexed questions touching the bond debt of the state was apparently effected; and, in the opinion of her best citizens, was attained with marked pecuniary advantages to the state. By this adjustment the debt was reduced to an amount less than existed prior to 1868. Of the morals of the mode of its reduction we are not to speak, but only of the fact. People in and out of the state were now freely and confidingly investing in these new securities. The consols were thrown upon the market, and the rich and poor, trustees, charitable institutions, and men of all avocations, purchased them, confiding in the good faith of the state pledged on the face of each bond, and the strong guarantees of the act.

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*That faith and that contract the law will not permit the state to violate for any of the insufficient reasons alleged in the defence of these suits.

The aforesaid acts of acquiescence, waiver and confirmation, in our judgment, estop the state, and preclude the defence she now sets up to these suits.

II.

That the act of December 22d, 1873, creates a contract between the state and every holder of any of her securities named in that contract who has accepted the terms thereof, whereby, in consideration of mutual advantages, a composition of their claims was made which is final and conclusive. The third section of that act declares that the bonds and certificates of stock therein authorized to be issued "should bear upon their face the declaration that the payment of the interest and the redemption of the principal is secured by the levy of an annual tax of two mills upon the dollar upon the entire taxable property of the state, which declaration shall be considered a contract entered into between the state and every holder of said bonds and stocks."

The fifth section declares that "all coupons upon the bonds, and the interest orders of said certificates of stock herein authorized to be issued, shall be received in payment of all taxes due the state during the years in which they mature, except for taxes levied for the public schools."

That this legislation constitutes a contract which the state is not at liberty to violate is set at rest by repeated decisions of the Supreme Court of the United States.

The first is the case of State of New Jersey v. Wilson, 7 Cranch 164 [3 L. Ed. 303]. In this case it is, as it was in the case of Fletcher v. Peck [6 Cranch, 87, 3 L. Ed. 162] and in later cases, held that the clause of the constitution of the United States prohibiting states from passing bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, applies as well to contracts to which a state is a party as to contracts between individuals.

In Woodruff v. Trapnall, 10 How. 190 [13 L. Ed. 383], decided in 1850, it was held that the provision in an act of the legislature of

Arkansas, chartering a bank that the bills
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and notes of the bank shall *be received in all payments of debts due to the state, constituted a contract between the state and the holders of these notes which the state was not at liberty to break.

In the case of Furman v. Nichol, 8 Wall. 44 [19 L. Ed. 370], decided in 1868, a similar decision was made as to the bills of a bank chartered by the legislature of Tennessee. A number of other cases from the same court might be cited in which analogous principles are held, but it is enough to refer to but a single other, and that is the case of Wagner v. Stoll et al., from this state, in which the Supreme Court of the United States has made a like decision, touching a like provision in the charter of the bank of the State of South Carolina. [State v. Stoll] 17 Wall. 425 [21 L. Ed. 650].

The consolidation act was an adjustment or compromise offered by the state to the holders of certain carefully-enumerated outstanding stock, bonds and coupons, that if they would surrender these securities to be canceled, the state would issue to them, in lieu thereof, at the rate of fifty cents on the dollar, new bonds with guarantees that did not attach to those surrendered, to wit, the guarantees set forth above, in Sections 3 and 5 of the act.

Each holder of one of the designated securities who accepted the terms of the act, thereby entered into a solemn compromise and firm contract with the state, founded upon a good and valuable consideration, and binding upon the state.

Of the securities thus invited to be surrendered, $4,051,527.35 consisted of old bonds and stocks, the validity of which was never questioned.

Of the conversion bonds, $5,965,000 were repudiated as void; but of the balance of the reconstruction debt, carefully enumerated by amounts and classes, in the act, aggregating $5,835,100, nearly if not quite all had been questioned, as has been shown, by suits in court, by acts of the legislature, reports of committees, and through the public press; and questioned, too, upon the grounds set forth in the report of the bond commission and in the answers to these suits. In this condition of doubt as to the ultimate determination of the questions involved, and with full knowledge of the facts, the act of December 22d, 1873, was passed, wherein the state proposed to her creditors therein enumerated the terms of compromise contained
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therein. The con*sideration offered to the bondholders was a security, as was supposed and intended, unquestioned and unquestionable, with higher guarantees, at fifty cents on the dollar, in exchange for a security whose validity had been assailed.

The consideration moving the state was the reduction of her outstanding liabilities to less than one-third of its original amount.

The effect of the compromise was mutual gain to the parties in interest. The state gained in greatly reducing the volume of her debt, and the creditor gained in receiving a security of a higher grade, though less in amount, but of unquestionable validity. Story Eq. Jur., §§ 129–131, and cases there cited; Cann v. Cann, 1 P. Wms. 727; Stapleton v. Stapleton, 1 Atk. 10; Gibbons v. Count, 4 Ves. 840; Durham v. Wadlington, 2 Strob. Eq. 258.

Other cases, equally as strong and perhaps more applicable, might be referred to and citations made therefrom did space permit. We enumerate some of them: Ex parte Lucy, 21 Eng. L. & Eq. 199; Union Bank of Georgetown v. Geary, 5 Pet. 99 [8 L. Ed. 60]; Barlow v. Ocean Insurance Company, 3 Met. 270.

It makes no difference that we are dealing with a contract entered into by a sovereign state.

Contracts of states are measured by the same rule and governed by the same principles of law as control the compromises and contracts of private individuals. Murray v. City Council of Charleston, 96 U. S. 432 [24 L. Ed. 760].

The legislature had been informed of the several matters which, it was alleged, affected the validity of the coupons in question, and which were subsequently stated in the Dunn report; but, nevertheless, that body made no discrimination between the bonds and coupons, and the treasurer was required, under severe penalties, to consolidate all coupons maturing before January 1st, 1874, as well as the bonds to which they were attached or from which they had been clipped. In the work of consolidating these coupons the treasurer, in 1875, was interrupted by the aforesaid address for his removal, but the legislature, after mature deliberation, ordered him to proceed, and he did so.

The consolidation act is a compact and a
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compromise—a con*tract between the state and the holders of bonds issued in exchange for vouchers enumerated in the act.

This contract the courts are bound to recognize and enforce; and any attempt at legislation designed to alter, vary or violate the same, would be in violation of Section 10, Article I., of the constitution of the United States.

III.

These consolidation bonds are negotiable instruments, and in the hands of bona fide holders for value before maturity, if issued by competent authority, are unaffected by, and exempt from inquiry into, the circumstances under which they were put in circulation. 2 Dan. on Neg. Inst., § 1502.

States enjoy the rights and incur the liabilities of individuals when they deal in commercial paper, and such are these coupon bonds, so much so that in a recent New York

case coupons are held to be entitled to days of grace.

In Murray v. City Council of Charleston, 96 U. S. 432 [24 L. Ed. 760], it is said: "When states and cities borrow money and contract to repay it with interest, they are not acting as sovereignties; they come down to the level of ordinary individuals; their contracts have the same meaning as similar contracts between private persons."

Under the law of commercial paper or negotiable instruments, we are at a loss to perceive how these consolidation bonds are obnoxious to any of the defences alleged against them by the state. If they were issued by competent authority, being negotiable instruments, they are in the hands of innocent holders for value before maturity and without notice, exempt from inquiry into the circumstances under which they were put in circulation. City of Lexington v. Butler, 14 Wall. 296 [20 L. Ed. 809].

Were they issued by competent authority? Did the treasurer who issued them have authority to do so, and bind the state thereby? If so, their validity cannot be questioned. The purchaser is not bound to look further than to ascertain this fact. He need trace the title no further than the act empowering and directing the treasurer to issue them.

In the Floyd acceptance cases, the United

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States escaped the *payment of the accepted drafts, solely upon the ground that Floyd had no authority to bind the government by the acceptances. The court says: "Recurring to the written law as the conclusive source of such authority we may confidently assert that there is no express authority to any officer of the government to draw or accept bills of exchange."

But how is it in the case of these consolidation bonds? The treasurer is not only authorized to issue the bonds in lieu of certain designated securities upon their surrender, but is commanded to do so under severe penalties for refusal. This authority is clear and explicit, and is all that a purchaser of a consolidation bond would desire to see in investigating the title of a bond.

The bonds enumerated in Schedule 5 of the report of the bond commission, and acknowledged to be valid, were issued by the same agents, under the same law, and by the same authority as those in Schedule 6, which are alleged to be invalid, and the same officer of the state, under the same law, is continuing the work of consolidation. Should the purchaser of consolidation bonds see fit, however, to go further in his investigation of title, and examine the records of the treasury, he will there find that the bonds he intends to purchase were duly and regularly issued in exchange for vouchers expressly named in the act as proper to be exchanged. No higher proof of the validity of the bonds could be desired, and the purchase is accordingly made with the utmost confidence in its safety.

But, it is contended for the state, that although this be true, yet the securities exchanged are no securities at all, though named in the act; that they were really not binding on the state, and should not have been authorized by the act to be received in exchange for consolidation bonds. It is now too late to raise this objection. The state is estopped by the act. With great pains and accuracy the legislature designated the securities to be consolidated, and peremptorily commanded the treasurer to issue bonds in exchange therefor. This action, it must be remembered, was taken, in the face of the objections, against the securities to be funded, which are now so strenuously urged. The act leaves to the treasurer no discretion or option, but is mandatory, and imposes on that officer duties purely ministerial. So it

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cannot *now be objected that any of these bonds were issued without authority, or by an improper exercise of authority.

An improper exercise of authority could only occur in knowingly receiving in exchange for consolidation bonds, vouchers not included in the act. If, upon examining the act, he finds the securities tendered to be among those therein directed to be funded, his duty is to make the exchange. No discretion is left him. But suppose, by the terms of the act, the treasurer could act judicially and determine whether vouchers tendered, though named in the act, are valid or invalid. Clearly his judgment upon the question is final, as there is no appeal, and the consolidation bond issued by him becomes, in the hands of an innocent holder for value without notice, unimpeachable.

Should he err in his judgment, and issue a consolidation bond in exchange for invalid vouchers, how is that to impair the bonds in the hands of an innocent holder? Who is to be the loser, the state, who confided this work to its servant, or the innocent purchaser? Clearly the state must suffer. She, having conferred upon the treasurer authority to issue consolidation bonds, cannot, as against an innocent holder for value of her bonds, deny that the authority was conferred, or that it was properly exercised.

In Knox v. Aspinwall, 21 How. 540 [16 L. Ed. 208], the defence of the county against the suit of the plaintiff was, that the bonds were authorized to be issued only upon a vote of a majority of the voters of the county, after due notice of the time and place of the election, and that this due notice not having been given, the bonds were invalid.

The court holds that it was for the board to determine that question, and their decision could not be called in question "after the authority had been executed, the stock subscribed and the bonds issued and in the hands of innocent holders." Page 545. See,

too. Coloma v. Eaves, 92 U. S. 484 [23 L. Ed. 579]; Bissell v. City of Jefferson, 24 How. 288 [16 L. Ed. 664]; Moran v. Miami County, 2 Black 722 [17 L. Ed. 342]; Mercer Co. v. Hackett, 1 Wall. 83 [17 L. Ed. 548].

The same rule of law is laid down in Myer v. City of Muscatine, 1 Wall. 393 [17 L. Ed. 564]; Gelpcke v. City of Dubuque, 1 Wall. 175 [17 L. Ed. 520]; Supervisors v. Schenck, 5 Wall. 784 [18 L. Ed. 556]; Lynde v. County, 16 Wall. 11 [21 L. Ed. 272]; Commissioners v. January, 94 U. S. 205 [24 L. Ed. 110].

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*In County of Dallas v. McKenzie [94 U. S. 660, 24 L. Ed. 182], the general doctrine is thus tersely stated: "A holder for value is not affected by any irregularities or frauds or unfounded assumptions of authority on the part of the agents of the town or county."

By an unbroken series of decisions this doctrine has become the settled law of negotiable bonds put in circulation by towns, cities, counties and states. It is a rule of law founded in the wisest views of public policy and of fairness and justice. With any other rule prevailing, these negotiable instruments would be valueless in the market, and municipal corporations would be unable to realize money on them. Through the whole series of authorities on this point, from the earliest to the latest, the doctrine is clearly and uniformly sustained that, when the authority to issue the bonds exists, and the holder is a bona fide holder for value, the bond is valid; and that this rule of law is as applicable to bonds of states as to those of inferior municipal corporations.

The case of State of California v. Wells, Fargo & Co., 15 Cal. 236, bears with peculiar force upon the issues here involved, and we propose to close the list of references on this branch of the cases in hand by free extracts from it. * * *

Such is the sound reasoning of the court which adjudged the State of California liable for these bonds in the hands of a bona fide holder for value, though issued for warrants which had been stolen from the treasury.

Stolen negotiable paper in the hands of an innocent holder for value before maturity, and without notice, is a valid claim against the maker. This doctrine is a necessary incident to commercial paper, and is sustained by best authority. 2 Pars. on Cont. 118; 1 Dan. on Neg. Inst. 61.

Against the views above expressed the counsel for the state contend that the plaintiffs are not entitled to the protection which the law accords to innocent holders of negotiable paper, because there can be no such thing as an innocent holding of a void security which the law will protect, and that these bonds are void.

While it is true that a holder of a void security can derive no benefit from the fact that he became a purchaser for value before

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*maturity, and without notice, we cannot see that the doctrine is applicable to the present plaintiffs.

It has not been made to appear that any of the surrendered vouchers, in exchange for which consolidation bonds were issued, were void; and, furthermore, consolidation bonds were not affected by any infirmities which may have attached to the securities which have been surrendered and canceled. By the compromise tendered in said act and accepted by the creditors of the state, the old bonds, coupons and certificates of stock have been delivered up and canceled. They are dead, and neither they nor questions appertaining to their validity can be resurrected. Thereby the state entered into a new contract, founded in a valuable consideration; and its obligation she cannot, therefore, escape, by reviving issues from which the new contract is discharged and free. The state, therefore, in these suits, cannot avail herself of the doctrine that the law will not afford protection to the holders of said securities.

Before closing this branch of the case it may not be improper to notice a question pertinent to the rights of bona fide holders of these bonds. None of them, it seems, gave full value for them. They were purchased at prices varying with the fluctuations of the market. Are they entitled to set up these bonds against the state for their face value and interest? We hold that they are, and in support of this view we rely upon a recent decision of the United States Supreme Court settling this question in language clear, forcible, and consonant with sense and good law. Cromwell v. County of Sac., 96 U. S. 60 [24 L. Ed. 681].

So far we have considered the questions involved in these cases as if the facts alleged by the state to establish infirmities in the vouchers, in exchange for which the consolidation bonds were issued, were true; and have endeavored to show that even if such infirmities existed, they could not affect these bonds in the hands of the plaintiffs, who are innocent holders for value without notice and before maturity. The next inquiry is, whether the facts alleged by the state are sustained by proof, and whether the legal propositions advanced to impeach the bonds are well taken. The objections to the validity of these several bonds, both of fact and of law, set up in the several an-

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swers, are, *in the main, the same as are advanced in the report of the bond commission, and we propose to review them in the order therein set out.

The coupons embraced in objections 1, 2, 3 and 4 of the report, aggregate $837,246; and the charges in substance are, that these are coupons, some of which were clipped from bonds that were never issued, others

from bonds before they were issued, and a large number were coupons that matured before January 1st, 1871, up to which date the state promptly paid all accruing interest, and therefore must have paid these coupons so maturing. Bearing upon this branch of the case much testimony was introduced, a part of which is hearsay in its character, to the admission of which counsel for the plaintiffs very properly objected. An examination of all the legitimate testimony, and in fact the hearsay as well, does not enable me to discover satisfactory proof of the facts alleged. We are asked to infer these facts from certain documentary evidence, and by a method of speculative reasoning adopted by the bond commission.

On examining that report (and the evidence on these trials is not so strong, because there is much there that is purely hearsay,) we are constrained to say that we cannot adopt some of these conclusions. A court of justice would not be warranted in rendering judgment upon hypotheses and conjectures, such as are indulged in by the commission.

We are constrained to say that the state has failed to furnish the court with sufficient proof of the allegations touching these coupons; and, as we have already seen, such is the law that the facts, if established, would avail her nothing. State of California v. Wells, Fargo & Co., supra.

Objection 5 is, that a large number of bonds, to wit, $2,166,039, were hypothecated by the financial agent after the time allowed by law. After six months' patient investigation by the bond commission, with full power to receive and consider secondary evidence and hearsay testimony, and with access to and liberty to use the reports of previous investigating committees, the strongest allegation which the commission was able to make is, that "there is no evidence within the knowledge of the commission that these bonds, or any of them, had ever been

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pledged *within the time limited by law." In its most liberal construction, the evidence on this point adduced by the state amounts to no more, and falls short of proof. But the state having alleged that these bonds were not hypothecated within the lawful period, is bound to prove it.

It does not devolve upon the bondholders to prove that they were pledged within the time allowed, but it does devolve on the state to prove that they were not so pledged, before she can ask benefit from the allegation. But suppose the facts were so, was it not as competent for the legislature to ratify the pledge as for that body by act to extend the time in which to effect a loan, as it did by enlarging the time from twelve months to two years? And has not the hypothecation, whensoever made, been fully ratified?

The retention of the loan or proceeds of the pledge is the strongest act of ratification; but the validating act, the settlement with the financial agent, the consolidation act, and the action upon the charges against Cardoza, are all acts of ratification.

Does it lie in the mouth of the state retaining the proceeds of the hypothecation to set up this defense? We think not. But again, these hypothecated bonds could not be, or were not, redeemed, and being sold under forfeiture, passed into the hands of bona fide holders for value without notice. Surely, against their claim the state was without defense, as we have seen in State of Illinois v. Delafield, and other cases cited.

Objection 6 is that some of the vouchers, in exchange for which consolidation bonds were issued, are a part of the second issue of bonds under act of August 26th, 1868, "to negotiate a loan for the relief of the treasury," all of which second issue, the state alleges, were null and void, and should not have been consolidated.

A sufficient reply to this is, that the legislature thought otherwise, and so said expressly in the act of December 22d, 1873, in which the whole of the second issue then outstanding was directed to be consolidated. But looking at the act of August 26th, 1868, we see that, by its express terms, the governor was authorized to borrow, on coupon

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bonds of the state, within twelve *months from the passage of the act, $1,000,000. The amount to be borrowed is limited, and clearly the power is conferred to issue bonds until, by sale or hypothecation, that amount of money should be raised. The act can admit of no other interpretation than that the bonds could be issued and sold until $1,000,000 were realized, and of course the number of bonds necessary to this end would depend upon their market value.

The recital in the first $1,000,000 of bonds which were issued under this act being calculated to impair their market value, a second $1,000,000 was issued, with less prejudicial recitals, the object being to retire the first with this second issue. Much the largest part of the first issue was thus retired, and less of both were left outstanding than was sufficient to raise $1,000,000.

The next objection is against both issues of the land commission bonds, which the state alleges are void. She has received the proceeds of these bonds, and proposes to retain the same. She next has, by act of December 22d, 1873, forced the holders to surrender them and take consolidation bonds in exchange therefor at fifty cents on the dollar; and now gravely contends that these she is not liable to pay, because of alleged infirmities in the original.

The two grounds upon which the surrendered vouchers are assailed is, that the bonds were not issued to the land commis-

sion as required by the act; and, second, that they were sold below par.

Both objections are unavailing to invalidate the original land commission bonds, much less to avoid the payment of the bonds issued in consolidation thereof.

It is further urged that the scheme of the ordinance of the convention of 1868, providing for a land commission, has not been pursued by those charged with its execution. That ordinance was not binding on the legislature. The convention of 1868 was an extraordinary body, called in an extraordinary manner, by an extraordinary power, and for a special purpose, viz., to frame a constitution as a basis of reconstructing the state.

Beyond this special purpose it could not go. It possessed no legislative powers. This ordinance is legislative, and, never having been submitted to and ratified by a vote of

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the people, it *acquired not the sanction of a law, but, at most, could only be regarded as advisory. But the constitution of 1868 was so ratified, and so became the fundamental law of the land. By it alone the legislature is restricted. Its mandates and inhibitions must be obeyed. The bonds were issued under the act of the legislature, and not under the ordinance. The bonds, it is true, were not issued directly to the land commissioner, but by and with his consent and the advice of the advisory board, were placed in the hands of the financial agent of the state to be negotiated for the benefit of the land commission. The land commissioner got the proceeds and invested the same in lands, in the purchase of which atrocious frauds were doubtless perpetrated on the state. But she took the title to these lands, many tracts of which she has sold to purchasers.

Gross irregularities are apparent in the management of this important matter, but these cannot avoid the bonds. Between the state and her dishonest agents these matters must be settled, and, if loss there be, it must fall upon the state rather than the purchasers of her bonds, who are innocent of the frauds practiced. All these irregularities were well known to the state's representatives before the passage of the consolidation act, in which all these outstanding land commission bonds were directed to be consolidated. Behind that act the state cannot now be admitted to go in her efforts to impeach these bonds. It makes no difference that the original bonds may have been sold below par. For this infirmity the old bonds in the hands of innocent holders could not have been impeached (Illinois v. Delafield, supra), and surely the consolidation bonds cannot be.

The next defense is that the various classes of bonds issued under the several acts above enumerated were put upon the market in violation of Article IX., Section 14, of the constitution, which requires that "a correct registry of all such bonds shall be kept by the treasurer, in numerical order, so as always to exhibit the number and amount unpaid, and to whom severally made payable." This is evidently a mode of book-keeping prescribed by the constitution for the convenience and information of the state officials, and as a check and safeguard against the mischiefs that might result from less pre-

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caution. But its *observance or non-observance cannot and should not affect the validity of bonds issued by the state. It is a piece of clerical work which must necessarily follow and not precede the act of issuing the bonds. With it the bondholder has nothing to do, and should not be affected injuriously by a duty not his, and over which he can have no control.

But even in this allegation the state is not fully sustained. The journals of the treasury do show a registry of these bonds in most part, though not in the exact method contemplated by the constitution, arising from the fact that the bonds were not sold directly from the treasurer's office and to individual purchasers, in which event a detailed registry could and would have been kept, but they were issued en masse directly to the financial agent, and to him they were charged in perhaps the only method practicable. But this omission of duty, irregularity—if such it can be called—is, as well as all other irregularities, cured by the consolidation act. It is not a defect going to avoid the consolidation bonds.

The last defence of the state is that the acts of the legislature under which the various classes of surrendered vouchers were issued were not passed by the constitutional two-thirds vote of the general assembly, as required in Article IX., Sections 7, 10 and 14, of the constitution, and that the consolidation act, in so far as it attempts to make that a debt which before was void, is inoperative because not passed by a two-thirds vote.

This contention is res judicata. The Supreme Court of the state, in Morton, Bliss & Co. v. Comptroller-General, 4 S. C. 430, in August, 1873, before the act of December 22d, 1873, decided the first branch of this proposition against the state. In that judgment the court holds that the several acts under which the bonds were issued which have been subsequently consolidated, were passed by the constitutional two-thirds vote; until overruled by competent authority, this judgment is controlling. Rights which have been acquired under the law of that case cannot be divested now by its reversal. It would avail the state nothing, so far as these consolidation bonds are concerned, to obtain a reversal of that case; because both the

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state and bondholders *have acted upon it

as good law, and have entered into a contract which its reversal cannot avoid.

The state issued various classes of bonds, and, throwing them upon the market, raised money by their sale and hypothecation.

Upon these bonds she paid interest, and the money raised upon them went into the treasury, or should have gone there.

By the consolidation act the state offered an inducement little short of compulsion to the bondholders to surrender them and receive well-guaranteed bonds, at half their full value, in exchange for those surrendered. Accordingly large surrenders have been made, and the vouchers now lie canceled in the treasury. Now she seeks to repudiate the new consols for alleged defects of the canceled vouchers, but makes no offer to restore the money she realized on these vouchers. Her defence does not stand the test of law. With its policy the court has nothing to do.

As to the defence that the consolidation act, for want of a two-thirds vote, is void in so far as it creates a debt by making that an obligation which before was not such, we cannot see the force of it. The act neither creates nor pretends to create a debt. It is, from beginning to end, a proposed scheme of settlement and compromise of the outstanding bond debt of the state, and, such being its avowed purpose—viz., "to reduce the volume of the public debt"—it needed not a two-thirds vote, and was constitutionally enacted.

We have considered the question of the validity of the bond in suit, as if we were a court having full power to consider and determine the whole question, the entire matter at issue. The question referred to us, and the one we are specially created to decide, is the validity of certain classes of consolidation bonds, and not consolidation bonds generally.

The interpretation of the text of the joint resolution creating this court by the majority of its members is, in my judgment, a misconception.

Its jurisdiction is defined in Sections 1 and 9, and appears to me to be free from ambiguity, and too plain to admit of debate. The two sections, when read together, mean nothing more nor less than that the court is

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created to determine the validity, not *of consolidation bonds in general, but only those classes of them reported to be invalid by the bond commission.

Surely there is no room to misunderstand the meaning of this language. It gives to the court unlimited jurisdiction to determine the validity of those consolidated bonds, coupons and certificates of stock which the bond commission mention as resting on vouchers which were not issued in accordance with law, and which bonds, coupons and certificates of stock the bond commission arranged and tabulated in Schedule 6.

It is clear that the joint resolution creates a special court for a special purpose, and that is to determine the validity of a well-defined class of consolidated bonds, viz., those pronounced by the bond commission to be invalid, and classed in Schedule 6 of their report. Beyond this limited sphere the court cannot go; but for the purpose of deciding the validity of those particular bonds, its powers are as ample and plenary as the Court of Common Pleas. There is absolutely no restriction of power within this limit. It is true the court is empowered and required to suffer the litigants to bring before it the vouchers upon which the consolidated bonds rest. This makes evidence touching these vouchers expressly admissible, when otherwise it might not have been so. But making it admissible does not take from the court the power and duty to determine its ultimate effect upon the single question at issue, to wit, the validity of the consolidated bonds.

I am at a loss, therefore, to understand how the court has arrived at so strange a conclusion as is announced in its judgment. That conclusion is that we are appointed to determine not the validity of the consolidation bonds, coupons and certificates of stock, but the validity of the vouchers upon which they rest; and that if those vouchers are found to be invalid, we are compelled, by the terms of the joint resolution, to declare the bonds resting on them to be invalid. In other words, that if we possessed the general jurisdiction of the Court of Common Pleas, we might go further, and determine the validity of consolidation bonds, although resting on invalid vouchers, and would be at liberty to pronounce them valid, notwithstanding infirmities in the vouchers. But no such power, it is contended, is accorded this court, which, should it find the vouchers in-

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valid, is ex vi *termini of the joint resolution, precluded from further inquiry into the validity of the consolidation bonds resting thereon.

If this be the correct interpretation of the language of the legislature, the whole work of that body and the labors of the attorneys for the litigants and of this court are abortive. It leaves the main question, the one which perplexed the legislature, and which underlies this great public debt question, untouched, to wit, the legal effect of the consolidation act upon the bond debt of the state.

Furthermore, it leaves the bondholders entirely free to renew this contention in a court which will take cognizance of the question of the validity of the consolidation bonds.

I am constrained to differ with my brethren in the construction placed upon the joint resolution, and to dissent from the judgment of the court in the aforesaid test cases, for the reasons above given. And I hold that each of the bonds sued on is a valid obligation of the State of South Carolina, as is every bond issued in exchange for vouchers expressly named in the act of December 22d, 1873.

Suppose the debate upon the report of the bond commission had resulted in a proposed compromise of the consolidated bonds, coupons and certificates of stock designated and described in Schedule 6, and that the holders of these consols, accepting the terms of the compromise, had surrendered them and received new consols at a further reduced amount.

Would any man contend that the compromise was not binding on the state? Could the new consols, the fruit of such a compromise, be successfully resisted by the state in a court of justice? We hold not; and yet the present consolidated bonds occupy ground just as unassailable. They are valid obligations of the state, and their payment she cannot avoid on any recognized principles of law. She may escape through repudiation, but the law will lend her no helping hand in this last desperate resort.

Could South Carolina be honorably discharged from this heavy debt and all others that burden her impoverished people, no one would rejoice more than I would. I have, throughout this trial, keenly felt the heavy

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responsibility resting upon me, *and have endeavored to discharge my duty as a judge with an eye single to the law governing the case.

Better by far that the state should suffer through a proper vindication of the law by her courts than that temporary relief should accrue to the taxpayers through its perversion; and if relief shall come to her people through the judgment of those with whom I have, with much diffidence and great respect, differed, I will be most happy to acknowledge my error when demonstrated before the court of last resort.

I greatly regret that the court has so construed the joint resolution as to eschew and ignore the only question which can settle the issue between the state and the holders of her consolidated bonds, viz., the force and effect of the consolidation act, and has confined itself to the simple inquiry as to the infirmities of the surrendered and canceled vouchers.

It leaves the vexed question of the validity of the bonds in Schedule 6 res integra.

The plaintiffs appealed to this court, when these cases were argued upon the several points made in the court below.

†Messrs. James Conner, Simonton & Barker, C. R. Miles, Lord & Inglesby, and W. H. Brawley, for appellants.

†The Reporter has not been supplied with the arguments of all the counsel engaged on both sides. Those which he has are very able and exhaustive, but are necessarily omitted for want of space, as they are long, and no considerable abridgment of them can be made without doing the learned counsel injustice. They do not seem to be necessary to a full understanding of the points made.—REPORTER.

Messrs. L. F. Youmans, Attorney-General, Henry Meetze and Y. J. Pope, for the state.

September 29th, 1879. The opinion of the court was delivered by

McIVER, A. J. For a proper understanding of the questions raised by this appeal, as well as to show how it is that these actions are brought against the state in one of

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her own tribunals, *it will be necessary to make a brief statement of the legislation which gave rise to the cases.

On the 8th of June, 1877, (16 Stat. 318), the general assembly adopted a joint resolution, which, after reciting that "great uncertainty" existed in the minds of the taxpayers as to the real amount of the valid indebtedness of the state, provided for the appointment of a commission, consisting of three members of the senate and four members of the house of representatives, whose duty, in general terms, it should be to investigate and report upon such indebtedness. This commission, which, for convenience, will be called, as it is usually designated, the bond commission, were, amongst other things, specially directed to inquire and report: First. What was the entire amount of consolidated bonds and certificates of stock which had been issued under the provisions of an act entitled "An act to reduce the volume of the public debt and provide for the payment of the same," approved December 22d, 1873, (15 Stat. 518), which act will be called throughout this opinion the consolidation act. Second. "Whether there is, in the state treasurer's office, on file as vouchers, canceled bonds, coupons and certificates of stock of the issues described, issued in accordance with law and authorized to be consolidated by the act above recited, to the amount required by said act." These duties involved, therefore, the institution of four inquiries: First. What was the entire amount of consolidation bonds and stocks issued? Second. Whether there were vouchers in the treasurer's office in the shape of canceled bonds, coupons and certificates of stock for which the consolidation bonds and stocks were issued, to the amount required by the terms of the consolidation act? Third. Whether such vouchers—canceled bonds, coupons and certificates of stock—had been issued in accordance with law? Fourth. Whether such canceled bonds, &c., were amongst those which were authorized to be consolidated by the terms of the consolidation act? For, it will be remembered, that the bonds, coupons and certificates of stock authorized to be consolidated are specifically mentioned in that act, while others are not mentioned at all; and others again, a very large proportion—nearly all, in fact—of the conversion bonds, are special-

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ly *excepted from the operation of the act,

because they were issued "without any authority of law."

In due time the bond commission submitted an elaborate report, accompanied with various schedules—that called No. 6 being intended to represent the consolidation bonds and certificates "affected by vouchers which, in the judgment of the bond commission, were not issued in accordance with law and authorized to be consolidated under the act to reduce the volume of the public debt and provide for the payment of the same." Thereupon the general assembly, without either affirming or disaffirming the conclusions of the bond commission, so far as the validity of the bonds and stocks mentioned in Schedule No. 6 were concerned, passed a "joint resolution providing a mode of ascertaining the debt of the state and of liquidating and settling the same." March 22d, 1878, 16 Stat. 669. That resolution, in its first section, provides for the establishment of a Court of Claims, which "shall have jurisdiction to hear and determine any case or cases made up or brought to test the validity of any of the consolidated bonds, coupons and certificates of stock, or of any of the various classes of them, mentioned in the said report of the bond commission as resting on vouchers not issued in accordance with law and authorized to be consolidated by the act of the general assembly, approved December 22d, 1873, entitled 'An act to reduce the volume of the public debt and provide for the payment of the same,' and, also, as not issued in accordance with law, and further designated and described in Schedule 6 of said report. In Section 9 it is provided "that the attorney-general and his said associates, with the consent of the creditors of this state, or so many of them as shall be necessary, may make up a case or cases to be heard and determined in said court, in which, if practicable, the state shall be defendant, to test the validity of the said consolidated bonds and coupons and certificates of stock mentioned in said Schedule 6, bringing before the court the various classes of vouchers which, it is alleged in the report of the said commission, impair the validity of the said consolidated bonds, coupons and certificates of stock, or any of them." The tenth section directs "that there shall be levied for the current fiscal year a tax sufficient to pay the coupons and interest orders

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*maturing on the outstanding consolidation bonds and certificates of stock during the said fiscal year." The eleventh directs the payment of such interest on those consolidation bonds and certificates of stock mentioned in Schedule 5 as are subject to no valid objection, and then Section 12 provides for the payment of the interest for that and the preceding fiscal year on the several classes of consolidation bonds and certificates of stock mentioned in Schedule 6, "whenever there shall be a final adjudication as to the validity of the several classes of bonds and certificates of stock in the manner hereinbefore provided, and none other." In pursuance of the provisions of this resolution, the cases which we are now called upon to determine, being actions on coupons of the various classes of bonds mentioned in said Schedule 6, were brought before the Court of Claims, and the majority of that court have rendered their judgment in favor of the state, from which these appeals have been taken to this court, as provided for in the second Section of the said joint resolution.

The judgment of the Court of Claims is based upon a construction of the provisions of the joint resolution constituting it, by which they hold that their jurisdiction is limited to the inquiry, "Were the vouchers—that is, the canceled bonds, coupons and certificates of stock—issued in accordance with law and authorized to be consolidated by the act of the general assembly, approved December 22d, 1873?" But they carefully avoid the inquiry, as not, in their judgment, within the scope of their jurisdiction, whether, assuming this to be so, the bonds and certificates of stock issued under the provisions of the consolidation act, are, nevertheless, valid or invalid; or, to use their language, whether "the consolidation bonds issued under the act of 1873 are valid or invalid in other respects." It is very clear, from the grounds upon which that court base their conclusions, that they use the words "not in accordance with law," not in the sense that there was no act of the general assembly authorizing the issue of the bonds in question, but that the various provisions of the acts authorizing their issue were not complied with, and for that reason they were not issued "in accordance with law." But, as we shall see, the real question in these cases is, whether there were any acts au-

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thorizing the issue, and that *whether the bonds were issued in accordance with the various provisions of such acts, is a question comparatively unimportant. An act may fully authorize the issue of bonds, and yet the bonds may not have been issued in strict conformity to the provisions of such act—"not in accordance with law." Hence, the fundamental inquiry is, has the power to issue the bonds been conferred? not whether such power has been exercised "in accordance with" the various provisions of the law conferring the power.

We think it plain that the object of the resolution was to provide for "a final adjudication" of the vexed question as to what was the real debt of the state, and not simply to institute an inquiry into the consideration of that which purported to be such debt: for it is too plain a principle of law that a negotiable security—to which class it will be seen the bonds in question belong—whether issued by a private individual, a corporation, or a state, may constitute a valid debt, even

though originally based upon an insufficient or fraudulent consideration, or upon no consideration at all, to suppose that any one, much less the legislature which passed this resolution, could be ignorant of it. Hence, when the declared object of the legislature, as evidenced by the title of the resolution, was to provide "a mode of ascertaining the debt of the state, and of liquidating and settling the same," we cannot suppose that they intended that the investigation should stop half way, but that it should be complete and thorough—that the debt should be ascertained, and not simply the nature of the consideration upon which it rested. And as this investigation was referred to a judicial tribunal, the necessary inference is that the object was to submit the question to the test of legal principles. But, in addition to this, the express terms of the resolution leave no doubt in our minds as to the real intention. In the first section the Court of Claims is invested with jurisdiction to hear and determine any case brought "to test the validity," not of all the consolidation bonds, &c., but only of such of them as are "mentioned in the said report of the bond commission as resting on vouchers not issued in accordance with law." Now, the validity of these bonds could not be tested by limiting the inquiry, as the Court of Claims have done, to the

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*question whether the vouchers—the canceled bonds, &c.—were issued in accordance with law; for it may be, as we shall presently see, that such vouchers are liable to all the objections alleged against them in the judgment of the Court of Claims, and yet the consolidation bonds may still be valid debts of the state. It seems to us that the construction which the Court of Claims have placed upon the words "as resting," in the first section of the resolution, is altogether inadmissible, and that those words are used merely for the purpose of indicating a particular class of bonds whose validity is to be tested. For it will be remembered that while the objection urged by the bond commission to much the larger part of the bonds, &c., mentioned in Schedule 6 is because they were issued in exchange for bonds, coupons or stock which, though embraced within those mentioned in the consolidation act, were yet illegally consolidated, because they were not issued in accordance with law, the additional objection is made to others because they were issued in exchange for bonds, coupons or stock which were not embraced within those mentioned in the consolidation act. Hence, in the first section of the resolution provision is made for testing the validity not only of that class of bonds which is subject to the first objection, but also of that class of bonds which is subject to the second as well as the first objection, so as to insure the consideration of both objections. But were there any doubt, the provisions of the ninth section demonstrate that the construction which we have adopted is the correct one. In that section the attorney-general and his associates are directed to make up a case. What for? Not to try the question whether the vouchers upon which the consolidation bonds rest were issued in conformity to the provisions of the several acts authorizing their issue, but "to test the validity of the said consolidated bonds and coupons and certificates of stock mentioned in Schedule 6;" and certainly the additional words contained in that section—"bringing before the court the various classes of vouchers which it is alleged in the report of the said commission impair the validity of the said consolidated bonds, coupons and certificates of stock, or any of them"—cannot have the effect of either enlarging or contracting the issue which the cases were

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made up to *try. The only object of these additional words was to instruct the attorney-general and his associates to see to it that the grounds upon which the consolidation bonds had been assailed in the report of the bond commission should be brought fully before the court which was specially constituted to try the above-stated issue, and perhaps to provide that these vouchers should be competent evidence upon such trial. To make the matter still clearer, the legislature proceeded, in the tenth section, to direct the levy of a tax sufficient to pay the interest on all the consolidation bonds, &c.; and in the twelfth section provided that the interest on the bonds, &c., mentioned in Schedule 6 should be paid "whenever there shall be a final adjudication as to the validity of the said several classes of bonds and certificates of stock in the manner hereinbefore provided and none other." This language would seem to place it beyond dispute that it was intended to invest the Court of Claims with full jurisdiction to make "a final adjudication" (subject only to appeal, as provided in the resolution,) of all questions touching the validity of the consolidation bonds, and that when such adjudication was made no question as to the validity of such bonds should remain open; but if such adjudication was in favor of the bonds, then the interest thereon was to be paid. Now, as under the construction adopted by the Court of Claims some of these questions were left open and undecided, it is very clear to our minds that such construction was not the proper one.

In reviewing the judgment of the Court of Claims two general questions present themselves: First. Are the conclusions announced in that judgment as to the existence of the several infirmities alleged against the several classes of vouchers well founded? Second. If they are well founded, does it follow that the consolidation bonds, &c., resting in whole or in part upon such vouchers, are invalid and not binding obligations of the state? But, from the view which we take of this

case, it will only be necessary for us to consider the second question, as the answer to that will be conclusive of the result in the cases now before the court.

But for the fact that a different view has been suggested from a source which we have

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always been accustomed to treat with *the highest respect, we would have deemed it scarcely necessary to say that in the consideration of this question we are bound to regard the constitution of 1868 as the fundamental law of the state, and that all acts of the general assembly passed since its adoption, not in violation of any of its provisions or those of the constitution of the United States, are just as valid and of the same binding force and effect as any other statute passed at any other period of the history of the state. Any other view would be in violation of the fundamental principles upon which all republican governments rest, and would lead to inextricable confusion, and perhaps to civil commotion and strife. Without undertaking to inquire into the mode and manner by which the constitution of 1868 was adopted, it is enough to say that the people of the state have for years acquiesced in it, and treated it as the fundamental law of the state. The whole machinery of the state government was framed and is now operating under the provisions of that constitution. The very investigation which led to the framing of the cases now before the court was set on foot by a legislature elected in pursuance of its provisions. The Court of Claims, whose decision we are called upon to review, and this court itself, were both organized under and owe their authority to the constitution of 1868. It is manifest, therefore, that we are bound to regard that constitution as the fundamental law of the state, and all acts passed in pursuance of its provisions, as of the same binding force and effect as any that may be found on the statute-book passed prior to the adoption of that constitution. As Taney, C. J., says, in the case of Luther v. Borden, 7 How. 40 [12 L. Ed. 581]: "Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived; and if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government [or was an usurpation, as seems to

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be contended for by *one of the judges of the Court of Claims], it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power."

The legal principles which determine the answer to the question which we are called upon to solve are few in number, and are well established. It is manifest that the question depends upon the inquiry whether the state has, by a valid contract, bound itself to pay the amounts which the consolidation bonds in question purport to secure; for though the action in each of the cases is upon a coupon of one of such bonds, it may be regarded, and, for convenience, will be spoken of in this opinion, as if the action were upon the bond itself—the legal principles involved being alike applicable to an action on a coupon as on a bond. State v. Spartanburg and Union Railroad Company, 8 S. C. 163, recognizing City of Kenosha v. Lamson, 9 Wall. 483 [19 L. Ed. 725], and City of Lexington v. Butler, 14 Wall. 296 [20 L. Ed. 809].

Now, as the Supreme Court of the United States has uniformly held that, while they will, as a general rule, regard the construction given by state courts to state legislation and state constitutions as conclusive, such rule is subject to this exception; that where the question involved is not only whether such legislation impairs that which is admitted to be a contract, but whether that which is alleged to be a contract, is, in fact, a contract; (State Bank of Ohio v. Knoop, 16 How. 369 [14 L. Ed. 977]; Jefferson Branch Bank v. Skelly, 1 Bla. 436 [17 L. Ed. 173]; Gelpcke v. Dubuque, 1 Wall. 203 [17 L. Ed. 520]; Township of Pine Grove v. Talcott, 19 Wall. 666 [22 L. Ed. 227]); and as the general assembly, in providing for this investigation, has, in express terms, recognized the right of the parties to invoke the judgment of this tribunal of last resort, it becomes important to examine the question in the light of the decisions of the Supreme Court of the United States.

There can be no doubt but that coupon bonds like these under consideration, as well as the coupons thereof, are negotiable securities, and as such, are subject to the same rules of law as govern that class of securities. White v. Vermont R. R. Co., 21 How. 575 [16 L. Ed. 221]; Mercer County v. Hackett, 1 Wall. 83 [17 L. Ed. 548]; Crom-

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well v. *County of Sac., 96 U. S. 57 [24 L. Ed. 681]; Langston v. S. C. R. R. Co., 2 S. C. 248.

There is as little doubt that states which issue negotiable paper incur the same responsibilities which attach to individuals or corporations in like case. United States v. Bank of Metropolis, 15 Pet. 392 [10 L. Ed. 774]; Murray v. City Council, 96 U. S. 445 [24 L. Ed. 760]; Floyd Acceptances, 7 Wall. 666 [19 L. Ed. 169]. As is said in the last-named case, "it must be taken as settled that when

the United States becomes a party to what is called commercial paper—by which is meant that class of paper which is transferable by endorsement or delivery, and, between private parties, is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation—they are bound, in any court to whose jurisdiction they submit, by the same principles that govern individuals in their relations to such paper."

That the plaintiffs in these cases, as well as the holders of the coupons for which the bonds here in question were exchanged, are entitled to be regarded as bona fide holders before maturity, and entitled to all the rights incident thereto, we do not think can be questioned, as there is no proof to the contrary—at the very utmost, only suspicion. The rule upon this subject, as stated by Mr. Justice Swayne in the case of San Antonio v. Mehaffy, 96 U. S. 314 [24 L. Ed. 816], upon the authority of 2 Pars. on Bills and Notes, 9, and Pinkerton v. Bailey, 8 Wend. 600, is that "the holder of commercial paper, in the absence of proof to the contrary, is presumed to have taken it under-due for a valuable consideration, and without notice of any objection to which it was liable;" and, as is said by Mr. Justice Field in Cromwell v. County of Sac., 96 U. S. 57–8 [24 L. Ed. 681] in speaking of similar obligations issued by municipal corporations, "they are transferable by delivery, and, when issued by competent authority, pass into the hands of a bona fide purchaser for value before maturity, freed from any infirmity in their origin. Whatever fraud the officers authorized to issue them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent bona fide purchasers for value before maturity or the liability of the

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municipalities. As *with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part. Such is the decision of this court, and substantially its language, in the case of Murray v. Lardner, 2 Wall. 110 [17 L. Ed. 857]." This is a very strong case upon the subject. The facts, in brief, were these: Negotiable bonds were stolen from Lardner and sold to Murray, a broker in New York, under circumstances well calculated to excite his suspicion, though there was no proof of any actual guilty knowledge on his part—the complaint against him being that he did not prosecute the inquiry which such circumstances of suspicion naturally suggested. The court, after an elaborate review of the English cases, held that he was not bound to do so; that the possession of negotiable paper is presumptive proof of good title, and the burden of proof is upon him who assails the right claimed by the party in possession, and laid down the rule in very much the same language as that above quoted, declaring it to be settled law, from which there was no disposition to depart.

If, then, the bonds here in question are negotiable securities and the holders thereof are bona fide holders, our next inquiry will be as to the rule governing that class of securities in the hands of such holders. The rule, as stated by one of the most recent writers on this branch of commercial law, is that if such securities are issued by competent authority, they are, in the hands of such holders, unaffected by, and exempt from inquiry into, the circumstances under which they were put into circulation. 2 Dan. on Neg. Inst., §§ 1502–3. Now, as corporations or states issuing such paper must necessarily do so through the instrumentality of officers or agents, the only inquiry in such cases is, whether the officer or agent has been entrusted with authority to make and issue the paper, and it is not competent to inquire into his conduct in making the issue. If he has been guilty of irregularities or even frauds in exercising the power with which he has been entrusted, the loss thereby occasioned must fall upon the party who entrusted him

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with such power, and not upon the *innocent holder, who has taken the paper in the usual course of trade. The rule, as stated in Supervisors v. Schenck, 5 Wall. 784, is: "When a corporation has power, under any circumstances, to issue negotiable securities, the decision of this court is that the bona fide holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper." And this rule has been re-affirmed in the recent case of San Antonio v. Mehaffy, 96 U. S. 314 [24 L. Ed. 816], and again in the still more recent case of County of Macon v. Shores, 97 U. S. 278–9 [24 L. Ed. 889]. In the case of Commissioners of Knox County v. Aspinwall, 21 How. 545 [16 L. Ed. 208], it was held that where bonds have been issued by the board of county commissioners, under the authority of an act of the legislature, which prescribed certain conditions upon which the bonds were to be issued, "the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription by the board to the stock of the railroad company and the issuing of the bonds. The bonds, on their face, import a compliance with the law under which they were issued. 'This bond,' we quote, 'is issued in part pay-

ment of a subscription of $200,000 by the said Knox county to the capital stock, &c., by order of the board of commissioners,' in pursuance of the third section of act, &c. The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power." In the comparatively recent case of Coloma v. Eaves, 92 U. S. 490 [23 L. Ed. 579], the foregoing case is characterized as a leading case upon the subject, and is said to have established two propositions. First. "That the issue of the bonds containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with, and that the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it." Second. That "where legislative authority has been given to a municipality, or to its officers, to subscribe for

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the stock of a railroad company, *and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality." In Coloma v. Eaves, it is said that the first proposition has been re-affirmed in the cases of Moran v. Miami County, 2 Bla. 732 [17 L. Ed. 342]; Mercer County v. Hackett, 1 Wall. 83 [17 L. Ed. 548]; Supervisors v. Schenck, 5 Wall. 784 [18 L. Ed. 556]; and in Myer v. Muscatine, 1 Wall. 384 [17 L. Ed. 564], and, though doubted and dissented from by individual judges, has never been overruled. But, so far as the second proposition is concerned, it is said that it "has been so firmly seated in reason and authority that it cannot be shaken." This case has been repeatedly recognized and affirmed in a number of subsequent cases, among which may be mentioned Marcy v. Oswego, 92 U. S. 637 [23 L. Ed. 748]; Humboldt v. Long, 92 U. S. 642 [23 L. Ed. 752]; Commissioners v. Bolles, 94 U. S. 104 [24 L. Ed. 46]; County of Warren v. Marcy, 97 U. S. 96 [24 L. Ed. 977]. That the effect of these decisions is to reaffirm both of the propositions laid down in Knox County v. Aspinwall, is made manifest by what is said in the dissenting opinion of Mr. Justice Bradley in Coloma v. Eaves, 92 U. S. 493 [23 L. Ed. 579], and in the dissenting opinion of Mr. Justice Miller in Humboldt v. Long, 92 U. S. 649 [23 L. Ed. 752]. We think, therefore, that the result of the cases in the Supreme Court of the United States clearly is, that when an act of the legislature authorizes the issue of bonds by a municipal corporation upon certain conditions therein named, and the bonds are issued by the proper officers of such corporation, containing a recital that they are issued under the authority conferred by such act, that such recital is conclusive in favor of a bona fide holder—that all the necessary conditions named in the act have been complied with, as a purchaser is not bound to look beyond the legislative act and the recitals contained in the bonds. As was said in Marcy v. Oswego, 92 U. S. 641 [23 L. Ed. 748], "the subsequent issue of the bonds containing the recital above quoted—that they were issued 'by virtue of, and, in accordance with,' the legislative act, and in 'pursuance

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of, and *in accordance with, the vote of three-fifths of the legal voters of the township'—was another determination, not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds." The case of Weith and Arents v. City of Wilmington, 68 N. C. 24, which seems to be much relied upon by the counsel for the state, does not seem to us to be in conflict with the foregoing views; for in that case there was an absolute lack of power to issue the bonds which were there brought into question, and they were, therefore, properly held to be absolutely void even in the hands of a bona fide holder. The act under which the bonds were issued only authorized their issue in exchange for outstanding valid debts of the state, and as it was conceded that the original bond in exchange for which they were issued was given for money advanced in aid of the rebellion, which class of debts had been declared by the constitution of that state to be absolutely void, there was of course, no authority whatever for the issue of the bonds in question.

It is true that the cases which establish the foregoing principles arose upon bonds issued by municipal corporations; but if, as we have seen, negotiable bonds issued by states are subject to the same rules which govern that class of paper when issued by individuals or corporations, it is difficult to conceive how this can make any difference—and, indeed, it seems to be conceded in the argument on both sides that there is no distinction. The rule grows out of the principles which apply to that class of paper, and is in no wise dependent upon the character of the parties who make or issue such paper.

There is, however a very strong case in which these principles were applied to bonds issued by a state. California v. Wells, Fargo & Co., 15 Cal. 236. In that case certain warrants which had been issued by the proper authorities of the state were paid and deposited in the office of the state treasurer. The warrants were afterwards stolen and presented to the treasurer to be funded under the provisions of an act entitled "An act to pro-

vide for paying certain equitable claims against the state." Bonds were issued in exchange for the stolen warrants, the treasurer at the time not knowing that they had been

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stolen. Sub*sequently discovering this fact, he demanded the surrender of the bonds, and, upon refusal, brought this suit. There was no allegation or proof that the defendants knew the facts showing the fraud. It was held that, the warrants being negotiable paper, the bonds issued in exchange for them were valid debts in the hands of innocent holders, as the defendants were declared to be, in the absence of any proof to the contrary.

The practical question, then, in these cases is, were the bonds in question issued by competent authority? As the bonds purport to be the bonds of a state, and as a state cannot, like an individual, directly make and issue a bond, but must do so through the instrumentality of its officers or agents, who can only act under special authority conferred upon them, the inquiry in these cases is narrowed down to the question whether such authority was conferred upon the officers who issued the bonds in question. This authority, under the constitution of the state, could only be conferred by an act of the general assembly passed in conformity to the provisions of that instrument. Hence, it is not sufficient to show that an act of the general assembly has been passed authorizing the issue of such bonds, but it must also appear that such act is not subject to any constitutional objection. Town of South Ottawa v. Perkins, 94 U. S. 260 [24 L. Ed. 154]; Harshman v. Bates County, 92 U. S. 569 [23 L. Ed. 747]. Which, though overruled by the case of Cass County v. Johnston, 95 U. S. 360 [24 L. Ed. 416], as to the point that the act there in question was unconstitutional, may yet be regarded as authority for the proposition that if the act conferring the power to issue the bonds is unconstitutional the issue of such bonds will be without authority, and the bonds, even in the hands of a bona fide holder, will be invalid. So, too, if, by a proper construction of the terms of the act, the authority to issue the bonds is not conferred, the bonds will be invalid in the hands of a bona fide holder. As, for example, in the case of Marsh v. Fulton County, 10 Wall. 676 [19 L. Ed. 1040], where the act authorized the issue of bonds to one railroad corporation and the bonds in question were issued to another corporation, which, though a portion of the first-named corporation, was held to be a distinct and separate corporation; and in the case of Town of East Oakland v. Skinner, 94 U. S. 255 [24 L. Ed.

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The bonds, the validity of which we are called upon to inquire into, all purport to be bonds issued under the provisions of the consolidation act in exchange for coupons or other bonds called vouchers, purporting to have been previously issued under various acts of the general assembly, which will hereinafter be more particularly mentioned, and it is conceded that in every instance except one—that of the case of G. M. Walker, cashier—the vouchers were amongst those mentioned in the consolidation act, the bond in the case of Walker, cashier, being admitted to rest in part upon a batch of some $9000 of coupons detached from bonds for relief of the treasury, which are not included in the bonds of that class mentioned in the consolidation act. It is likewise conceded that the consolidation act was not passed "by the vote of two-thirds of the members of each branch of the general assembly," and was not submitted to a vote of the people, as is required by Article 16 of the constitution, adopted January 29th, 1873, (15 Stat. 466,) where after that time the general assembly undertakes "to create any further debt or obligation" on the part of the state. It cannot, therefore, be allowed the effect of creating "any further debt or obligation," and must be regarded as simply a scheme for the re-adjustment of the then existing debt. When, therefore, a question arises as to the validity of any bond which purports to have been issued under the provisions of that act, the inquiries are: 1. Was the debt for which such bond was issued a then existing debt of the state? 2. If so, was such debt amongst those provided for by the terms of the consolidation act? The answer to the first inquiry depends upon the answer to the question whether the "vouchers," which were surrendered upon the issue of the consolidation bonds now in question, were made and issued by competent

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authority. These *vouchers, in the cases now before the court, consist of coupons of bonds of various classes, which, for convenience, may be designated as bonds for relief of treasury—bonds for funding bills of the bank of the state—bonds for the payment of interest on the public debt, first issue—bonds for redemption of bills receivable—conversion bonds—bonds for payment of interest on the public debt, second issue—land commission bonds of 1869—land commission bonds of 1870. These coupons, as we have seen, were negotiable securities, and hence the only question is whether there was any lawful authority for their issue. Not wheth-

er in issuing them the officers charged with that duty complied with all the conditions prescribed in the acts authorizing their issue, or, as it is phrased in the decision of the Court of Claims, whether they were issued "in accordance with law," but was there a law authorizing their issue? The bonds to which these coupons were originally attached bear upon their face the evidence that they were issued in pursuance of certain acts of the general assembly, referring in express terms to such acts. These bonds, together with their coupons, must, therefore, upon the foregoing principles, be regarded as valid debts in the hands of bona fide holders, if the acts so referred to be constitutional and do in fact authorize their issue, even though it may now appear that all the conditions prescribed may not have been complied with, and even though there may have been the grossest frauds perpetrated by the officers and agents of the state in issuing them and putting them into circulation.

It is not and cannot be denied that the acts so referred to do in fact purport to authorize the issue of the bonds, except in the case of the second issue of bonds for the payment of the interest upon the public debt, for which there does not seem to have been the shadow of authority of any kind, and which, therefore, are absolutely void, no matter in whose hands they may be. For, if the act be construed as giving authority for a second issue, there is no conceivable reason why a third or fourth or an indefinite number of issues could not have been made upon the same construction; and, certainly, a construction leading to such a result cannot be the correct one. It is a mistake to suppose that because the consolidation act author-

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izes the funding of $1,197,000 of *bonds issued under the act of August 26th, 1868, to pay interest upon the public debt, there was, therefore, an over-issue under that act of $197,000. The act does not limit the amount of bonds to be issued to $1,000,000, but simply limits the amount to be raised to that sum, and judging from the prices at which the bonds were then selling, the only matter of surprise is that a much larger amount of bonds had not been issued. If this be so, then the only remaining question is whether these various acts purporting to authorize the issue of bonds are constitutional. Various objections have been raised to their constitutionality, which we will proceed to consider.

The constitutionality of the act entitled "An act to authorize a loan to redeem the obligations known as the bills receivable of the State of South Carolina," ratified August 26th, 1868, (14 Stat. 17,) is assailed upon the following grounds:

1. Because the debt thereby purported to be contracted was not for the purpose of defraying "extraordinary expenditures," and is, therefore, a violation of Article IX., Section 7, of the constitution. This objection is manifestly based upon the idea that the word "extraordinary" is used in that section in its popular sense, whereas it is clear from the context that it is only used in contradistinction to the word "ordinary," as the latter word is used in the sense of current or usual annual expenditures in a preceding section of the same article; for in Section 3 of that article the constitution declares that "The general assembly shall provide an annual tax sufficient to defray the expenses of the state for each year; and whenever it shall happen that such ordinary expenses of the state for any year shall exceed the income of the state for such year, the general assembly shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year." After thus providing for the expenses of the state government (of course meaning the government which was then to go into operation under the provisions of the constitution of 1868), designated as "ordinary," in the sense of current annual expenses, the constitution proceeds, in Section 7, to provide that "for the purpose of defraying extraordinary expenditures, the

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*state may contract public debts"—that is, for the purpose of defraying all such expenditures as do not fall within the class of ordinary current annual expenses, the state may contract debts. It is a matter of history that upon the reorganization of the state government of 1868, that government found itself not only with an empty treasury, but embarrassed with debts contracted by the government to which it had succeeded, some of which were floating in the shape of bills receivable and bills of the bank of the state, and some funded, upon which there was a large arrearage of past due interest. These debts were manifestly no part of the ordinary current annual expenses of the state government then going into operation, which the constitution required should be provided for by an annual tax, and to obtain the means of providing for such debts, as that government was undoubtedly bound to do, it was absolutely necessary that extraordinary expenditures should be incurred. This objection, therefore, does not appear to us to be well founded.

2. The next ground is that the act in question does not levy a tax annually sufficient to pay the annual interest of the debt, the contracting of which it purports to authorize, and is, therefore, in violation of one of the clauses of Article IX., Section 7, of the constitution. This objection is disposed of by the decision of this court in the case of Morton, Bliss & Co. v. Comptroller-General, 4 S. C. 430. Whether that decision be right or wrong, until overruled by competent author-

ity it stands as an authoritative construction of those sections of the constitution which are therein considered, binding not only upon every citizen of the state, but upon every tribunal which undertakes to administer its laws. To say, as has been said, that each judge has a right to determine for himself the proper construction of a clause of the constitution, regardless of the construction which may have been placed upon it by superior authority, amounts to saying that we have no settled law, and that we are living in a state of anarchy. It is quite true that each judge, as well as each of the other officers of the state, takes an oath to observe the constitution; but the constitution is not what he construes it to be, but what it is construed to be by the tribunal invested with the power to determine what is the proper

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construction. As long as *human language remains imperfect, it is absolutely essential that in every well-regulated community, living under a written constitution, there should be some tribunal of last resort, invested with the power to decide authoritatively upon the true meaning of the terms used in such constitutions. Here the Supreme Court is such tribunal, and when it has determined the proper construction of any particular clause of the constitution, such construction becomes the supreme law of the land, binding alike upon every citizen, every officer and every department of the state government, until it is reversed or altered by proper authority—that is, by a subsequent decision of the same tribunal, or by the Supreme Court of the United States in any of those cases which fall within the jurisdiction of that court. But even were we now to overrule the decision in the case of Morton, Bliss & Co. v. Comptroller-General, that could not affect the result in the cases now before the court. That decision was rendered August 27th, 1873, and at the very next session of the general assembly the act was passed under which the bonds were issued which are now called in question. These parties, therefore, must be regarded as having acted upon the faith of the law as it was then authoritatively declared to be, and their rights cannot be affected by any subsequent change in the law, whether such change be effected by statute or judicial decision. Such, at least, is declared to be the law by the Supreme Court of the United States, which, as we have seen, claims and exercises the right finally to decide such questions as we are now considering.

The rule, as stated by Taney, C. J. in Ohio Life Insurance and Trust Company v. Debolt, 16 How. 432 [14 L. Ed. 997], is as follows: "The sound and true rule is that if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature or decision of its courts altering the construction of the law." This rule was recognized and affirmed in the same terms in Gelpcke v. Dubuque, 1 Wall. 206 [17 L. Ed. 520], and to it was added the following language: "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this

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rule, *thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." This rule was again affirmed in the case of Lee County v. Rogers, 7 Wall. 181 [19 L. Ed. 160], and the question was there said to be not open for re-examination in the Supreme Court of the United States. It is perfectly manifest, therefore, that even were we now to overrule the case of Morton, Bliss & Co. v. Comptroller-General, it could not help the case of the state, in view of the rule thus firmly established, whether correctly or not we are not called upon to say, by the tribunal of last resort.

It is argued, however, that the decision in the case of Morton, Bliss & Co. v. Comptroller-General is confined to the five bonds there considered, none of which are under consideration here. This, we think, is an entire misconception of the effect of that decision. What is said in that case in regard to confining the remedy there applied for to the particular bonds mentioned in the pleadings, manifestly was not intended to have, and could not have, the effect of confining the operation of the decision of the various constitutional questions there discussed to the five bonds there in issue. A court of justice, when called upon to administer a remedy under a statute which is alleged to be unconstitutional, must first determine whether the statute is liable to the objection urged against it, and, having determined that question, it then proceeds to inquire whether the parties in the case have shown themselves entitled to such remedy. The two inquiries are entirely distinct and separate. Whether the objection urged against the constitutionality of the act is well founded is one thing, and whether the parties in the particular case have shown themselves entitled to the remedy which the act purports to give rise to is quite another thing. The decision of the one question was an authoritative construction of a particular clause of the constitution, which necessarily affects every one, while the decision of the other question could only affect the parties then before the court. The decision of the various constitutional questions raised in the case must necessarily be conclusive whenever the same questions arise in

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any other case, though the ap*plication of

the remedy claimed as following from such decision must be confined to the particular parties who had shown themselves entitled to such remedy.

3. The next ground upon which this act is claimed to be unconstitutional is that bills receivable are bills of credit, and are, therefore, within the prohibition contained in Article I., Section 10, of the constitution of the United States, which declares that "no state shall * * * emit bills of credit." Whether bills receivable are bills of credit within the meaning of that clause of the constitution of the United States it is not important for us now to consider, inasmuch as such a question is, in our judgment, wholly immaterial to the inquiry in which we are engaged. It will be observed that the prohibition is against the issue of such bills—not against their payment. If, therefore, these bills are of the character claimed for them, it may be that they would be invalid and worthless as legal obligations in the hands of those who happened to hold them, and that if the question were whether the payment of such bills could be enforced, or whether the officers of the state should be restrained from issuing them, the position taken by the attorney-general would be entitled to great consideration. Such, however, is not the question. It is not, and cannot be, denied that these bills were issued by the proper officers of the state, under an act of the general assembly purporting to confer authority for so doing, and that the state received full value for them. When the state government was reorganized in 1868, they found these bills outstanding, and, even though it should be admitted that they were unconstitutional in form, they nevertheless represented valid and bona fide indebtedness of the state. If the state saw fit, voluntarily, to recognize such indebtedness, even though it stood in a form which affected its legal obligation, and provided for paying it or funding it in a form to which there could be no constitutional objection, we cannot conceive how such an act on the part of the state, in conformity, as it was, to the plainest dictates of common honesty, can be regarded as in violation of the constitution of the United States. So far from emitting or issuing paper supposed to be within the prohibition of that constitution, the state, on the contrary, made provision for the with-

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drawal of such *paper from circulation, and replacing it with other evidences of indebtedness in a form which would not be amenable to such constitutional objection.

4. The next ground of objection is, that the act in question was not passed by the requisite constitutional majority, by which is meant that the journal of the senate does not show a vote of two-thirds of all of the members in favor of the passage of the act, but only shows a vote of two-thirds of those voting—a quorum of that body. This objection is also disposed of by the decision in the case of Morton, Bliss & Co. v. Comptroller-General, and it is not necessary to repeat here what we have already said in regard to the effect of that decision. Inasmuch, however, as this seems to be one of the principal grounds of objection to that decision, we may add that it is not without the support of very high authority upon this point. See County of Cass v. Johnston, 95 U. S. 360 [24 L. Ed. 416].

The next act, the constitutionality of which is called in question, is "An act to authorize a state loan to pay interest on the public debt," ratified August 26th, 1868. 14 Stat. 18. This act is assailed upon the first and second grounds upon which the foregoing act was attacked, and it is not deemed necessary to add anything to what we have said above, except to say that while current interest upon the public debt may properly fall within the class of "ordinary" expenses, yet the interest provided for in this act not being the current interest, it cannot be placed in that class, and must, therefore, fall into the class of "extraordinary expenditures;" for it will be remembered that while provision has been made by the act of September 21st, 1866, (13 Stat. 391), as supplemented by the act of December 20th, 1866, (13 Stat. 421), for funding the interest on the public debt up to July 1st, 1867, there would be no provision for the interest which accrued from July 1st, 1867, to November 1st, 1868, the beginning of the first fiscal year of the government as then reorganized, unless the act which we are now considering be regarded as intended to provide for such interest. It is a mistake to suppose that provision was made by taxation for such interest by the appropriation act of March 23d, 1869, (14 Stat. 237), for that act was expressly declared to be an act

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to make appropriations for the *year commencing in October, 1868, and hence no appropriation made by that act could be regarded as made for the payment of interest accrued prior to October, 1868. Then, too, the very language used in Section 7 of that act —"For the payment of the interest on the public debt, accrued since the same was last funded, five hundred thousand dollars"—shows that such appropriation was not designed to pay interest accrued prior to October, 1868. The interest was first funded—by the acts of 1866, above cited—up to July 1st, 1867; then the interest which accrued between July 1st, 1867, and November 1st, 1868, the commencement of the first fiscal year of the reorganized state government, was provided for by the act now under consideration, and must be regarded as the last funding of interest; and the interest for the year commencing in October, 1868, is provided for by the appropriation act of March 23d, 1869, above cited; while, by the act of March 1st, 1870, (14 Stat. 382), an appropria-

tion is made to pay the interest on the public debt for the year commencing November 1st, 1869; and so on, from year to year, as long as the general assembly saw fit to provide for the payment of interest on the public debt. Nor can any argument be drawn from the fact that the amount authorized to be raised by the act now under consideration largely exceeded the estimate presented by the comptroller-general at the beginning of the regular session of 1868–9, of the amount of interest due on the first of October, 1868, for that was only an estimate, and it might very well have been supposed that such estimate, made so soon after the reorganization of the state government by an officer who had had no previous acquaintance with the operations of the government which had been superseded, would not prove to be correct, and hence the act under consideration might very well give authority to the governor to borrow a sum not exceeding $1,000,000, especially when such authority was qualified by the words, "or so much thereof as he may deem necessary." And it must be remembered that such estimate did not include the interest for the month of October, nor did it include any interest upon such additions to the public debt as had been authorized by acts passed at the preceding extra session.

The next act which we propose to consider

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is, "An act to close *the operations of the Bank of the State," ratified September 15th, 1868. 14 Stat. 21. The counsel for the state discuss this act as if the bonds issued under its authority created a new debt on the part of the state, and, therefore, contend that its constitutionality must be tested by the provisions of Section 7, Article IX., of the constitution, for they urge the same objections as were urged against the foregoing acts. But the act now in question does not purport to create any new debt. It does not even authorize the borrowing of money to pay an old debt. It simply authorizes the funding of certain obligations for which the state was liable, then outstanding, in the shape of bills of the bank, in the bonds authorized by the act. In other words, instead of authorizing the issue of bonds to raise money to pay outstanding debts, it simply authorizes the change of the form of such indebtedness from bank bills to bonds, and its constitutionality must be tested by the provisions of Section 10, rather than Section 7, of Article IX. of the constitution. Such objections cannot, therefore, be sustained. Another ground of objection, however, is that these bills were not "stock, bonds or other evidences of indebtedness of the state, issued by it," and the act is, for that reason, in violation of the provisions of Section 10, Article IX., of the constitution. It is quite true that these bank bills were not either stocks or bonds of the state, but we are at a loss to conceive how any one can deny, in view of the provisions of the bank charter, that such bills were "evidences of indebtedness," which, though not previously issued directly by the state, were issued by a corporation created by the state, in which it was the sole stockholder, under express authority from the state, for the sole benefit of the state. For the charter expressly provided that "the faith of the state is hereby pledged for the support of the said bank, and to supply any deficiency in the funds specially pledged, and to make good all losses arising from such deficiency." 8 Stat. 24. Of course, it must be remembered that the liability of the state for these bills was incurred under a constitution which did not impose the same limitations upon the power of the general assembly to contract debts as are contained in the constitution of 1868, and the state having, under the previous constitution, incurred a

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liability, evidenced by these bank bills, *issued by its authority, we see no reason why the present state government, under the present constitution, may not change the form of such liability by converting these "evidences of indebtness" in the shape of bank bills into bonds.

The next act to be considered is "An act to authorize a loan for the relief of the treasury," approved February 17th, 1869. 14 Stat. 182. This act we regard as liable to two constitutional objections: 1st. It purports to create a debt which was not "for the purpose of defraying extraordinary expenditures;" and, 2d. The debt therein sought to be created is not "for some single object," and such object is not "distinctly specified therein," and it is, therefore, in violation of two of the clauses of Section 7, Article IX., of the constitution. As we have already seen, provision had previously been made for the redemption of the bills receivable and for the payment of the interest on the public debt then in arrear, and we are not aware of any other expenditures which the general assembly were then called upon to provide for which could properly be classed amongst "extraordinary expenditures," and none such have been suggested to us. The most natural inference is that the object of this act was to raise money to meet the current demands upon the treasury, in anticipation of the collection of the taxes levied for that purpose, and such demands, as we have seen, fall into the class of ordinary expenses, and cannot, therefore, be regarded as "extraordinary expenditures." Again, the debt which this act purports to authorize cannot be said to be "for some single object," nor is such object "distinctly specified therein." Money borrowed "for the relief of the treasury" might and would be applied to as many different objects as there were demands upon the treasury. We think, therefore, that this act clearly violates both

clauses of the constitution above referred to, and, upon the principles heretofore announced in this opinion, every bond, together with its coupons, issued under the authority of this act is absolutely void even in the hands of a bona fide holder because issued without any authority whatever, and hence every consolidation bond resting upon such bonds or coupons is, to the extent that it does rest upon such bonds or coupons, not a valid debt of the State of South Carolina.

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*The next act which we propose to consider is "An act to provide for the appointment of a land commissioner and to define his powers and duties," approved March 27th, 1869, (14 Stat. 275,) and the act amendatory thereof, approved March 1st, 1870, (14 Stat. 385.) The constitutionality of these acts is assailed: 1. Upon the ground that they relate to more than one subject and such subjects are not expressed in their titles, and they are, therefore, in violation of Section 20, Article II., of the constitution. This objection has already been disposed of by the decision in the case of Morton, Bliss & Co. v. Comptroller-General, to which may be added the case of San Antonio v. Mehaffy, 96 U. S. 312 [24 L. Ed. 816], in which the Supreme Court of the United States put the same construction upon a similar clause in the constitution of the State of Texas. 2. Upon the ground that these acts were not passed by the requisite constitutional majority—that is, by the vote of two-thirds of all the members of each branch of the general assembly—but only by the vote of two-thirds of the members voting, being a quorum. This ground has been already considered and disposed of. 3. Another objection, however, is that it does not appear that the vote upon the passage of the first of these two acts now under consideration was entered upon the journal of the house of representatives as is required by Section 7, Article IX., of the constitution, which, in speaking of acts authorizing the contracting of public debts, provides that "no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the general assembly, to be recorded, by yeas and nays, on the journals of each house respectively." This provision, it will be observed, is more stringent than that contained in Section 21, Article II., providing that "no bill shall have the force of law until it shall have been read three times, and on three several days, in each house." In the former, the constitution expressly requires, not only that such law shall be passed by a vote of two-thirds of the members, but also that such vote shall "be recorded, by yeas and nays, on the journals of each house," while in the latter the requirement simply is that the bill shall be read three times, and there is no requirement that the fact that it has been so read shall be recorded on the journal. Hence,

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while it would be entirely *legitimate to infer that an act which has the great seal of the state affixed to it has been signed by the presiding officers of the two houses, approved by the governor, or, in the absence of such approval, certified to by the secretary of state as having become a law by reason of the failure of the governor to return it within the time required by the constitution, deposited in the archives of the state and published among the laws, under the superintendence of the secretary of state, is a valid law, even though the journals may not affirmatively show that the act was read three times, as we have decided in the case of City Council of Charleston v. Grand Lodge of A. F. M., and as has been decided by the Supreme Court of Illinois under a similar clause in the constitution of that state (Supervisors of Schuyler County v. People, 25 Ill. 181,) yet when the constitution expressly requires that the vote upon the passage of a bill shall be entered upon the journal, and the journal does not contain such entry, there is no room for inference, but there is positive proof of the omission of one of the constitutional requirements, and, in such a case, the bill would fail to become a law. Town of South Ottawa v. Perkins, 94 U. S. 260 [24 L. Ed. 154], in which the Illinois cases are collected, and from them it will appear that the Supreme Court of that state draws the same distinction that we have done. If, therefore, the objection which we are now considering be well founded in fact, it is well taken. It appears to us, however, from an inspection of the journal of the house of representatives, that there is no foundation in fact for the objection. It is quite true that on page 425 of house journal for the sessions of 1868–69, it does not appear that the vote on the third reading of the original bill was taken by yeas and nays, or that such vote was recorded by yeas and nays on the journal; but it is very obvious that this was not the vote upon the bill as it finally passed, for an inspection of the senate journal for the same session, pages 521–526, will show that the bill which came from the house was entirely remodeled, and the house journal, pages 630–632, shows that the bill, as thus remodeled, was finally passed by a two-thirds vote—yeas 50, nays 15—and that such vote was recorded by yeas and nays on the journal of the house. This we regard as a substantial compliance with the provisions of the constitution, more so,

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in *fact, than if the journal simply showed the passage of the bill as it originally went from the house by a two-thirds vote and did not show such a vote upon the final passage of the bill after it was amended in the senate, for the vote on the bill as it went from the house would not show the assent of the requisite two-thirds of that body to the provisions which eventually became the

law, while the vote upon the bill after it was amended in the senate did show such assent, and this is the real object of that clause of the constitution. It seems to have been the practice of the house of representatives at the time these acts were passed, contrary to what had been previously the practice, to read bills originating in the house three times before they were sent to the senate, whereas under the former practice after a bill had received two readings in the house it was sent to the senate for its consideration, and, if amended in that body, such amendments could be considered when the bill came back to the house for its third reading. But under the other practice, where a bill has been so materially altered in the senate as the one now under consideration seems to have been, it would practically defeat the very object of the constitutional provision now under consideration to hold that a two-thirds vote on the bill, as it went from the house after its third reading there, would satisfy the requirements of such provision. For it might frequently happen, just as it did happen in reference to the very act we are discussing, that its features might be very materially changed in the senate and totally new provisions inserted, which might be passed by a bare majority of a quorum in the house, and the various provisions of the act would not in fact have what this provision of the constitution was intended to secure—the assent of two-thirds of both branches of the general assembly to all the various provisions of the act; so that when the journals show, as they do in reference to the act under consideration, that the bill, as amended, received the assent of the requisite two-thirds of both branches of the general assembly, we think the constitutional requirement was fully complied with.

As to the "Act to provide for the conversion of the state securities," approved March 23d, 1869, (14 Stat. 241,) it not being an act to authorize the borrowing of money or the

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contracting of *any new debt, but simply providing for a change in the form of that then existing, the question of the validity of the bonds issued under it must be determined by an inquiry into the validity of the securities therein authorized to be converted. So that any bond issued under this act, which was not issued in exchange for some then-existing valid debt of the state, in the form of stocks or bonds, was issued "without any authority of law," and is, therefore, absolutely void, even in the hands of a bona fide holder.

The "Act to authorize the financial agent of the State of South Carolina to pledge state bonds as collateral security, and for other purposes," approved March 26th, 1869, (14 Stat. 258,) will next be considered. It is not pretended that the object of this act was to authorize the issue of any bonds or the contracting of any additional debt, for its sole purpose seems to have been to authorize the financial agent to dispose of the bonds, the issue of which had been previously or should be thereafter authorized, in a particular way. This act, therefore, did not come within the provisions of Article IX., Section 7, of the constitution, and the fact that it was not passed by a two-thirds vote cannot affect its validity. In Article IX., Section 14, the constitution prescribes that "Any debt contracted by the state shall be by loan on state bonds," but how such loans are to be effected is left to the discretion of the general assembly. Whether they shall be by a sale of the bonds, (the most questionable mode, if the words above quoted be given a rigid literal interpretation,) by direct borrowing, as in case of one individual borrowing from his neighbor a thousand dollars, and giving his bond directly to the lender for the amount, (a mode so inconvenient in case of a state as to be almost impracticable,) or by a deposit of the bonds as collateral security for such sums as may from time to time be advanced to the state, as its necessities require, are all matters which are left for the general assembly to determine. We do not see, therefore, how the act now under consideration can be regarded as in conflict with any provision of the constitution.

The last objection which is urged against all the bonds issued under the several acts which we have been considering is, that they were not registered in conformity to the provisions

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of Sec*tion 14 of Article IX. of the constitution. The language of that section is as follows: "Any debt created by the state shall be by loan on state bonds of amounts not less than fifty dollars each, on interest, payable within twenty years after the final passage of the law authorizing such debt. A correct registry of all such bonds shall be kept by the treasurer, in numerical order, so as always to exhibit the number and amount unpaid, and to whom severally payable." It is very manifest that this provision in regard to the registry of the bonds is a mere direction to the treasurer, and was not designed to be a condition precedent, the performance of which should be necessary to the validity of the bonds. It does not provide that before any bond is issued it shall be registered by the treasurer, but it is clear that the registration is to follow, not precede, the issue of the bonds, and could not, therefore, affect their validity. No other construction is consistent with the language used, for it will be observed that the treasurer is not only required to keep such registry, but he is to keep it "so as always to exhibit the number and amount unpaid." Now, as the mode of keeping the registry must be regarded as quite as imperative as the direction to keep it, it must be manifest that it never was designed that this provision of the constitution should be

regarded as essential to the validity of the bonds, for in order to keep such registry "so as always to exhibit the number and amount unpaid," it would, of course, be necessary for the treasurer to make alterations in the registry, from time to time, as one or more of the bonds were paid; and surely it would not be pretended that the failure of that officer to keep the registry in such mode, by making such alterations as from time to time became necessary, would invalidate bonds which otherwise would have been good. The constitution was never designed to afford the means of setting a trap for the holders of the bonds of the state by making their rights dependent upon the performance or non-performance of duty by one of the officers of the state after the bonds had been issued.

Our conclusions, therefore, are:

1. That all the bonds issued under an act entitled "An act to reduce the volume of the public debt and provide for the payment of the same," are valid obligations of the

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State of South *Carolina, except as follows: 1st. Such as were issued in exchange for bonds issued under the act entitled "An act to authorize a loan for the relief of the treasury," or for the coupons of such bonds. 2d. Such as were issued in exchange for the second issue of bonds under an act entitled "An act to authorize a state loan to pay interest on the public debt," or the coupons of such bonds. 3d. Such as were issued in exchange for those conversion bonds which were issued in exchange for either of the two classes of bonds last mentioned, viz., bonds for relief of the treasury and the second issue of bonds to pay interest on the public debt, or in exchange for the coupons of such conversion bonds.

2. If any consolidation bond rests wholly upon any of the three objectionable classes of bonds or coupons just mentioned, then it is wholly void; but if it rests only in part upon such objectionable bonds and coupons, then it is only void to the extent which it does rest upon such objectionable bonds or coupons, and for the balance it is a valid obligation of the state.

3. That the burden of proof is upon the state to show that any particular bond which may be brought into question does rest either in whole or in part upon such objectionable bonds or coupons, and if in part only, then the state must show what part is so affected.

The judgment of the Court of Claims is set aside, and the cases are remanded to that court for such further proceedings as may be necessary under the principles herein announced.

WILLARD, C. J. It will be unnecessary to add anything to what has been already said, in the opinion of the court, as to those matters in respect to which there is entire unanimity in the court. I shall confine myself to noticing the leading points, as to which some difference of opinion has arisen in the court.

The first question that will be considered is, whether constitutional authority existed for the issuing of the class of bonds that have been termed the second issue of bonds to pay interest on the public debt. The history of the transaction in question is briefly as follows: An act was passed August 26th, 1868, entitled "An act to authorize a state loan to pay interest on the public debt,"

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*authorizing the governor "to borrow, on the credit of the State of South Carolina, on coupon bonds, within twelve months after the passage of this act, a sum not exceeding $1,000,000, or as much thereof as he may deem necessary to pay interest on the public debt." It appears in evidence that bonds to the nominal amount of $1,000,000 were issued and sold under the authority of this act. It also appears that after such bonds had been so issued, and, as we must assume from the evidence, had become the property of private individuals, it was urged upon the financial board, which consisted of the governor, the attorney-general and the state treasurer, that the bonds would be more salable if in a form that would not make it appear that they were intended for the payment of interest on the public debt. The financial board thereupon assumed authority to retire the outstanding issue by replacing it with bonds prepared under the same act, and bearing the same date as the bonds which had already been issued thereunder, but omitting from their face the objectionable statement that was supposed to prejudice their marketable quality. It appears also that bonds so issued for the sole purpose of replacing such previous issue were sold for original bonds, and were not, in fact, used for the purpose of replacing previous issues. The question is, whether sufficient authority existed in the financial board to create bonds of the class just named that in the hands of a bona fide holder for value, would constitute a valid obligation of the state.

The first question is one of fact, namely, what was the nature of the authority that the financial board thus attempted to exercise? This must be disposed of upon the evidence in the case. It is very clear that what the financial board assumed to do, and all it assumed to do, was to change in point of form as to an immaterial matter, so far as it affected the liability of the state, outstanding obligations of the state. It is not pretended that the board intended to create one dollar of new debt. There is not the slightest evidence that the governor, who was a member of the board intended or had in contemplation as a consequence of the

transaction to add to the sum that had already been borrowed under the act already mentioned, a single dollar to be applied according to the purposes of that act, namely,

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"to pay interest *on the public debt." The sole object of the transaction, as we are bound from the evidence before us to conclude, was to make an immaterial change in the form of securities evidencing outstanding obligations of the state.

It is not competent to argue that because the action of the board appears to have resulted in the creation of new debt, that that circumstance stamps the nature of the authority attempted to be exercised. In the first place, we are bound from the evidence to assume that there was a distinct abuse of the authority attempted to be vested in him, on the part of the financial agent, who, instead of issuing the new bonds for the exclusive purpose of retiring the first issue, as to part of them at least, used them for the purpose of creating a new debt. We have no right as matter of legal conclusion, in the absence of evidence supporting such a conclusion, to hold that the board intended the wrong accomplished by the abuse of its authority. But even if it had been made to appear that the board intended that the retirement of the old issue should be accomplished by the sale of the new issue in open market, and the application of the proceeds of the sale to retiring the old bonds, that would leave the nature of the authority attempted to be exercised by the board entirely unchanged. It would still be, in its nature and essence, an attempt to change, as to matter of form, only an old obligation. It may be argued that such a method of effecting the change would not be a fair exercise of the power of conversion; that is quite a different question, that need not be passed on here. A power does not change its nature merely because it is abusively exercised. We are here drawing a distinction between two very different classes of powers, both of which are recognized by the constitution, but differ from each other most materially, both as it regards the sanctions necessary to give validity to the exercise of such powers, the mode of their exercise, and the effect of their exercise, both upon the state and third parties dealing with the state. It is of the greatest importance that this distinction should be clearly discerned and held in mind. To possess and exercise authority to bind the state by the terms of an obligation newly created, implies a delegation of authority of a very high order, and generally esteemed of so much importance

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and delicacy as to *receive the special attention of the framers of the fundamental law, and to be guarded with very careful constitutional restrictions, while to effect a change in the form by which an obligation is evidenced that does not touch its nature or extent, is, when authorized, a mere act of administrative detail.

Let us trace these distinctions into the constitution. Section 7, Article IX., provides as follows: "For the purpose of defraying extraordinary expenditures the state may contract public debts, but such debts shall be authorized by law for some single object, to be distinctly specified therein, and no such law shall take effect until it shall have been passed by the vote of two-thirds of the members of each branch of the general assembly, to be recorded by yeas and nays in the journal of each house, respectively, and every such law shall levy a tax annually sufficient to pay the annual interest of such debt."

Here is a distinct negation to the state of power under the constitution to create public debts, except where that power is exercised for particular purposes and in a particular way, and it is of course a negation of the authority of any agent of the state to create such debts in a manner inconsistent with the provisions of the constitution.

Section 10 of Article IX. deals with the powers of evidencing existing obligations, including that of changing the forms of such evidence. It provides that no scrip, certificate or other evidence of real indebtedness shall be issued except for the redemption of stocks, bonds or other evidences of debt previously issued, or for such debts as are expressly authorized in the constitution.

In these provisions we have distinctly recognized the two classes of powers—the one capable by rightful exercise of bringing into existence a new specific obligation of the state, and the other of certifying in form a debt already existing. It is perfectly clear that the authority which the board attempted to exercise in the present case is that regulated by Section 10, and not that treated of in Section 7.

Our attention has not been called to any act authorizing the financial board, or the officers composing that board, individually, to issue any bond, certificate or evidence of debt by way of changing the evidence of any ante-

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cedent debt of the state. After *a careful examination of the acts I am unable to find any evidence that the governor, attorney-general and the treasurer possessed legal authority to exercise any such power, or even to act as a board under the name of the "financial board." The only authority conferred upon them, so far as I am able to find, is contained in certain sections of acts authorizing the borrowing of money for particular objects. These powers relate exclusively to the particular cases in reference to which they were given. 14 Stat. 17, 18, 182. The only power conferred as it regards the loan for paying interest on the public debt is contained in the fifth section of that act, and is as follows,

(14 Stat. 18): "That the bonds authorized by this act shall be sold at the highest market price, and for not less than a sum to be fixed by the governor, attorney-general and the treasurer, who are hereby authorized to appoint, under a commission signed by them, some responsible bank or banker in the city of New York, to be subject to their direction and control, and they are further authorized to pay such sums of money as may be necessary to effect the purposes of this act out of any funds of the state not otherwise appropriated." This power is not in the least analogous to that attempted to be exercised and cannot include it.

The only power at all analogous to that in question was conferred in the particular case of the issue of bonds to redeem the bills receivable of the state and was confined to that object. That act (14 Stat. 17, § 5,) provides "that the bonds authorized by this act shall be sold at the highest market price by the financial agent of the state in the city of New York, and not less than for a sum to be fixed by the governor, attorney-general and treasurer, who shall fix the time of redemption and redeem said bills receivable at the office of the state treasurer, and they are further authorized to pay such sums of money as may be necessary to effect the purposes of this act out of any funds of the state not otherwise appropriated." The powers here conferred on the persons who claimed to constitute the board are confined to the retirement of the bills receivable, and, being thus specially delegated, instead of supporting, contradicts the assumption that they had general powers of that nature, while the fact that no such power was conferred as it regards the class

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of bonds in *question shows that it was not intended to be granted to be exercised in any form. Such powers as are claimed here nowhere appear granted either expressly or as incidents to other powers granted.

It will not be seriously contended that the governor, attorney-general and treasurer could, either singly or unitedly, assume to change the form of an outstanding obligation of the state, in any respect, without the authority of the legislature therefor. It is apparent that the legislature, whose authority they claimed to exercise, took the same view of this question as that just expressed, for that body passed an act entitled "An act to provide for the conversion of state securities," March 23d, 1869, (14 Stat. 241,) which covered the exercise of the very power in question, namely, that of changing the form of existing obligations. This act allows bonds to be changed into stock and stock into bonds, but does not authorize any other change to be made in any evidence of indebtedness, and altogether ignores the existence of any authority of that description in the hands of the financial board or the officers composing it, though two of them, the governor and the treasurer, have duties to perform under this act.

It must be concluded that the governor, the attorney-general and the treasurer had no such authority, collectively or individually, as would enable them or either of them to put out an obligation for the redemption of an antecedent debt or obligation of this state, or in any way to change the form in which any such debt may be evidenced.

It is necessary to notice a view that has been strenuously urged, namely, that the action of the financial board must be referred to authority contained in the act under which the bonds in question purport to be issued, communicated to the governor, to issue as many bonds as he should at any time judge necessary, for the purpose of borrowing money sufficient to pay the interest on the public debt, provided he did not overstep the limit of the amount to be borrowed, namely, $1,000,000. This proposition has already been answered in part. It is clear that if the governor had such authority he has not attempted to exercise it. It assumes that the governor found that the proceeds of $1,000,000 of bonds was not sufficient to pay the outstand-

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ing interest on the *public debt. There is not a particle of evidence that the governor ever arrived at any such conclusion or attempted to act upon it; on the contrary, the evidence shows that the governor was satisfied with the amount issued, and did not intend to give any authority to increase the sum to be borrowed beyond what was intended by the first issue. He attempted to change, in certain respects, the form of the security taken, but did not purpose to borrow more money. This completely disposes of the argument. But, it is apparent, the governor had no such authority.

It is not necessary to contend that after the governor had once made up his mind that a certain sum was necessary he could not afterwards increase that sum; but the proposition that disposes of the question is, that after he had fixed the whole amount to be raised and had actually issued it, the whole intention of the act was carried out, and the authority it conferred spent. All the act contemplated was that the governor should exercise a certain authority, based on his own judgment, of the extent to which that authority should go within a certain general limit. After he had exercised his discretion, and had performed the act intended to be based upon it, what remained to accomplish the full purpose of the act? Possibly if an act conferring authority on a public officer, intended to meet the case of making provision against future contingencies, should be brought in question, its purposes, when rightly understood, might give rise to the conclusion that it was intended as a continuing power. But here the mat-

ter to be ascertained by the governor was such as a sum in arithmetic would solve, and no ground is afforded by enlarging the sense of the words used by holding that it was intended that the governor should have a continuing open judgment in the matter.

It is said that the amount that the bonds would bring on public sale was uncertain, and, therefore, the governor could not know until the sale was over how much money would be derived from the proceeds for the payment of interest. But the governor knew how much money had been realized when the further sale was stopped. The completion and termination of the issue, in view of the fact that in his judgment enough money had been raised for the purpose, was an exhaus-

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tive exercise of his power *under the act. Had the issue been based on the actual amount needed, it would have been otherwise; but being based on the judgment of the governor as to what was needed, his final conclusion and action under it was a complete satisfaction of the purpose of the statute. The act contains no expression to signify that the act of borrowing or of issuing the bonds should be a continuous act, such as the phrase "from time to time," but authorizes what is described as a single act to be performed.

It is clear that parties having no legislative authority so to do have put in circulation evidences of indebtedness on the part of the state, and the holders of these evidences claim that they cannot be questioned as to their legal validity. A clearer case of the abuse of public authority cannot be stated, nor one that defies more openly all the safeguards placed by the constitution around the creation of public debts.

The next question to be considered is as to the validity of the bonds issued under the act entitled "An act to authorize a loan for the relief of the treasury," passed February 17th, 1869, (14 Stat. 182.) It is objected to these bonds that the object of borrowing is not sanctioned by the provisions of the constitution on that subject. Article IX., Section 7, is the one that alone afforded authority for the passage of the act. That section provides as follows: "For the purpose of defraying extraordinary expenditures, the state may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein." The remaining provisions relate to the requirements for the purpose of giving validity to such an act, and are not in question here.

In the first place, this section must be regarded as a limitation of the power of the legislature to authorize the creation of debt by borrowing, of such a nature as to render any attempt to communicate authority for that purpose inconsistent with its provisions, abortive and inefficacious. Unless this section is powerless, this is its intended function. The use of prohibitory language is not indispensable in a provision of law in order to have that effect. When power is granted for the purpose of bringing into existence specific rights, the mode in which that power is required to be exercised is material to the creation of such rights, and

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the *provisions are mandatory. State, ex rel. Attorney-General, v. City of Columbia.†† This principle depends on the nature of the powers granted, and is equally applicable to the construction of statutory and constitutional provisions. It follows that the legislature could only validly authorize the creation of public debt when the object was "defraying extraordinary expenditures."

What are, then, to be regarded as extraordinary expenditures? If the verbal force of the expressions employed by the constitution was entitled to be solely considered, we should have to conclude from the third section of Article IX. that "extraordinary expenditures" were such as did not, in their nature, constitute the ordinary and current annual expenses of the state. It may be conceded that this view is included in the true construction of the language employed; but before all that may be embraced in the term "extraordnary expenditures" can be ascertained, a larger and vital principle of construction must be employed—one that is universally recognized among the canons of constitutional construction.

The necessities of a state may render the power of borrowing money indispensable even as to current expenditures, although, as an ordinary rule, the current expenses should be regulated from current income. War, domestic insurrection, pestilence and famine may be instanced as capable of giving rise to such an exigency as would warrant a departure from the safe, general rule of meeting current expenditures with current income. A constitution of government that cannot adjust itself to calamitous circumstances is of no practical value—as worthless as a man that cannot meet disease, or a ship that cannot endure a storm. No principle of construction that has the tendency to divest a constitution of government of the elasticity demanded for the reasonably-anticipated exigencies in human affairs, has the support of either principle or recognized authority. It must, therefore, be concluded that it is not impossible that what would generally be regarded as a current and ordinary expenditure may assume the character of an extraordinary

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expenditure under the *influence of circumstances affecting the ability of the state to maintain itself.

Giving, then, to the act in question the

†† See post case No. 762 [State ex rel. Cathcart v. City of Columbia, 12 S. C. 370.]

benefit of this large and liberal construction, the question arises whether the act to authorize a loan for the relief of the treasury can be regarded as passed with a view to meet extraordinary expenditures.

The contents of the act do not assist in making its object any clearer than it is made by the statement in the title of the act. We must, then, inquire whether funds in relief of the treasury can be regarded as funds devoted to extraordinary expenditures. Clearly they cannot. The act would have undergone no material change in principle had its title been "to provide the means of meeting all demands upon the treasury." Such a title would include ordinary as well as extraordinary expenditures. As ordinary expenses are sure to arise, and extraordinary ones of merely contingent occurrence, such a title would have to be regarded as an indication of an intent to provide means to pay current and ordinary expenses. Such an act would be inconsistent with the constitution, and necessarily void. Thus, if we read the act as it stands, without the light of concurrent events, the inference to be drawn would be against its validity.

It may be a question whether, in view of the provisions of the constitution, a case for determining the actual intent of the legislature could be made out from the knowledge of circumstances that attended the passage of the act; but it is not necessary to consider this question, for the case affords no circumstances which, if admissible, would tend to correct the inference drawn from the language of the title and the body of the act. It is true the state was emerging from a great and exhaustive war, and was seeking to adjust itself to a new and untried constitution of government, was putting in operation new machinery for collecting and applying income, and was with an empty treasury and burdened with debt, but the legislation contemporaneous with the act in question precludes the inference that any exigency existed that would justify the borrowing of money in aid of the current demands upon the treasury.

An elaborate and carefully prepared act, regulating the assessment and collection of taxes, was passed September 15th, 1868.

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*Under this act it became the duty of all persons liable to the payment of taxes to make returns on or before October 20th then next ensuing. Each county auditor was required by Section 66 on or before the third Monday of December, 1868, and on the same day of each year thereafter, to transmit to the state auditor a transcript of the real estate of each township in his county. The taxes levied were to be payable on the first day of March thereafter. Sec. 79. The conclusion must be drawn from this act that all the machinery requisite to the assessment and collection of taxes was in existence at the time the act was passed to borrow money for the relief of the treasury, and nothing necessarily prevented the passage of the necessary supply and appropriation bills at or before that date. A supply and appropriation act was passed March 23d, 1869, a few days over a month after the passage of the act to borrow money for the relief of the treasury. The authority for the disbursement from the treasury of all moneys applicable to the payment of current expenses, is contained in the appropriation act just referred to, and by the inspection of the provisions of that act it appears that the matters included were of the class of ordinary expenses of the government. As we have seen, the proceeds derived under the act for the relief of the treasury were applicable to the payment of the appropriations made by this act, and thus we have clear ground for concluding that the object of the act for the relief of the treasury was to provide the means of paying the current and ordinary expenses of the government for the year 1869, and any deficiency that may have occurred for the fiscal year, or part of the year, of 1868.

The constitution (Article IX., Section 3,) requires "that the general assembly should provide for an annual tax sufficient to defray the estimated expenses of the state for each year, and whenever it shall happen that such ordinary expenses of the state for any year shall exceed the income of the state for such year, the general assembly shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of the ensuing year." Here is a source made compulsory for meeting any deficiencies that might have

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stood from the *fiscal year 1868, as well as the current expenses of 1869. As such an act appears in the statute book, it must be assumed to be sufficient for the purposes contemplated by the constitution. If it be conceded that, if the passage of such act or its enforcement had been rendered impossible, that money might have been borrowed on the idea that expenses usually to be regarded as "ordinary" had become "extraordinary" under the operation of uncontrollable circumstances, still that would not help the validation of the act in question, for it appears by contemporaneous legislation that no such fact existed.

The question, then, resolves itself to this: Could the general assembly, in any year, create a public debt by borrowing for the purpose of anticipating the taxes or other current revenues of that year? To that question only one answer can be given, and that is that such a case is outside of the power to borrow money, and therefore within its implied inhibition.

It will not be necessary to examine the

other objections made to this act, as the view considered is regarded as fatal to the validity of the bonds issued under it.

The next question to be considered is, whether the act entitled "An act to reduce the volume of the public debt, and to provide for the payment of the same," passed December 22d, 1873, (15 Stat. 518), and ordinarily known as the consolidation act, is a legislative contract, binding the state and all parties coming in under it, so as to preclude an inquiry into the validity of the securities issued under its provisions. This question resolves itself into two inquiries. First. Whether it was competent for the legislature, by any act, to impart validity to obligations that were rendered invalid under the constitution. Second. Whether the act in question purports to have any such effect. The first of these questions has been fully considered in the leading opinion in this case and needs no further elucidation. The question involving the character and intent of the act will be noticed.

The first section of the act authorizes the treasurer to receive from the holders of bonds of certain specified classes such bonds, and also certain certificates of stock, and directs that he "shall thereupon, in exchange for and in lieu of such bonds and stocks so surrendered, issue to such holders other

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coupon bonds and *certificates of stock, as they may desire, equal in amount to fifty per centum of the face value of the bonds or certificates of stock so surrendered." A similar provision is made in Section 2 as it regards coupons from such bonds. Section 3 is as follows: "That the bonds and certificates of stock herein authorized to be issued shall bear upon their face the words 'consolidation bonds,' 'certificates of stocks,' and shall also bear upon their face the declaration that the payment of the interest and redemption of the principal is secured by the levy of an annual tax of two (2) mills upon the dollar upon the entire taxable property of the state, which declaration shall be considered a contract entered into between the state and every holder of said bonds and stocks," &c. It must be conceded at once that wherever the holder of one of the valid obligations of the state surrendered the same, and took in lieu thereof the bonds or certificates of stock provided to be issued under this act, at fifty per cent. upon the face value of the obligation surrendered, this clause became a binding legislative contract, based on an adequate consideration, namely, the surrender and relinquishment of one-half of the amount of such valid security, and, as such, the legislature has no power to dispense with it.

But the proposition here to be considered has regard to the surrender of obligations alleged to be unconstitutional and void. This act must be regarded as assuming the validity of all the bonds of the classes enumerated in it as the basis of the issue of new bonds, but not necessarily as declaring such validity. Had such a declaration been made, and not been left to implication, could it conclusively determine the existence of the fact declared? If so, then it would follow that the act must be considered a conclusive legislative contract as it regards all bonds or certificates of stock issued in exchange for the securities named in the first section, at the rate of reduction therein named. The bearing of this proposition is this: a legislative contract, like any other contract, must be upon consideration; and if the existence of that consideration is validily declared by law, the obligation resting on it must stand.

At this point the proposition is advanced that the legislature cannot make a declaration that would have the effect to preclude

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*inquiry into the constitutional character of its enactments. The application of the limitations of the constitution to the legislation passed under it is made by the courts, and if the nature of the limitation is such that it can only be tested by the existence of facts outside of the recitals of the acts themselves, the courts are bound to look to the existence of such facts as the ground of applying such constitutional limitations. To say, then, that the legislature may, in such a case, by a declaration, preclude the courts from examining the actual state of the facts, is to affirm that this authority and duty of the courts is not absolute under the constitution, but dependent on the will of the legislature—a proposition manifestly false. The consequence is, that neither an express or implied declaration that an obligation otherwise void is valid, can preclude inquiry into the validity of such obligation where it is alleged as a valid consideration for a legislative promise based upon it.

It is, therefore, necessary to inquire whether there was, in fact, any consideration in the case of a party giving up an invalid bond and taking another of less amount. The proposition answers itself. If the obligation was void nothing was given up, and therefore no consideration exists. As the legislature could not validly declare that to be lawful which the constitution pronounced unlawful, and as the act does not declare the validity of all the bonds, for which provision is made in express terms, whatever declaration is read in the act on that subject must be the result of implication, and as the rules of implication are based on the primary idea that that sense which is agreeable to law must be preferred, the most that can be concluded from the act is that it assumed the validity of the unenumerated bonds provided for. This assumption being disputable under the constitution, it placed the holder of the bond in the position of taking the chances of the correctness of the assumption in his favor, but gave him no

higher assurance nor ground of certainty. When it is asserted that this legislative assumption gave the holder of a bond a presumptively good title, all the efficacy has been allowed to the statute as affecting him that can be allowed consistently with the constitution, or that construction of the intent of the statute which results from view-

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ing it in the light in *which the constitution has placed it. That presumption is repelled the moment it appears by sufficient evidence that the obligation was, in fact, unconstitutional and void. This principle of construction was applied in Neely v. McFadden, 2 S. C. 169.

An attempt is made to meet the force of this argument by treating the consolidation act as a composition between a debtor and his creditors. It is claimed that the creditors of the state are to be regarded as parties to each transaction with any bondholder of the class provided for. In this way an attempt is made to make out a consideration in favor of A, arising from the fact that B took a less amount than was due to him. The answer to this is that the act exhibits no such character, either in form or substance. As it regards the force of the provisions made, they are, professedly, with each individual holder of a bond, coupon or certificate of stock alone. The test of this is the fact that had but a single person accepted the benefits of the act and complied with its provisions, there is no clause or condition that could have interfered with its entire efficacy as affecting him. It was not made a necessary feature of the scheme that all or any particular part of the persons for whose benefit it was intended should come in under it. Such being the case, it was competent, so far as the form of the transaction is concerned, that it should operate wholly with particular individuals, and should not depend for its validity on its acceptance by any number or class of individuals. If, then, it can, consistently with the language and terms employed, have such operation and effect, it ought to receive that construction, if it be found equally consistent with the spirit and fundamental intention of the act. This brings us to consider what was the true character of the transaction in its substance.

Conceding that if it be found that the act could not operate efficiently according to its intention, except by construing it as intending a compact among all who came in under it of such a nature that its considerations and obligations are mutual, as among all such parties—that in that case it might assume the character contended for—what is there to lead to any such conclusion? And here we may affirm that that is an unnecessary

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*construction, not called for by the necessities of the case, having only one argument, and that an unsound one, in its favor, namely, that it enables the parties to effect a successful evasion of the constitution and defeat its provisions. In itself, that argument should be ground for avoiding the conclusion to which it points. There is no other argument that has been, and it may confidently be asserted that none can be, adduced to support the view thus contended for. If, for instance, the act had been so framed that it could not take effect until all of a certain class or number came in, this then would be ground to contend that inducements would be offered by those anxious to come in to those opposed to or indifferent to that course to bring about that result, and in that case mutual consideration as among those thus coming in might be supposed. That, however, is not the case. Then, again, if the state had set apart a certain fund or sum of money to be divided up among all who should come in, the distribution of that fund to be at the disposal of the parties coming in, then mutual obligations and considerations among the parties coming by mutual consent upon such fund would be naturally and reasonably assumed; but the transaction did not have that character. The fact that the state offered to pay a sum less than the amount due on such debt does not alter the case, for such a tender could as well be made to A, B and C individually as collectively. It cannot be shown that anything was given up by a creditor that was intended to enure to the benefit of any other; on the contrary, all were treated alike, the same rate of reduction being applied to all, whether their demands were large or small. There is a total failure in the case to show any reason drawn from the nature of the transaction, and the terms and intention of the act to change that simple character that stands out on the face of the act into the more complex and cumbersome one contended for. This conclusion rests upon the simple proposition that one who parted with a good obligation gave a valid consideration to support the legislative contract imported by the terms of the act, while one who gave up a void and worthless bond gave no such consideration. The opposite construction rests upon the inadmissible proposition that A in giving up a

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worth*less bond was in a worse position by reason of the fact that B had given up a good bond for less than its value.

It is clear, therefore, that there is no legislative contract founded on consideration to support the validity of any bond issued under the consolidation act, when the security for which it was issued was invalid in law.

There is no necessity for considering the limits of the authority of the legislature to ascertain or liquidate an uncertain or doubtful debt, as no such power was exercised in the consolidation act. The act sets out with no declarations that depend for their

force on the assent of the parties coming in under it, and it affords no ground for an assumption that anything the act dealt with was regarded as unliquidated or disputable. It is very clear that whatever power the legislature possesses of the class just mentioned, its rightful exercise does not extend to a declaration that that is valid which the constitution declares to be otherwise.

The conclusions to which the court has arrived are not in conflict with anything decided in Morton v. Comptroller-General, 4 S. C. 430. The questions just considered were not raised or considered in that case.

HASKELL, A. J., dissenting. Concurring in the result, so far as it affects other classes of vouchers, I dissent from the reasoning and the conclusion by which the "second issue of bonds to pay interest on the public debt," (August 26th, 1868,) and "bonds for the relief of the treasury," (February 17th, 1869,) are excluded from the operation of the consolidation act.

Some reasons for such dissent will be briefly stated.

The act of August 26th, 1868, 14 Stat. 18, clothed the governor with power to borrow money for the state by issuing bonds, and prescribed two limitations. First, relating to amount; Second, to time. It is not pretended that either of these restrictions was violated; but it is contended that the governor was, by the act, impliedly restrained from making more than a single issue. The act is, itself, very brief, and it is difficult, within the widest scope of its language, to find support for such a proposition.

But however interesting might be questions

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as to exhaustion *of power by a single exercise of it, or as to the right of the general assembly, without a two-thirds vote, to extend the time for the exercise of a power conferred in an act creating a public debt, or what disaster might result if the legislative body should authorize the executive to make successive issues of bonds at his discretion, to borrow money to a limited extent —however interesting in themselves—such questions do not properly arise in this case. For, so far as rights arising under the operation of the consolidation act are concerned, such objections are disposed of by the act itself, enacted as it was under the full light of the judicial determinations announced in the case of Morton, Bliss & Co., 4 S. C. 430. The ruling of the court on the point referred to, is thus succinctly stated in the heading to the case as reported: "Where an act to create a public debt, by a loan on bonds of the state, is passed in the mode prescribed by the constitution of the state, but some requirement of the act—as, for instance, that the bonds shall be sold at the highest market price—is not complied with by the officer charged with its execution, it is competent for the legislature by an act, not passed by the vote of two-thirds of the members of each house, to waive the objection and validate the bonds."

The consequence is plain, for the officer is the mere agent of the general assembly, and the principal may waive objections to the irregularities of his agent, and, by recognition or other conduct, as well as by direct ratification, may validate his transactions. The Supreme Court having decided that a two-thirds vote was not necessary, the act of March 20th, 1869, to extend the time to make the issue, is of force. The consolidation act likewise, although not passed by the two-thirds vote, is of full force and effect so far as it has any relation to irregularities on the part of the agents employed by the legislature to issue the bonds therein named. Anterior to the passage of this act the "first" and "second issue" had been completed—the second in part canceling the first, and leaving outstanding from both issues $1,197,000 in bonds. The general assembly recognizes the amount and specifies it, and orders it to be treated as an existing debt of the state, under and by virtue of the act creating the debt, and, waiving any and all objections for

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irregularities or *lack of authority on the part of its agent, ratifies and confirms his acts. This point involves no constitutional question, for that, whether rightfully or not, was settled when the act was passed, but depends solely upon the law of recognition by the principal of the acts of his agent, and the ratification of them by such recognition. The recognition exceeds mere acquiescence in this case, and amounts to active confirmation, for the legislature rests a new contract upon the bonds thus recognized.

The objection to the other class of bonds "for the relief of the treasury" rests upon constitutional grounds, and as to them the recognition by the general assembly does not, for the same reasons above stated, remove the defect, if such there be.

The first ground is that the loan was not "to defray extraordinary expenditures. Const, Art. IX, § 7.

Money to be expended for the "relief of the treasury" certainly does not come within the "ordinary" expenses as defined by the constitution. That instrument carefully defines the "ordinary," and leaves to the word "extraordinary" every expenditure which does not come within the limits of the former. That is the sole question for the judiciary to consider; for if the expenditure be "extraordinary" in its nature, the general assembly, by the vote required by the constitution, has the power to create a debt by bonds to defray it. And it cannot for a moment be claimed that money for the relief of the treasury comes among "ordinary" expenses, which are

otherwise directly provided for by the constitution.

It is quite immaterial that the court is not able to perceive what relief the treasury might require or the reasonableness of the expenditure. Those are matters left to the discretion of the general assembly. Luther v. Borden, 7 How. 45 [12 L. Ed. 581]. But if that were a question within the jurisdiction, some light might be thrown upon it by the ordinance adopted January 29th, 1868, to levy a special tax and for other purposes, among which are drafts upon the treasury, with directions to the general assembly to raise funds, if necessary, to reimburse the treasury.

The other objection is that the debt is not for some single object distinctly specified. In obedience to another provision in the constitution, the "subject," or "object," (for the

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words are *synonyms in the sense in which they are there employed,) is distinctly stated in the title to the act, which is confined to the "subject" expressed in the title. Art. II., § 20. The act to borrow money to pay the interest on the public debt is subject to the same objection, for its object is contained in the title, but, according to the decision in this case, comprehends, by implication, (1) the interest accruing at a particular time, and (2) interest on a great variety of classes of public indebtedness. I wish no more than the application of the same rule.

The annual tax act seldom specifies more than the general purposes, but leaves the details to the appropriation act; yet the validity of such an act could not for a moment be questioned. The general assembly could, by a simultaneous or subsequent act, have made a detailed application of the money borrowed on the bonds issued by the act in question, and, while the propriety of the application might have been a question, the validity of the original act thus explained would hardly have been assailed by the most litigious mind. But that is a question resting with the legislative body, and not the judicial, and the public must not be made to suffer for what thus rests on discretion, and may be done after as well as before or together with the transaction out of which the contract arises.

For the reasons thus briefly and imperfectly presented, I dissent on the points indicated.

As regards the legal effect of the consolidation act, as a compromise or otherwise, I make no comment, since it has not been in that light discussed by the majority of the court. Nor do I discuss the effect of the various acts which are alleged as acquiescence on the part of the state, reserving to myself the right hereafter to express my views on these points, if, after further reflection, I should deem it necessary or proper.

Judgment set aside.

12 S. C. *314

*(Case No. 761.)

DANIEL HAND v. THE SAVANNAH AND CHARLESTON RAILROAD COMPANY et al.

THE STATE, ex rel. THE ATTORNEY-GENERAL, v. THE SAME.

(April Term, 1879.)

[1. *Railroads* ⟸156.]

Under "An act to aid in the construction of the Charleston and Savannah railroad," passed by the legislature of South Carolina in 1856, the guaranty of the state was endorsed upon certain bonds of this railroad company issued under the authority of this act. The act provided that as soon as any such bonds shall have been endorsed as aforesaid for the first section of the road as therein specified, "they shall constitute a lien upon said section," including the road-bed, &c., "and the State of South Carolina from the endorsing of the said bonds and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company for the payment by said company of said bonds, with the interest thereon as the same becomes due." Upon the completion of the second and other succeeding sections of said road, other bonds were to be endorsed by the state, "but upon the terms and conditions hereinbefore provided; and upon the endorsing of the said bonds the State of South Carolina shall be invested with a like mortgage, or lien, without a deed from said company, upon said stock, and upon said first and additional section or sections," &c., "for the payment of said bonds and the accruing interest thereon." And the act further provided that "when the whole of said road shall be completed, the State of South Carolina shall be invested with a lien * * * upon the entire road * * * for the payment of all said bonds, * * * and for the interest accruing on said bonds." *Held*, that the bonds when endorsed constituted a lien upon the entire road as successively completed, which not merely enured as an indemnity to the state against its guaranty, but vested in the state as well for its own protection as for the better security of the bonds and their coupons into whosoever hands they might fall, and not available to either one of the protected parties to the exclusion of the other. Haskell, A. J., dissenting.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 485; Dec. Dig. ⟸156.]

[2. *Railroads* ⟸156.]

The fifth section of the same act provided "that the state expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect the interests of the state, and to secure it against any loss in consequence of the endorsing of bonds under the provisions of this act, but in such a manner as not to impair the vested rights of the stockholders of the company." *Held*, that the state did not by this section reserve any power to destroy or postpone the lien created by this act to secure the payment of the bonds thereby authorized.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 478; Dec. Dig. ⟸156.]

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[3. *Constitutional Law* ⟸162.]

*Hence, a subsequent act, in so far as it attempted to postpone this lien, impaired the obligation of a contract with the holders of these bonds, and was to that extent void.

[Ed. Note.—Cited in Gibbes v. G. & C. R. Co., 13 S. C. 228, 229, 248.

For other cases, see Constitutional Law, Cent. Dig. § 471; Dec. Dig. ⟸162.]

4. Hand v. Railroad Company, 5 S. C. 182, and State v. Railroad Company, 8 S. C. 129, explained.

[5. *Railroads* ⇐156.]

In 1869 another act was passed by the legislature to enable the said railroad company, (which had been sold under a junior mortgage subject to the lien of the act of 1856, and purchased by a new company and its name changed to the Savannah and Charleston Railroad Company,) to rebuild its road, which had been partially destroyed during the war. By this act certain bonds were to be issued for money borrowed, and the state in this latter act assuming absolute control over the lien created by the act of 1856, directed that it should be postponed and become a second lien, as soon as the bonds so authorized under the act of 1869 were issued. And by the third section of the act of 1869 certain other bonds guaranteed by the state were to be issued in exchange for past-due coupons of the bonds of 1856, subject however to the provision that the bonds for money borrowed should have precedence of the lien of 1856. *Held*, that parties funding such coupons were bound by the terms of the act of 1869, and had surrendered all right to claim for such coupons or the bonds received in exchange therefor, the protection of the lien of 1856.

[Ed. Note.—Cited in Columbia & G. R. Co. v. Gibbes, 24 S. C. 74.

For other cases, see Railroads, Cent. Dig. §§ 478, 483–485; Dec. Dig. ⇐156.]

[6. *Railroads* ⇐171.]

Held further, that by such funding they accepted the postponement of the lien of 1856, as to all bonds and coupons of the same class, owned by them at that time.

[Ed. Note.—Cited in Hand v. Savannah & C. R. Co., 17 S. C. 245.

For other cases, see Railroads, Cent. Dig. § 576; Dec. Dig. ⇐171.]

[7. *Estoppel* ⇐90.]

The doctrine of equitable estoppel discussed and explained, and cases reviewed, and the rules laid down governing estoppel by silence.

[Ed. Note.—Cited in Scaife v. Thomson, 15 S. C. 362; Verdier v. Port Royal R. Co., Id., 483.

For other cases, see Estoppel, Cent. Dig. §§ 242–244, 248–256; Dec. Dig. ⇐90.]

[8. *Corporations* ⇐483; *Railroads* ⇐171.]

Parties holding bonds under the act of 1856 are not estopped from asserting for their securities a prior lien to the lien of 1869, because of their failure to oppose the passage by the legislature of the act of 1869.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1890; Dec. Dig. ⇐483; Railroads, Cent. Dig. § 576; Dec. Dig. ⇐171.]

[9. *Corporations* ⇐483; *Estoppel* ⇐92; *Railroads* ⇐171.]

Holders of 1856 bonds accepting payment of their coupons from the company after the rebuilding of the road, are not thereby estopped from asserting their rights under the act of 1856.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1890; Dec. Dig. ⇐483; Estoppel, Cent. Dig. § 262; Dec. Dig. ⇐92; Railroads, Cent. Dig. § 576; Dec. Dig. ⇐171.]

[10. *Corporations* ⇐483; *Railroads* ⇐171.]

Nor can it be objected by the corporation or junior encumbrancers that holders of 1856 bonds have made no attempt to obtain payment from the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1890; Dec. Dig. ⇐483; Railroads, Cent. Dig. §§ 560, 576; Dec. Dig. ⇐171.]

[11. *Corporations* ⇐483; *Railroads* ⇐171.]

Nor would equity, in favor of the second lien bonds, require such bondholders to look primarily to the state for payment under its guaranty, upon the ground that they held a double security.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1890; Dec. Dig. ⇐483; Railroads, Cent. Dig. § 576; Dec. Dig. ⇐171.]

[12. *Corporations* ⇐483; *Estoppel* ⇐93; *Railroads* ⇐171.]

The 1856 bond-holders are not estopped from asserting their prior lien, because, knowing of the act of 1869, they, without objection, permitted money raised thereunder to be expended upon the improvement of the mortgaged premises.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1890; Dec. Dig. ⇐483; Estoppel, Cent. Dig. § 264; Dec. Dig. ⇐93; Railroads, Cent. Dig. § 576; Dec. Dig. ⇐171.]

[13. *Railroads* ⇐156.]

Judgment cannot be rendered against the state upon its guaranty in favor of the holders of the redemption bonds issued under the act of 1869.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 478, 483–485; Dec. Dig. ⇐156.]

[14. *Railroads* ⇐156.]

Holders of the redemption bonds of 1869 have no lien either under the act of 1856 or the act of 1869, the lien of the latter act securing only the bonds issued for money borrowed; nor can they require the state as their

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*surety to set up the coupons received in exchange for these guaranteed redemption bonds, as against either the 1856 or 1869 bonds.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 478, 483–485; Dec. Dig. ⇐156.]

[15. *Railroads* ⇐171.]

After the passage of the act of 1856 the corporation purchased from H. a body of land, part of which was needed for their road-bed, and gave their bond and mortgage of same date to secure the payment of the purchase money; this was before the completion of the road, or of that section of the road where the land so purchased was situated. *Held*, that the mortgage to H. had precedence of the lien under the act of 1856.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 554–576; Dec. Dig. ⇐171.]

[16. *Railroads* ⇐171.]

At the time of the purchase from H. there was then outstanding a mortgage over the entire property of the company, given to certain trustees to secure the payment of bonds issued by the corporation. *Held*, that the mortgage to H., being for the purchase money, was a preferred lien upon the property covered by it, over the previously-executed mortgage to the trustees.

[Ed. Note.—Cited in Hand v. Savannah & C. R. Co., 17 S. C. 277.

For other cases, see Railroads, Cent. Dig. § 561; Dec. Dig. ⇐171.]

[17. *Taxation* ⇐210.]

Under the act of 1869, the exemption from taxes theretofore granted to said company, was revoked by acceptance of that act, and the company were required to complete their road from Charleston to Savannah by January 1st, 1870, and it was further provided "that no tax shall be assessed or levied upon said road until the same shall have been completed." In March, 1870, the road was completed to such extent that by the use under lease of another railroad company's track for three miles, and by means of a ferry boat belonging to this company,

freight and passengers were transported by the company from Charleston to Savannah. *Held*, that the company were liable to taxation for the year 1870 and all subsequent years. And for the payment of such claim, the state can in court demand a sale of the road.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 335; Dec. Dig. ⟸210.]

[18. *Railroads* ⟸192.]

Where part of a railroad is in this state and part in another, the court should order a sale of the entire road, so much thereof as lay in the other state being sold subject to the liens existing in that state.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 638; Dec. Dig. ⟸192.]

[19. *Marshaling Assets and Securities* ⟸3.]

[A promise of the state to pay money, being incapable of enforcement by suit, is not a security which can be marshaled.]

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 2; Dec. Dig. ⟸3.]

[This case is also cited in Hand v. Savannah & C. R. Co., 12 S. C. 88; Id., 17 S. C. 219; Id., 21 S. C. 178, as to facts, and in Chalmers v. Turnipseed, 21 S. C. 136; Bailey & Son v. Wells, 68 S. C. 152, 46 S. E. 768, as to the doctrine of estoppel.]

Before Wallace, J., Charleston, March, 1878.

For the previous history of these cases in this court, see, in the following order, 5 S. C. 182, 8 S. C. 207, 6 S. C. 307, and 10 S. C. 406.

These cases having been referred to William Alston Pringle, Esq., as special referee, he filed his report, in which he fully states all the questions of fact involved, and thoroughly discusses the points of law arising thereunder. The following are his conclusions of fact upon the matters determined by this court:

The Charleston and Savannah Railroad Company was incorporated by an act of the general assembly of the State of South Carolina, ratified on the 20th of December, A. D. 1853. 12 Stat. 271. On the 20th of Decem-

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ber, A. D. 1856, (12 Stat. 543), the *legislature passed an act, of which the following is a copy. [The act is fully set out in the opinion of the court, and is therefore omitted here.]

Under this act the company issued six per cent. coupon bonds to the amount of $505,000, which were guaranteed by the state, according to the provisions of the act, of which guaranty the following is a copy:

The provisions of the act of assembly, passed December 19th, 1856, having been complied with by virtue of the authority therein contained, the full and complete payment of this bond is guaranteed by the State of South Carolina, and the faith and funds of the said state are hereby pledged to secure the payment of the principal thereof, and of the installments of interest due or to become due thereon.

(Signed) T. J. Pickens,
Comptroller-General.

On January 1st, 1858, the company conveyed to I. W. Hayne, Edward Sebring and E. M. Beach, trustees, in trust to secure the payment of seven per cent. interest-bearing bonds, to the amount of $1,000,000, about to be issued, all its then present and future to be acquired property, and all franchises, rights and privileges of the said company, of, in, to or concerning the same. The said bonds were issued and sold to a large amount.

By an act of the general assembly, approved December 21st, 1865, (13 Stat. 368), the state authorized the company to borrow the sum of $500,000 upon a first mortgage of the property of the company, and for this purpose the state postponed the lien of the act of 1856, and directed that it should be a second lien on the said property of the company; provided that the holders of the endorsed bonds of said company, and the judgment creditors of said company, consent and agree, in writing, that their bonds and judgment be postponed, and become liens on said road next after the state lien. But the plan of effecting a loan under this act failed from a number of causes.

By the result of the war the company was reduced to insolvency, the road broken up,

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the bridges destroyed, great part of *the iron was carried off and lost, and the road was no longer capable of being used.

Under these circumstances the trustees, under the deed of January, 1858, at the suggestion of a number of the creditors representing bonds to the amount of $604,000, secured by that mortgage, proceeded, by virtue of the powers contained in the deed, to foreclose, and on the 20th of November, 1866, the mortgaged premises were sold, subject, nevertheless, to the lien created by the act of assembly of 1856. The advertisement under which the road was sold, stated that the bonds secured by that lien amounted in all to the sum of $505,000, bearing interest at six per centum per annum, payable semi-annually, and having an arrear of interest due and unpaid of about $140,000, and that the principal of the said bonds was due on March 1st, A. D. 1877. At the sale the road, subject to the above-mentioned lien, was purchased by G. W. Williams and others, for themselves and as trustees for their associates, for the sum of $30,000.

On December 21st, 1866, (13 Stat. 438), an act was passed to incorporate the Savannah and Charleston Railroad Company. This act, after reciting the charter previously granted to the Charleston and Savannah Railroad Company, the lien created by the act of 1856 to secure the payment of the bonds of the Charleston and Savannah Railroad Company, the mortgage to I. W. Hayne and others, the insolvency of the company and the foreclosure of the said mortgage, and purchase, by George W. Williams and others, for the use

of the holders of the said bonds, granted a new charter to the said purchasers and their associates, by the name of the Savannah and Charleston Railroad Company, with all the usual powers and privileges of railroad companies. The twentieth section of the act expressly provides, "that the company hereby formed shall assume and be held liable for the payment of the six per cent. interest-bearing bonds whereon the guaranty of the state has been endorsed, and the lien of the state is, in every respect, preserved and hereby reaffirmed."

On January 29th, 1867, by a decree entered in the suit of Charleston and Savannah R. R. Co. v. Hayne et al., trustees, et al., which was a suit originally instituted to enjoin the sale of the road by the trustees, under the

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mortgage of 1858, the sale by *the said trustees was confirmed, and it was ordered inter alia, that the said trustees should execute and deliver to the new corporation, the Savannah and Charleston Railroad Company, upon their paying and securing the purchase money in the manner therein directed and required, a conveyance of the mortgaged premises, advertised and sold on November 20th, 1866.

The new company was duly organized, took possession of the road, and endeavored to reconstruct the same. They attempted to borrow money for that purpose, but the lien of the act of 1856 defeated such attempt.

The condition of the road in 1869 is thus described by Mr. C. S. Gadsden, the engineer and superintendent of the road, Mr. Fisher, the treasurer of the road, and Mr. Campbell, whose evidence accompanies this report.

The road was in operation in May, 1869, to Coosawhatchie; the remainder of the road, some forty or forty-one miles, was destroyed, that is, all wooden structures, including bridges, were destroyed or useless, half of the iron of the road, for the forty or forty-one miles, was gone, having been carried away either prior to the evacuation of the line or subsequently. The road, beyond Coosawhatchie, was unproductive; the company had no means by which they could make up that portion of the road, without resources outside of the means of the road. At that time it would not have been practicable to make those forty miles available—the only means of raising money was by postponement of the prior lien. The road was first reconstructed as far as Salkehatchie, with money obtained from the hire of all the rolling stock to the South Carolina Railroad Company, for from $8000 to $12,000 per month, on a lease which ended in August, 1866, and as far as Coosawhatchie by iron, or the sale of iron, taken from the rest of the road beyond that point. The road rested at Coosawhatchie for more than a year, from the close of 1867, till May, 1869. The trains ran to Coosawhatchie as soon as the road was completed to that point. The country was broken up and the road made no earnings, except from local traffic, and had no surplus over expenses. The estimated value of the rolling stock at the close of the war was $94,450. Under these circumstances the company had no other means of repairing

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the road than by *a loan, but they were unable to effect this as long as the lien created by the act of 1856, in favor of the state, was the prior lien. The company, therefore, in 1869, presented a memorial to the legislature, setting forth a statement of the condition of the road, and praying that the state should consent that the company may secure, by a mortgage, to take priority of the state statutory lien, a new loan of $500,000, if so much should be necessary to rebuild and complete the road in the first place; and then, secondly, to pay off the arrears of interest now due on the six per cent. bonds guaranteed by the state.

The legislature referred this memorial to the attorney-general for his opinion as to the right of the state to postpone her lien and subordinate it to the mortgage, to be executed as prayed for by the memorial.

The attorney-general gave his opinion that the state had a right so to postpone the lien of the act of 1856.

Whereupon the legislature, on March 2d, 1869, (14 Stat. 201,) passed an act entitled "An act to enable the Savannah and Charleston railroad Company to complete their road." The act is as follows:

"An act to enable the Savannah and Charleston Railroad Company to complete their road.

"Section 1. Be it enacted by the senate and house of representatives of the State of South Carolina, now met and sitting in general assembly, and by the authority of the same, That the Savannah and Charleston Railroad Company is authorized and empowered to borrow and raise the sum of not more than five hundred thousand dollars, to be used in extending and rebuilding their road, under the provisions of their charter.

"Sec. 2. That for this purpose the said company is hereby authorized and empowered to issue bonds to the amount of not more than five hundred thousand dollars, payable twenty years after the date thereof, with coupons attached for interest, at the rate of seven per cent. per annum, payable semi-annually.

"Sec. 3. That the said company is hereby further authorized and required to fund and redeem the coupons for interest of the bonds of the Charleston and Savannah Railroad Company, guaranteed by the state, now past

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due, and that may fall due on *or before the first day of September, eighteen hundred and sixty-nine, by issuing therefor an equal amount of their bonds, with coupons attach-

ed, with interest payable semi-annually, at the rate of seven per cent. per annum, and the principal to become due in twenty years after the date thereof; and the payment of the said bonds, so to be issued in substitution for interest coupons, shall be guaranteed by the state in the same manner, and as fully as the said original bonds of the Charleston and Savannah Railroad Company are now guaranteed, subject, however, to the provisions of Section 6 of this act.

"Sec. 4. The bonds hereinbefore authorized for rebuilding said road shall be used exclusively for the building thereof and the outfit of the same. No salary shall be paid to any officer of the said road out of the funds so raised by this act.

"Sec. 5. The said railroad company shall deposit the interest on all their aforesaid bonds, as it becomes due, with the financial agent of the State of South Carolina in the city of New York, and shall notify the creditors of the same by public advertisement in one newspaper in New York, one in Charleston, and one in Savannah; and if said company shall fail to pay the interest on its debt within six months after it shall have become due, or fail to pay or provide for the payment of the principal of its debt within six months after it shall have become due, it shall be the duty of the comptroller-general of the state, and he shall have the power to take immediate possession of said road with all its appurtenances, and lease the same to responsible parties, who shall have control thereof until the general assembly shall, by law, provide for the settlement of the affairs of said company in the interest of all its creditors. The governor of the state is hereby authorized and empowered to appoint two directors to represent the state in the direction of said company.

"Sec. 6. That the present lien of the State of South Carolina on said road shall, upon the issue of the bonds provided for in and by the first section of this act, be postponed and become a second lien; which said second lien shall extend over and cover the whole road, its outfit and real estate, as fully as is already provided for by law. The said road shall be completed by the first day of January, eighteen hundred and seventy.

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*"Sec. 7. This act shall not be of force until the said Savannah and Charleston Railroad Company consent to the amendment of their charter, so that the property of said corporation shall be subject to taxation in conformity with Section 2 of Article XII. of the constitution, and said consent be certified, under the seal of said company, to the comptroller-general and secretary of state. Upon the filing of said consent the said charter shall be deemed and held to be modified in conformity with said section of the constitution; provided, that no tax shall be assessed or levied upon said road until the same shall have been completed."

On July 1st, 1869, the Savannah and Charleston Railroad Company issued bonds to the amount of $500,000, under a mortgage to William Aiken, James Robb and G. W. Williams, as trustees, which recited the act of March 2d, 1869, and represented that it was a first mortgage on all the present and future-to-be-acquired property of the said company, not including, however, the chartered franchises, powers and privileges of the said company. This mortgage was duly recorded.

It is in evidence that the application to the legislature for a postponement of the state lien was publicly discussed in the newspapers, and was generally known.

The bonds issued under the mortgage of July 1st, 1869, were negotiated with the contractors who rebuilt the road, and for other purposes connected with renewing the road.

Besides these bonds the company, under the provisions of the third section of the act of March 2d, 1869, issued another class of bonds, to the amount of , for funding and redeeming the coupons for interest of the bonds of the Charleston and Savannah Railroad Company, which fell due before September 1st, 1869. These bonds were guaranteed by the state, and were declared subject to the provisions of the sixth section of the act of 1869, which postponed the lien of the act of 1856, and declared that that lien should be a second lien on the road.

The shareholders of the Savannah and Charleston Railroad Company, at their annual meeting, held on the 8th day of February, 1871, authorized and directed the directors to issue bonds of the company to the amount of $300,000, payable twenty years

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*after their date, with interest, payable semi-annually, at the rate of eight per centum per annum.

The directors accordingly issued the said bonds, secured by a mortgage to Andrew Simonds, H. H. De Leon and E. Bates, of all the property of the company, its estate, rights, privileges and franchises in this state and Georgia, according to and under the sixth section of the charter of the company. The mortgage deed is dated March 21st, 1871, and is duly recorded.

As to the claims of the estate of G. A. Trenholm and Rev. W. T. Potter.

On March 14th, 1858, the Charleston and Savannah Railroad Company purchased from Nathaniel Heyward a tract of land called White Hall, together with adjoining tracts situated in St. Bartholomew's parish, containing in all eight hundred and twenty-two acres. Through the land thus purchased the Charleston and Savannah Railroad Company laid out their track and constructed their road, and the track thus laid out is the same

now in the possession of and used by the Savannah and Charleston Railroad Company. In payment of this purchase, the Charleston and Savannah Railroad Company delivered to Mr. Heyward its four separate bonds, three of which were for the payment of $5000 each, and one for the payment of $4800.

And, to secure the payment of these bonds, the company mortgaged to Mr. Heyward the lands thus purchased from him. By subsequent assignments, the said bonds passed into the hands of G. A. Trenholm and the Rev. W. T. Potter. On August 14th, 1866, proceedings were commenced against the Charleston and Savannah Railroad Company in the Court of Equity, for the foreclosure of the mortgage by which the bonds were secured.

On November 20th, 1866, all the property of the Charleston and Savannah Railroad Company was sold, and subsequently all of the said property was conveyed to the new company, the Savannah and Charleston Railroad Company. The new company were not made parties to the proceedings commenced against the old company for the foreclosure of the mortgage on the White Hall tract. But on June 17th, 1875, G. A. Trenholm and the Rev. W. T. Potter, the assignees of the bonds secured by the mortgage of White Hall, inter-

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vened by petition in the case of *D. Hand v. Savannah and Charleston Railroad Company, setting up the mortgage and reciting the proceedings which had been taken, and which had ended in a decree for foreclosure and sale.

As to the claim of the state for taxes.

The sixth section of the act of March 2d, 1869, concludes as follows: The said road shall be completed by January 1st, 1870. The seventh section of the same act concludes as follows: "Provided, that no tax shall be assessed or levied upon the said road until the same shall have been completed."

In the opinion of Mr. Gadsden, the engineer of the road, and of Mr. Campbell, the road has never been completed; the connection with Savannah not being on its own track, the road cannot transport freight and passengers from city to city on its own track.

There is a satisfactory connection with Savannah at the Georgia end, but that connection does not belong to the road; the length of the road from the western bank of the Ashley river to the crossing of the Central Railroad of Georgia, is one hundred and one miles. A bridge across Ashley river was always contemplated.

The first plan was to cross Ashley river at Bee's ferry, and afterwards it was proposed to cross at other points. The road has not yet been completed at either end. The plans and estimates of the company and engineers contemplated a starting from this side of Ashley river, the eastern side, with a bridge over the river. The road has never entered Savannah on its own track. The terminus of the track of the road is three miles from Savannah. There are many estimates for a bridge over the Ashley.

On the part of the state the following facts were submitted:

The Charleston and Savannah Railroad, as originally projected, contemplated a bridge across the Ashley river on the west side of the city of Charleston. The line on which the road was finally built strikes the western bank of the river (which is there about one quarter of a mile wide) at a point just opposite the city itself. The depot, or place for receiving and delivering freight and passengers, was placed on the other side of the river (the eastern) within the limits of the

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city, and nearly exactly *opposite the terminus of the road, on the western bank. The road bed and track were finished and in condition for transporting freight and passengers before the bridge across the Ashley was constructed. The road, as then built, extended from the point mentioned on the western bank of the Ashley to a point a little more than three miles from the city of Savannah, where it met the line of the Central railroad. Beyond this point the Charleston and Savannah railroad never built any road bed or track. By an arrangement with the Central railroad they used the track and depot of the latter in common, and the Charleston and Savannah railroad ran their trains over this track to the depot, at a point within the corporate limits of Savannah. No bridge across the Ashley ever was built by the Charleston and Savannah Railroad Company. A bridge across the river was built shortly prior to the war by a company called the Charleston Bridge Company, at a point above the line of the Charleston and Savannah railroad.

At the beginning of the war the Charleston Bridge Company allowed the railroad to lay a track upon their bridge across the river, but the road itself never either owned or built the bridge.

The Charleston and Savannah railroad was in operation for some time before the bridge across the Ashley was built. Passengers and freight were carried to and fro over the railroad, and delivered and received at the depots already mentioned in Charleston and Savannah. The transportation over the Ashley river was effected in boats provided by the company and belonging to it, without any charge additional to the regular fare and freight over the road.

The track of the road, as laid over the bridge of the Charleston Bridge Company, ran continuously from the west bank of the river across the river on the bridge, and to the depot within the limits of Charleston.

This bridge across the Ashley, and a great part of the railroad itself, were destroyed during the late war, and the Charleston and

Savannah' railroad was sold soon after the close of the war, and purchased by certain persons who were afterwards incorporated as the Savannah and Charleston Railroad Company.

The bridge cross the Ashley has never been rebuilt.

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*The road now is, and has been since March, 1870, in working order, and engaged in the transportation of freight and passengers between Charleston and Savannah.

The railroad company receives and delivers its freight and passengers at its depot in Charleston. The transportation across the river is effected under the care, responsibility and supervision of the Savannah and Charleston Railroad Company, in a large steamboat, the property of the company.

The passengers and freight are placed in the cars of the company on the western bank of the river, and in them transported to a point within the limits of the city of Savannah. In like manner, freight and passengers from Savannah to Charleston are received in Savannah, transported over the road to the end of the track, on the west bank of the Ashley, taken across the river in the company's steamer, and delivered at the depot in Charleston. The railroad company has, from time to time, advertised for through freight and travel, claiming that its connections were complete and its communications thorough.

Up to the year 1875, the arrangements with the Central railroad continued, the Savannah and Charleston railroad using the track and depot of the former. In that year a rupture occurred, owing to an alleged failure on the part of the Savannah and Charleston railroad to meet its engagements, and pay its rent for the use of the track and depot of the Central railroad.

Since that time a connecting line or track has been built from a point just across the point where the Savannah and Charleston railroad meets the Central railroad, to a point within or near the limits of Savannah, connecting with the line of the Atlantic and Gulf railroad; and this line is now rented by the Savannah and Charleston Railroad Company, who now make use of it for the transportation of freight and passengers. The road bed and track is not the property of the Savannah and Charleston Railroad Company.

The State of South Carolina, claiming that taxes were due from the Savannah and Charleston Railroad Company, has levied the following sums upon the road as taxes so due: * * * *

A bill was filed in the United States Circuit Court for the District of South Carolina,

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in March, 1872, by George N. Mil*ler, a stockholder of the railroad, to enjoin the collection of these taxes. The injunction was refused and the bill dismissed. From the decree of the Circuit Court an appeal has been made to the Supreme Court, and the case is now on the docket.

The referee's conclusions of law were that the lien created by the act of 1856 was not merely for the indemnity of the state, but attached to the bonds themselves, and was a part of the contract with the bondholders; that in the fifth section of this act the state did not reserve any right to interfere with this lien; that the condition of the road could not authorize the state to postpone this lien; that the holders of 1856 bonds were not estopped from asserting their lien, because of their failure to object to the mortgage of 1869 and the sale of bonds thereunder; that the holders of the guaranteed redemption bonds issued under the third section of the act of 1869, by accepting these bonds, have accepted, as to them, the provisions of the act of 1869; that the claims of Trenholm and Potter are a first lien on the land described in the mortgage to Heyward; and that the consent of the railroad company to surrender its exemption from taxation, being in consideration of the postponement of the lien of the act of 1856, which was beyond the power of the legislature and inoperative, that the state was not entitled to her taxes. The report concludes as follows:

"Since writing the report I have been, on July 3d, 1877, served with the copy of a suggestion that the state retires as a party to these proceedings in all questions, except that in relation to the liability of the company for taxes. But if the principles of the report are correct, the retirement of the state will not affect the rights and relations of the other parties to the several actions."

Suggestions of Attorney-General.

And now comes the State of South Carolina, by James Conner, the attorney-general, and gives the court to understand and be informed that the act entitled "An act to protect the interest of state whenever payment of interest now due remains unpaid on bonds issued by any railroad company, and whenever the guaranty of state is endorsed,"

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approved March 7th, 1871, under *and by virtue of which proceedings were filed on the day of , 187 , by the attorney-general of the state, against the Savannah and Charleston Railroad Company, (In re Hand v. Savannah and Charleston Railroad Company,) has been repealed by act of the general assembly, approved the 23d day of May, 1877, and that the State of South Carolina is no longer a party to the proceedings in the above-entitled cause, or bound thereby, or by the judgment in the said cause, except so far as regards the claim for taxes due the state by said Savan-

nah and Charleston Railroad Company, made and filed in the above-entitled cause.

James Conner, Attorney General.

To this report voluminous exceptions were taken by several parties before the court. Upon the report and exceptions, his Honor Judge Wallace rendered the following

Decree:

On hearing the report of W. Alston Pringle, the referee herein, and the argument of counsel, it is ordered that the report be confirmed and stand as the judgment of this court, except as will be herein specifically mentioned. In the judgment of this court, the lien created by the act of 1856 is vested in the state for the benefit of the holders of those bonds and coupons issued by the Charleston and Savannah Railroad Company, and guaranteed by the state according to the terms of that act, and for the payment of these bonds and coupons. It will not be necessary to inquire how far and in what manner this court might proceed to execute the trust so created, even if the state were not a party to these proceedings. According to the suggestions filed by the attorney-general, the state is a party, at least, as to all questions relating to the liability of the company for taxes and the lien for the same claimed by the state.

Neither will it be necessary to inquire how far the state may be a party for one purpose and not for other purposes.

In this case the state is a party seeking the enforcement of a lien upon the property of a company, confessedly insolvent, for

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*taxes, the payment of which cannot be had without a sale of the mortgaged property.

The state, therefore, must be considered as a party seeking a sale of the road and other property under the decree of this court, and is a party to this action in such manner and to such an extent as to be bound by the title to be given to the purchaser under its order of sale.

On account of the fact that more than half a million of dollars is represented by each class of the bonds which are respectively claimed to be the first lien, it is probable that no outside purchaser will be found, and it will become necessary for the bondholders to protect their respective interests at the sale.

How can this be done intelligently and effectively by either class of bondholders, unless the question of the priority of their claims has been finally adjudicated by the court of last resort? A part of the road lies in the State of Georgia.

It is not necessary at this time to inquire how much of the property of the company this court can order to be sold. It is sufficient to consider that such a question would cast a cloud upon the title at the sale, and that it is for the interest of all concerned that, when sold, the entire road and all the property of the company should be sold with a clear and unquestioned title to the purchaser.

It is to be presumed that the necessary proceedings will be instituted in the court of the State of Georgia for the adjudication of the rights of parties in the portion of the road lying in that state; and that by the comity of the respective courts, or by the agreement of parties, a time of sale, assented to in each jurisdiction, will be eventually fixed upon.

It is therefore ordered and decreed that all the property of the Savannah and Charleston Railroad Company included and described in the several deeds and mortgages proved in this case, and all the property of which the said company is seized and possessed, be sold by W. D. Porter, master, at such time and upon such terms and conditions as may hereafter be directed by the further order of this court.

It is further ordered that the Savannah and Charleston Railroad Company, and all the parties to these proceedings, and all

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*persons claiming under them, or either of them, be forever barred and foreclosed of all right, title, interest and equity of redemption in the mortgaged premises so sold.

And it is further ordered that out of the proceeds of sale the liens be paid by the said master, in the order and for the amounts (when amounts are set down) recommended in the report of the referee, except as to the claims of W. D. Gillison, Thomas H. Gregorie, the heirs or devisees of Thomas W. Gillison and Frederick R. Blake, in relation to which claims an order in the cause has been signed, bearing date April 24th, 1878, based upon a compromise of said claims by the parties thereto.

It is further ordered that if, after paying the liens according to the orders herein established, there should be a balance in the hands of the said master, the same be held subject to the further order of this court.

It is further ordered that all the parties to these proceedings have leave to apply at the foot of this decree for all necessary papers.

From this decree appeals were taken by the several parties against whose interests it operated; the grounds whereof will appear from the opinion of the court.

[For subsequent opinions, see 13 S. C. 467; 17 S. C. 219.]

Messrs. T. M. Hanckel, W. H. Brawley and I. M. Bryan, for respondents.

Messrs. J. B. Campbell, A. G. Magrath, C. G. Memminger, and Rutledge & Young, for 1869 bondholders.

Mr. L. F. Youmans, Attorney-General, for state.

Mr. E. McCrady, for redemption bondholders.

Messrs. James Conner and A. G. Magrath, for Trenholm & Potter.

September 30th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The nature of the various questions arising in these cases, and the facts bearing upon them, are fully stated

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*in the report of the referee, and it is unnecessary to recapitulate them. The various questions for decision will be separately stated and considered, and their bearing upon the judgment pointed out.

The first question involves the construction of the act of 1856, (12 Stat. 543,) entitled "An act to aid in the construction of the Charleston and Savannah railroad." The parties who contest such construction are as follows: 1. The Savannah and Charleston Railroad Company, a corporation distinct from the Charleston and Savannah Railroad Company, that has succeeded to the property formerly belonging to the Charleston and Savannah Railroad Company by purchase under title derived through a sale for foreclosure of a mortgage made by the Charleston and Savannah Railroad Company to certain trustees for the benefit of a specified class of bondholders, and has received from the legislature corporate franchises by that name to maintain and operate the railroad originally conceded to the Charleston and Savannah Railroad Company. The new company is a party defendant to each of the suits above entitled, while the former company is not made a party. 2. Certain bond and couponholders, creditors of the Charleston and Savannah Railroad Company, the former corporation, claiming to have liens on the property in suit prior to that under which the defendant corporation claims to have purchased and hold the same. For convenience these creditors will be designated the bond and couponholders of 1856. 3. Certain bondcreditors of the defendant corporation, asserting liens; and, 4. Certain judgment and other creditors of the original corporation claiming to have liens thereon.

The sections of the act of 1856 immediately involved in the present question of construction are the third, fourth and fifth. The object of the act is well stated in the title to be "to aid in the construction of the Charleston and Savannah railroad." The aid offered by this act consisted chiefly in the voluntary offer of the state to become an endorser on certain bonds of said company, intended to be issued for the purpose of finishing the construction of the road by providing and putting down iron rails, chairs and spikes,

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and providing an equipment for said *road. Certain conditions are annexed to the offer of the state; first, there must be bona fide subscriptions to the capital stock of the company "to an amount sufficient to grade, bridge and prepare for the iron rails fifty-one miles of the said road;" second, "such subscriptions must be shown to the governor of the state to be good and solvent;" third, "at least twenty miles of the road must be fully prepared for putting on the iron rails and equipments, and the governor notified thereof;" and it must appear, by certain evidences, that such section and every part thereof is free from any lien whatsoever other than that created in favor of the state by this act. Upon compliance with the foregoing requirments the governor is directed by Section 1 to "cause to be endorsed, by the comptroller-general, upon the bonds of said company, to an amount not exceeding $5000 per mile of said section, the guarantee of the State of South Carolina, pledging therefor the faith and funds of the state, which bonds shall be payable at such places in the United States as the president of the company may designate, bearing an interest of six per centum per annum, payable semi-annually, and not having more than twenty years to mature." The second section confines the application of the sums borrowed upon these bonds to certain defined purposes, namely, "for procuring the iron rails, chairs, spikes and equipments for said section of said road, and for putting down said iron rails."

Then follows the third section, which is as follows: "That as soon as any such bonds shall have been endorsed, as aforesaid, for the first section of the road, as aforesaid, they shall constitute a lien upon said sections so prepared as aforesaid, including the roadbed, right of way, grading, bridges and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments when purchased and delivered; and the State of South Carolina, from the endorsing of the said bonds and by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company for the payment by said company of said bonds, with the interest thereon as the same becomes due."

The fourth section provides: "That when the said company shall have prepared, as

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aforesaid, a second section, or any addi*tional number of sections, of twenty miles each, of said road, connecting with the section already completed, for the iron rails, chairs, spikes and equipments, as provided in the first section of this act, and the governor shall be notified of the facts, as before provided, he shall in like manner cause to be endorsed for said company like bonds of the said company to an amount not exceeding $5000 per mile for each and every section of twenty miles of said road so prepared as aforesaid; but upon the terms and conditions hereinbefore provided, and upon the endorsing of the said bonds, the State of South Carolina shall be invested with a like mortgage or lien, without a deed from said company upon said stock, and upon said first and additional section or sections of said

road so prepared, upon the rails and equipments put or to be put upon the same, for the payment of said bonds and the accruing interest thereon: provided, that if the last section of said road shall be less than twenty miles, bonds of the said company shall be endorsed, as aforesaid, for such section for an amount in proportion to the distance, as provided in this act, but upon the same terms and conditions, in all respects, as required in regard to the bonds to be issued for the other sections of said road. And when the whole of the said road shall be completed the State of South Carolina shall be invested with a lien, without a deed from the company, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs and the whole superstructure and equipments, and all the property owned by the company as incident to or necessary for its business for the payment of all said bonds, endorsed as aforesaid, as provided in this act, and for the interest accruing on said bonds. And after the governor shall have caused bonds to be endorsed, as provided in the first section of this act, for the first section of the road, it shall not be lawful for said company to give, create or convey to any person or persons, or body corporate whatever, any lien, encumbrance or mortgage of any kind which shall have priority over, or come in conflict with the lien of the state herein secured; and any such lien, encumbrance or mortgage shall be null and void as against said lien or mort-

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gage of the state; and the said lien or *mortgage of the state shall have priority over all other claims existing or to exist against said company."

Section 5 provides "that the state expressly reserves the right to enact hereafter all such laws as may be deemed necessary to protect the interests of the state, and to secure it against any loss in consequence of the endorsing of bonds under the provisions of this act, but in such manner as not to impair the vested rights of the stockholders of the company."

The question now to be considered upon the construction of this statute is whether the lien designed to be secured thereby was intended exclusively as an indemnity for the state in case it should be called upon to pay the bonds so endorsed, or interest upon the same, or whether it was intended as a general security, collateral to the bonds so endorsed, to accompany them into the hands of the contemplated purchasers of such bonds as a means of charging the indebtedness arising upon such bonds, for principal and interest, on the property embraced by such lien as if mortgaged for that purpose.

The direct expressions of the act, in this respect, should be first noticed, and when their primary force is ascertained it will be competent to inquire whether the rules of construction demand that such primary sense should be modified by enlarging or narrowing the same to conform to any peculiar sense for such direct expressions. The language of the act must be considered with reference to three divisions of the subject matter; first, with reference to the first section of twenty miles; second, with reference to the succeeding sections of twenty miles each, and the final section of twenty miles, or a fractional part of that distance; and, third, in reference to the road, as a whole, upon the completion of each part of it. It may here be observed that the act assumes to look to the completion of at least fifty-one miles of the road, by the terms of the conditions imposed, as adequate means to bring that portion of the whole road to the condition stipulated for, prior to the actual endorsement of the bonds, are required to be provided by means of bona fide subscriptions to the capital stock of the road, good and available for that purpose.

It must then be considered that the con-

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struction of the whole *road, as a single object, was the intention of the act, and that its division into sections of twenty miles each was solely intended for the convenience of the corporation. From this circumstance it must be concluded that the terms employed to describe the character and intention of the lien, effected on any single section of the road, must be regarded as applicable to the entire lien as affecting the whole road, unless a contrary intent appears in the terms of the act.

The terms used in regard to the first section of twenty miles must be regarded as characteristic of the intentions of the parties as to all the succeeding sections. It is clear that a single indivisible lien on the entire road, when completed, was intended; so that each bond issued, for any part of the work, should have its proportional interest in the whole property subject to the lien. This appears directly from the language of the fourth section, that "when the whole of said road shall be completed the State of South Carolina shall be invested with a lien, without a deed from the company, upon the entire road," &c. It is also a necessary inference, from the general character of the transaction, inasmuch as the value of the road depends upon the union of its parts, and division, for the purposes of security, would impair that value.

The third section declares "that so soon as any such bonds shall have been endorsed, as aforesaid, for the first section of the road, as aforesaid, they will constitute a lien upon said section," &c. Here is the expression of a direct intent that the bonds shall, when endorsed, "constitute" a lien. There can be no mistaking the sense of these terms. If it had been said that a judgment, when recovered, should constitute a lien on certain property, there could be no doubt as to the intention.

The judgment itself would conclusively evidence the existence of such lien, and, therefore, in legal language, would be said to constitute or create such lien. In the same sense the endorsed bond conclusively evidences the existence of such lien, and, with equal propriety, may be said to constitute or create such lien. The word "they" can have no other sense than that of describing the endorsed bonds as that which shall constitute the lien in question. It is important to determine

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with accuracy whether *this is the true sense of the act, for, if it is, certain consequences tend naturally to follow it, which must be admitted unless precluded by other matters contained in the act. The most important of these consequences is that if the bond constitutes the lien, then in the strictest sense the lien is accessory to the bond, and must follow it into whosoever's hand it goes.

But it is contended that this is inadmissible in view of the language that follows in regard to the first section of the road, and is, in substance, repeated as to the other sections succeeding. This language is as follows: "And the State of South Carolina, upon the endorsing of said bonds, by virtue of the same, shall be invested with said lien or mortgage, without a deed from the company, for the payment by said company of said bonds, with the interest thereon, as the same becomes due." It is contended that this language evidences an intention that the lien should enure exclusively to the benefit of the state to indemnify it against loss by reason of its endorsements of the bonds of the corporation, and that such being its intent, the language quoted above, to the effect that the bond, as endorsed, shall constitute the lien, cannot have that sense, as it would necessarily be contradictory of such exclusive purpose. The argument presents two considerations; first, whether the language on which this argument is based was intended to describe the character and object of the lien, and, second, whether it indicates any such exclusive intention as that ascribed to it. As it regards the first of these inquiries it will be observed that if the clause stood by itself it would be impossible to determine what was the nature of the lien or the character of the property upon which it was intended to take effect. All these particulars had been previously described when defining the effect of the endorsed bonds upon the property of the corporation. That was the part of the section that dealt with the creation of the lien, while the subsequent language only shows in whom the lien shall vest, at what time, and for what purpose.

There were two good and sufficient reasons why, assuming that the declaration that the endorsed bond should constitute a lien has the force and effect already ascribed to it, and is that due to its primary sense, it should

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be followed by such a pro*vision as that which declares that on a certain event such lien should vest in the state for certain purposes. In the first place the title was in the corporation and not in the state, and it was the clear intention of the act that the lien should arise out of the terms of the act alone, on the happening of the event that called it into existence or constituted it, as expressed by the declaration that it should be a lien or mortgage without a deed from the company. It may not have been necessary, but it was strictly proper that the state should in terms invest itself with that which it assumed to dispose of by its own authority, by a declaration that would have that effect in virtue of the acceptance of the benefits of the act by the corporation. The state cannot effectually grant the lands of A to B, or create a lien on the lands of A in favor of B, except where it is done either with the consent of A or in aid of judicial remedies against him. The naked declaration that in a certain event B should have a lien on the lands of A in an act by which B was bound, by his acceptance, might, by implication, be held self-executing, by transmitting such title or right on the happening of the event contemplated; but that accuracy which is desirable in statutes interfering with rights of property of the citizen was better attained by the adoption of a course which would have been necessary had it been a transaction between private persons intending to confer rights on third persons not parties to the original transaction. The other reason for adopting this form of proceeding, consistently with the idea that the endorsed bonds, in themselves, constituted the lien, is that the bonds, after being endorsed, were to be placed in the hands of the corporation to be disposed of as they might think best under their charter, so that, if finally sold to third parties, there would be an interval of time after the endorsement of the bonds and before such third persons would be in a position, by their purchase, to be invested with such lien. During this period of time the state would be without a lien for its own security, unless such lien was brought into existence at the moment of the endorsement of the bonds and prior to their passing into the hands of purchasers; and, as at that moment the state was the only existing party that could be invested with such lien, the language employed in the act was a reasonable

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*and proper provision, assuming that the lien was originally intended as well for the bondholders as the state. Then, unless the language under immediate consideration indicates an intention that the state shall have an exclusive lien for its own protection, it must be concluded that the whole provision of Section 3 is harmonious with the declaration that the endorsed bond shall constitute a lien. Having found the form of the transaction to afford nothing in conflict with any construction, it remains to consider whether the language under consideration imports such an

intent for the exclusive advantage of the state as that contended for.

This inquiry will not be confined to the particular language in question, but we will inquire whether there is anything in the whole act, or its parts, that forces the conclusion that the state was to derive exclusive advantage from the security taken. If it was clearly manifest that good faith and fair dealing demanded such a construction, that would constitute a pole-star to guide us in this inquiry.

The appellants strive to make such a case by showing that, under transactions that have occurred since the acceptance of the act of 1856 and the issuing of the bonds contemplated thereby, parties have acquired interests, in favor of which good faith demands that a certain construction of the act of 1856 should be upheld. But the same construction should be put upon the act of 1856, at the present time, that would have been appropriate at the moment of its passage, and at that time the considerations of fair dealing, that are so strenuously urged, had no existence.

Does, then, the language vesting the lien in the state, without the mention of any other parties, imply an intention to hold such a lien for its exclusive protection? That such is not a necessary implication is evident from the fact already noticed, that these words have an office giving them full efficacy independently of any such implication. If any such implication as that contended for can be admitted, it must rest on its reasonableness. It is hardly necessary to say that the direct expressions employed do not lead to any such conclusion; for, the fact that the lien was vested, in the first instance, in the state alone, has already been accounted for as necessary

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under the circumstances of the case, *on the assumption that a security was intended directly for the bondholders. We are required to say that the vesting of the lien in the state means that the state shall have it exclusively, notwithstanding other portions of the same section of the act indicate an intent that it shall enure to the benefit of the bondholder. That part of the section that vests the lien in the state sets forth the object for which the lien was created and vested, namely, a security for the payment of the bonds and interest. Now, in the payment of the bonds and interest, not only the state but the bondholders were interested, and if security is given for the performance of a particular act, why should it not enure to all interested in the performance of the act, whose interests were the subjects of consideration and protection in the transaction that gave origin to the security?

It is not enough to say that the bondholder is not mentioned, and, therefore, must be excluded, for the previous declaration of the section, making the endorsed bond the agent for constituting the lien, fairly includes the bondholder, and now something must be found that as positively excludes him. If, then, a declaration equivalent to an expression of an intent that the bondholder shall have security is followed by a provision, the effect of which is to uphold a lien in the hands of the state until the rights of such bondholder shall come into actual existence, and by which it is further declared that the object of the investing of such lien is the obtaining security for the payment of the bonds, how, then, can such provision operate to exclude the bondholder when payment in its usual sense is an act in which he has an interest? If a private individual had stood in the place of the state, and the terms of the act had been the terms of a private contract, there can be no doubt that as such contract, in effect, created the rights of the bondholders, such as might, on the contingency contemplated, arise, such terms would be held to amount to a declaration of trust in favor of the after-springing rights of the bondholder, and the surety could not be regarded as holding, subject merely to a general equity of subrogation. It would be anomalous if the creator of rights should be freed, by the operation of implication alone, from all concern for their preservation and protection. All the learning that has

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*been brought to bear in this case has neither illustrated nor suggested any such proposition. But much stress has been laid upon the fact that in the present instance it is a sovereign that is dealing with a subject, and not persons standing on the same footing in terms of equality. That circumstance, it is conceived, makes against instead of in favor of the appellant's arrangement. Had this been a contract between private persons, conceived in the terms of the act, the legal title to the lien would doubtless have vested and remained in the party standing in the place in which the state now stands; but a trust would, doubtless, have arisen in favor of the future bondholder upon the coming into existence of such an interest. The reason why the legal title would remain in such party arises from the nature of instruments for the conveyance of an interest in land. A statute, as an assurance, is not subject to the limitations that affect deeds between individuals. It may create an estate or interest in the lands in futuro as well as in presenti, and in persons not in esse at the passage of the law, as well as those in being and in the direct contemplation of the statute. Equity often raises a trust on the idea that parties having a certain interest were powerless under the forms of law to effectuate directly that interest. Such want of efficiency cannot be predicated of a statute, and, therefore, the necessity of raising and upholding a trust cannot arise, as a better result can be reached by construction

without the aid of equitable invention. The foregoing observations properly relate to passive trusts, for active trusts depend upon a different principle, by which the judgment and skill of one may be made available for the benefit of another. Passive trusts are to be regarded as a mere form of assurance to aid defects in the formal methods in use.

There was nothing to prevent the title acquired by the state in the lien or mortgage from passing under the operation of the statute directly to and vesting in the bondholder according to the extent of his interest, and, therefore, there was no inconsistency in creating a lien, attached to a bond, that may pass from hand to hand, and vesting that lien in the state; but it was eminently proper at a time when the interest of the state under such lien was the only existing interest, and a cover to all that

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should sub*sequently arise out of that transaction. Much stress is laid on the fact that at the time this act was passed the financial credit of the state was such as to preclude the idea that one dealing with the state would desire any further security than that afforded by that credit. There is a difficulty in drawing such an inference consistently with the rules of interpretation, but if it should be successfully drawn it would not be sufficient in itself to change the sense of terms used in a statute in other respects free from doubt. When it is considered that a demand against a state cannot be enforced by any legal means by an individual, it is evident that the inference thus pressed upon is based on a sentiment mainly, if not altogether, and, as such, cannot be brought to the standards of legal measure. It certainly does not draw its whole force from an assumed idea that undoubting confidence in the fact that payment will be made at maturity leads to the disregard of securities, for such security is often afforded by the personal credit of individuals of great and sure wealth and probity, yet that circumstance would not be permitted to create exceptions to the rules and presumptions of law in favor of such persons. The argument must rest in the strength of the sentiment of patriotism, either wholly or to a large extent, and in that case is beyond the class of circumstances upon which the law models its rules and presumptions. It has not been argued that there is any inconsistency in the state as a sovereign and an individual having a mutual interest in a security, nor could that question present itself where such mutuality was created by the sovereign himself. It must be concluded that the language of the third section relating to the first section of the road of twenty miles completed is clear, and that it creates a security intended and available both for the state and the bond and coupon-holders under that section, and that neither of such protected parties can exercise exclusive authority over such security. It remains then to consider the language of the fourth section in its bearing on this question.

The provisions of the third section as it regards the character and object of the lien are substantially repeated in the fourth section, but the clause providing that the endorsed bonds should constitute a lien are omitted.

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This omission applies to the sec*tions of twenty miles succeeding the first completed, and to what is finally said in regard to the entire road being chargeable on completion. In all these cases the intention is clearly expressed that the security taken shall be for the payment of the bonds. It is in no case said that it is taken for the special indemnity of the state as endorser. That is undoubtedly implied; but the direct provision is for the payment of the bonds. A provision for the payment of bonds is primarily a security for those holding the bonds. It is always so in equity, and at law when its forms permit it. The foregoing view is consistent with the circumstance that the security was demanded by an endorser or surety for the payment of the bonds in the very event that he desires to have brought about. An inference applied to such a case that the surety would prefer to pay the bonds himself and have recourse to the security for his indemnity, and for that purpose to hold the security for his exclusive benefit, has no foundation in law or fact. It must be concluded that the provisions of the fourth section of the act, in regard to the object of the lien or mortgage stipulated for, are not only consistent with the idea that the bondholder should have the benefit of the security conjointly with the state, but bear that sense upon their face. It is, therefore, competent to refer the language of the fourth section to that of the third for a full understanding of the terms of the statute, and thus to satisfy the rules of construction that demand that all that appertains to a single object or purpose should be harmonized together. Such being the case, no further need of comparing the various provisions of the third and fourth sections of the statute exists, and it must be concluded, so far as it regards these sections, that the bonds issued under and in conformity to that act were entitled to the lien or mortgage created by that act at the issuing of such bonds, and that unless that right has been lost through subsequent events, it still remains perfect. It must also be concluded that this indemnity extends to the holders of detached coupons with like effect as to the holder of the bonds. State v. Spartanburg and Union Railroad Company, 8 S. C. 129.

The next question upon the construction of the act of 1856 arises out of the fifth section

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of that act, which is as follows: *"That the state expressly reserves the right to enact hereafter all such laws as may be necessary to protect the interests of the state, and to secure it against any loss in consequence of the endorsing of the bonds under the provisions of the act, but in such a manner as not to impair the vested rights of the stockholders of the company." It is contended that the true construction of this section secures to the state unlimited control over the lien created by the previous sections of the act as against the bond and coupon-holders claiming thereunder.

The question that presents itself is, is this a reservation of power as against the bond and coupon-holders? It may be conceded at once that it was competent for the state, in the act creating the lien, to reserve to itself authority to dispose of or destroy the lien at its pleasure; the important question is, has it done so? There are two features of this section that are the key to its construction; first, the declaration of the object of the reservation, namely, to protect the interests of the state as affected by its endorsement of the bonds of the company; and, second, the character of the persons whose vested rights should be regarded as limiting the exercise of the power reserved, namely, the stockholders of the company. These provisions serve to define both the character and the limits of the authority thus reserved. We may well look to the character of these provisions, and endeavor to understand what is implied in them as a means of approaching the direct expressions creating the reservation of power. Presumably the "interests of the state" are those disclosed by the act itself, or such as may be properly connected with the matters to which the act relates. If it means more than this, and reserves the right to deal with all the corporate rights and franchises of the company by general legislation, without limitation as to the object in view, and subject only to the limitation in favor of stockholders, then there is the strongest reason for holding that the reservation is made against the railroad company alone.

If, however, it be considered as a reservation against the rights created under the act, and thus against bond and coupon-holders claiming thereunder, then it cannot be regarded in any other light than that above stated, namely, as intended to operate upon

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*the interests recognized by the act itself. What are those interests? They may be summed up in these words: The payment of the bonds and coupons. It certainly does not mean that the state may pass a law arbitrarily canceling its obligation as surety on the bond, for this might be done without impairing the vested rights of stockholders of the company as such. There are but two constructions that can be put upon this section, namely, that it does not affect the bondholders, or else it is a reservation of unlimited power as against them, and, in the latter case, it would include the right to cancel the obligation of the state. As far as the company is concerned, it saves the rights of the stockholders; and if it is to be regarded as a reservation of power as against the bondholders, its unlimited character, as such, could be argued from the silence of the act as to their vested rights, while expressly reserving those of the stockholders of the company. It is more reasonable to conclude that it was not intended directly to affect the rights of bond and coupon-holders, rather than that it was intended to remove all the protection that well-ordered governments seek to throw around such rights. We must conclude, then, so far at least as it may either directly or indirectly affect the rights of bondholders, that the language disclosing the object of the reservation confines it to such measures as may be deemed necessary to protect the interests of the state, as it regards the full and fair application of the property on which the lien was imposed to the payment of the bonds and coupons. Under this view the interests of the state and that of the bondholders were identical, and the protection of the one was the protection of the other, and the reservation of power contemplated only the acquisition of the most ample means of carrying out all the provisions of the act as intended by it, and thus was a reservation in favor of rather than against the bondholders. This section, like all others in the act, must receive construction, as well as give it to other parts, so that the act, as a whole, may be reasonable and consistent with itself. The appellant's argument, on the contrary, seems to make this section the arbiter of the construction of the entire act; that all else that the statute contains must bend to it, while it can undergo no modification, however great may be the demands of consistency as

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arising from *the statute as a whole. This is placing the accessory before the principal, and making the means the point of construction instead of the end. It cannot be doubted that this section was introduced into the act for the purpose of affording the amplest means of accomplishing the object of the statute, and not to cover a possible opportunity to recall or destroy what had been given or created by it. The limits to which a power is subjected by the act creating it, often, no doubt, define the character of the power. Here the limit imposed in favor of stockholders primarily suggest, that the power was intended to affect matters in which the stockholders, as such, might have an interest, that is the corporate rights, property and franchises. To stretch this power beyond this definition is to give it an unlimited authority over other vested rights than those expressly reserved, and

such a construction is not admissible without stronger grounds of necessity than such as are presented by the present case. We have been referred to various decisions upon the statutes of other states as bearing on the question, but there is no obscurity in the act sufficient to render it necessary to go beyond its text for its construction. It must be concluded, from the foregoing, that the power reserved was not intended to affect or destroy the vested rights of bond and coupon-holders created under the act in question, and that any subsequent law destroying such vested rights or impairing the securities by which they were held, must be regarded as impairing the obligation of a contract made by said act, and, therefore, void in its operation upon such contract. The construction here put upon the act of 1856 is not in conflict with the decision of this court in Hand v. Railroad Company, 5 S. C. 182. The rights involved in that case were the same as those presented in the present appeals, but the court declined to pass upon such rights, as the case was not in a condition for that decision. It is true that the late Chief Justice, who delivered the opinion of the court, said: "The plaintiff here claims to be subrogated to the rights of the state, and unless he can prevail in his assertion, the foreclosure, for the purpose of providing the means of paying his demand set up in the complaint, could not be ordered;" but the claim to subrogation was the only view of the plaintiff's case that was then pressed before the court.

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*That the court did not then intend to hold the plaintiff to this narrow view of his rights, is evident from the last paragraph of the opinion, which says: "We do not intend to define the nature of the issues which may properly arise under the pleadings, or to limit the control of the Circuit Court over the case."

Neither does the present construction of the act of 1856 conflict with anything decided in State v. Railroad, 8 S. C. 129. The question in that case of a general character was, whether in the distribution of assets derived from the sale of corporate property, bondholders having liens under bonds not yet due, could come in equally with the holders of coupons detached from such bonds that were overdue. The Chief Justice, in that case, in commenting on the act of December, 1857, (12 Stat. 612), which contains language in regard to another railroad similar to that, the subject of the present discussion, says: "The mortgage was held by the state, and they ('the bond and coupon-holders') were entitled to no relief through its foreclosure; but by a resort to the equitable doctrine of subrogation, which entitles the creditor to the security which the guarantor took for his own protection." This was simply affirming the only view of construction of the act that was claimed or discussed in that case. The question, whether under that act bondholders had any higher rights than the equity referred to, was not discussed, nor could it well be, as the contest was between bond and coupon-holders, who both stood in the same rank of priority, as far as that question was concerned. The observation of the Chief Justice was illustrative merely, and not necessary to the decision of the case, and cannot be regarded as decided law.

The next question to be considered is, whether the holders of bonds or coupons, who took advantage of the provisions of the act of 1869, (14 Stat. 201), contained in the third section thereof, are estopped from asserting the full measure of rights conferred by the act of 1856. The principal object of the act of 1869 was to enable the Savannah and Charleston Railroad Company (the new company) to borrow money to complete the repairs of the road, which was partially destroyed by events connected with the late war.

The third and sixth sections are those with

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which the present *question is concerned. The third section is as follows: "That the said company is hereby further authorized and required to fund and redeem the coupons for interest of the bonds of the Charleston and Savannah Railroad Company, guaranteed by the state, now past due, and that may fall due on or before the first day of September, 1869, by issuing therefor an equal amount of their bonds, with coupons attached for interest, payable semiannually, at the rate of seven per cent. per annum, and the principal to become due in twenty years after the date thereof; and the payment of the said bonds, so to be issued in substitution for interest coupons, shall be guaranteed by the state in the same manner and as fully as the said original bonds of the Charleston and Savannah Railroad Company are now guaranteed, subject, however, to the provisions of Section 6 of the act."

The sixth section here referred to reads as follows: "That the present lien of the State of South Carolina on the said road shall, upon the issue of the bonds provided for in and by the first section of this act, be postponed and become a second lien, which said second lien shall extend over and cover the whole road, its outfit and real estate, as fully as is already provided by law; the said road shall be completed by the first of January, 1870."

The bonds referred to in the sixth section, which are to have a first lien upon the whole road and outfit, are those authorized by the second section of the act to carry out the authority conferred by the first section to borrow money for the purpose of extending and rebuilding the road. Can the persons taking advantage of the provisions of the third section by presenting coupons for interest, is-

sued under the act of 1856, and fundable under this section, be permitted to claim and make available, for the payment of the bond and coupons held by them, the original lien or mortgage created by the act of 1856? To answer the question it is necessary to put a construction upon the provisions of the act of 1869, as bearing on the continuance of the lien created by the act of 1856. It cannot be denied that the act of 1869 is, in effect, an assertion on the part of the legislature of its exclusive control over the lien created by the act of 1856. No attempt has been made in argument to point out any features of this act that will bear the construction of intend-

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ing to reserve the rights *of bond and coupon-holders under the act of 1856, where they do not choose to accept the provisions of the third section. Indeed, an opinion of the then attorney-general is produced, which appears to have been prepared to inform the legislature, while, as a bill, it was on its passage, that holds the control of the state over the lien created by the act of 1856, to be exclusive and absolute. Two circumstances may be inferred from the opinion, coupled with the language of the act as passed—first, that the question of the exclusive right of the state to control the lien acquired under the act of 1856 was involved in the passage of the act; and, second, that the judgment of the legislature was that such was the nature of the rights of the state, and, as a consequence, it could, at its pleasure, destroy or postpone such lien. With this conclusion in view, it is not difficult to put a construction on the intent and meaning of the third section in its bearing on the effect of refunding. It is too clear for argument or the citation of authorities, that one taking a provision made for himself by a statute, must take upon the condition upon which it was offered. This principle equally applies to express conditions, and such as may be fairly implied from the terms of the statute. The act of 1869 was a contract in its bearing on the rights of all parties who should take its advantages, and, as such, they are precluded by the principles of legal estoppel from averring against their obligation, voluntarily assumed upon a valuable consideration.

The third section, in terms, points to the sixth section as having a controlling influence upon its provisions, and the sixth section asserts, in plain terms, the exclusive and absolute character of the rights of the state, as it regards the ownership of the lien or mortgage created under the act of 1856. If the view just stated be correct, then the coupon-holder, refunding, is in the position of one contracting with another, who claims a certain right to obtain advantages which could not be obtained except upon the concession of such claims, and cannot afterwards dispute such right. In such a case he would be precluded, on strictly legal principles, from asserting such title to be in himself against the terms of his contract.

It may be proper to remark, as bearing on

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the question, *whether the correct statement of the position of the state and the coupon-holder, refunding, has been made above, that the assertion of the title of the state is accompanied by no circumstance or declaration capable of doing away or diminishing its force, and on which a construction can be placed like that already placed on the act of 1856. In that case language was employed that included the bondholder in the assertion of the title to the lien, while here he is expressly excluded therefrom.

Section 6 expressly assumes to deal with the lien to the exclusion of any right therein on the part of the bond or coupon-holder, and this section must be regarded as, in express terms, entering into and forming part of the contract arising by virtue of the act on the part of the coupon holder funding under the third section. The view here taken having placed the effect of the act of 1869 upon the legal principle of estoppel, as affecting those bound by covenant or contract, it will not be necessary to refer in this connection to the equitable principles of estoppel and the elaborate learning connected with that subject.

The referee, and the court sustaining his conclusions, hold that the effect of the act of 1869 on those funding coupons thereunder, was confined to the coupons so funded, and did not preclude parties having funded coupons from afterwards asserting their original rights as it regards the bond and other coupons not so funded. The correctness of this conclusion will next be considered.

The exact question is, whether one having a bond of the class of 1856, and, also, coupons of the same class, whether detached or otherwise, and funding such of said coupons as have matured under the third section of the act of 1869, can be regarded as having accepted the provisions of that act, as well as it regards such bonds and immature coupons as the coupons that are matured and actually funded.

The bonds and their coupons constitute a single obligation. State v. Railroad, 8 S. C. 163. The coupon merely evidences the obligation collaterally, as it regards one of its incidents. The act of 1869 operates upon the entire obligation, both principal and interest. One who accepts its provisions for one pur-

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pose, *necessarily accepts it for all purposes, for its provisions are not capable of severance.

Where one claiming upon an obligation for principal and interest accepts interest under a composition in terms assuming to affect the conditions upon which the same is due, it must be regarded as accepting the terms of composition in their whole scope. This con-

clusion is so obvious that it does not require authority or illustration. It depends upon the principle that when a contract is one and indivisible, if it takes effect at all, it must do so as to all its parts. This does not preclude the possibility of severing the terms and conditions of a contract, but that depends upon mutuality of consent, while in the present case there is no evidence that the state has assented that the act of 1869 may take effect otherwise than according to its entire scope and purpose. It would follow that one funding coupons under that act must be regarded as bond by its terms as it regards any bonds or coupons held by him at the time of funding of the same class, at least with the coupons funded. The case before us does not enable us to apply this principle to the facts of the case; we can, therefore, only set aside the conclusion of the Circuit Court to the extent that it conflicts with the conclusions just stated, and the exact application of the principle laid down must be made upon a further hearing, on which such evidence may be introduced on that point, as the nature of the case demands.

The next question is, whether the holders of the six per cent. bonds and coupons are estopped, in equity, from asserting the lien created by the act of 1856, in consequence of their failing to actively oppose the passage of the act of 1869. The equitable estoppel, the operation of which is claimed in this instance, is usually allowed on two grounds: 1. Where there is a concealment, studied or negligent, of a material fact, to the prejudice of the party alleging the estoppel. 2. Where there are facts and circumstances implying the consent or acquiescence of the party claimed to be estopped.

It cannot be contended that at the time the act of 1869 was passed there were any facts material to be known by the parties seeking and desiring the passage of that act, and not known to them, but which the holders of the

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bonds and coupons, issued *under the act of 1856, knew and improperly withheld, to the detriment of the rights of the former. The matter of difference in question turns on the construction of the act of 1856 wholly, apart from the question of estoppel. The facts were all known. The memorialists who asked the passage of the act of 1869, claimed that the bond and coupon-holders, under the act of 1856, had no lien as security on the property of the company, but had recourse on the guarantee of the state alone, and that the state could dispose of the security at its pleasure. This was the matter passed upon by the legislature, and decided in the interest of the state. The concealment of material facts cannot, therefore, be alleged as the ground of estoppel.

If, then, the doctrine of equitable estoppel is applicable to the case, it must be on the ground of presumed consent or acquiescence. If a party having title to property, or a right in respect thereof, permits another to exercise authority over such property, or deal with such right, the latter shall not be subjected to damages by reason thereof, for volenti non fit injuria. This is a well-known legal principle, and, under its operation, a license to use both real and personal property is recognized as existing at law, both by deed or other writing under seal and by parol, and is also presumed from the conduct and relationship of the parties, when not in terms expressed. This principle, in an expanded form, lies at the foundation of the equitable doctrine of estoppel by acquiescence. The grounds upon which equity upholds the action of one who deals with the rights of another in a manner inconsistent with the legal proprietorship, embrace the following particulars:

1. There must be a right, legal or equitable, held by one and exercised by another.

2. Such exercise must have been in good faith, and in the belief of its rightfulness, and its failure must involve the loss of a valuable consideration.

3. The actual proprietor must be chargeable with wrongful conduct, tending to induce such interference with his rights, either by misrepresenting or withholding the truth of some fact, or by conduct warranting a belief of his assent thereto.

Duke of Leeds v. Amherst, 22 E. C. R. 123,

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(2 Phill.) In *this case Lord Cottenham says: "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain."

This is a broad and altogether unlimited statement of the proposition, but fairly includes all the grounds above stated. The right involved in that case was that of a tenant in tail to prevent waste. As that case was not brought within the principle in question, a more limited statement of the rule was not called for.

Storrs v. Barker, 6 Johns. Ch. 166. In that case Chancellor Kent stated the rule in its application to one having title, yet encouraging a purchase from another person who had no title. He says: "When one having title acquiesces knowingly and freely in the disposition of his property for a valuable consideration by a person pretending to have title, and having color of title, he shall be bound by that disposition of the property, and, especially, if he encouraged the parties to deal with each other in such sale and purchase." The terms "knowingly and freely," as here used, exclude all possibility that the party standing by was acting in good faith, and are, in their effect, equivalent to the declaration that the conduct of a party in such cases must be wrongful. The distinction between legal and equitable estoppel

must be here borne in mind. The former, when arising from the specific acts or general conduct of parties, proceeds in harmony with their declared or presumed intentions, and is enforced as such in equity as well as at law, while equitable estoppel, in the strict sense, being based on the idea of fraud, proceeds against the intentions of the party, and upon the inferences that the party claiming the estoppel had a right to draw from such conduct. We are dealing altogether with the question of equitable estoppel, which rests on the idea of wrong, and aims to defeat the intention of the wrong-doer rather than to uphold and enforce it. Chancellor Kent further says: "It is deemed an act of fraud for a party conversant all the time of his own rights to suffer another, ignorant of that right, to go on, under that ignorance, and purchase the property or expend money in making improvements upon it;" but he also holds that the party sought to be estopped cannot plead that he was ignorant of his legal rights in

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the mat*ter. This last position is reconcilable with the statement that precedes it, that fraud is the basis of the equitable doctrine, as the assertion of title, after permitting an act inconsistent with it, through ignorance of such title, would tend to work all the consequences of a fraud on the opposite party, and thus make a case for the interference of equity as clear as if fraud actually lay in the intentions of the party while thus standing by. In that case an injunction was allowed to prevent one having legal title from recovering in ejectment.

Hobbs v. Norton, 1 Vern. 136. In that case a party ignorant of his right to claim an annuity encouraged its purchase of another party, and was held estopped from afterwards setting up his title as against the purchaser. The Lord Keeper held "that it was a negligent thing in him not to inform himself of his own title, that thereby he might have informed the purchaser of it, when he came to inquire of him, and, therefore, decreed Sir George to conform the annuity to Hobbs." Evidently this does not mean that every person ignorant of his legal rights must be deemed negligent, but that, under the facts before him, such negligence appeared. In that case the foundation of the relief granted was the wrong of the legal owner. The case excludes the idea that only actual and intentional fraud is sufficient to authorize such relief; still it is not in conflict with the general principle that fraud is at the basis of the remedy, for an attempt to gain advantage from a wrong is in the nature of fraud, having the same consequences, and often becomes actual fraud.

Hundson v. Cheyney, 2 Vern. 150. In that case, one having title and encouraging the plaintiff to purchase from a third party was held estopped, notwithstanding that ignorance of title was urged as an excuse. It does not appear that the defendant was ignorant of the facts upon which his legal title rested, and it may be assumed that the ignorance alleged was ignorance of the law, which cannot be affirmed.

Raw v. Pote, 2 Vern. 239. In that case the relief was granted, on the ground of actual fraud in encouraging the purchase.

Chamberlain v. Railroad, 92 U. S. 299 [23 L. Ed. 715]. One was held estopped from disputing rights claimed under an act of legislature, where he had actually urged be-

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fore the legislature the adoption *of the measure secured by such act. The case stands on the same ground of principle with those previously examined.

Chapman v. Chapman, 59 Penn. 214. The rule applied in that case was stated as follows: "Positive acts, tending to mislead one ignorant of the truth, which do mislead him, to his injury, are a good ground of estoppel; and ignorance of title on the part of him who is estopped will not excuse this act." Again: "Silence will postpone a title when one should speak out, when, knowing his own right, he suffers his silence to lull to rest instead of warning of danger; when, to use the language of the books, silence becomes a fraud. * * * He who is led by such silence, ignorantly and innocently, to rest upon his title, believing it to be secure, and to expend money and make improvements upon his property without the timely warning, he should have had to dispel his illusion, will be protected by estoppel against recovery." It was held that marriage was a valuable consideration within the rule as to estoppel.

The distinction here drawn between the wrong accomplished by active participation and that by guilty silence, illustrates the foundation of the equitable doctrine. When one seeks to overthrow the state of things which he has actually brought about, to the prejudice of another, a clear wrong is perpetrated, and it is no excuse that he was ignorant of his title, for that ignorance should prejudice him alone as the result of his fault or misfortune; but its consequences should not be cast off from himself upon another, for each one should bear the consequences of his own fault or misfortune. But, if silence only is alleged, knowledge of his right must be made to appear, for the possession of such knowledge is an essential element of the question of the wrongful character of such silence. The cases already stated sufficiently illustrate all the features of the proposition which they are here adduced to support, and it is unnecessary to make further citations.

Do these principles apply to the conduct of the bond and coupon-holders under the act of 1856? Can they be said to be chargeable with guilty silence, and that the ap-

pellants are in their present position through their misconduct?

We are dealing at the present time wholly

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with a class of indi*viduals between whom, as far as we know, there is no other ground for associating them than such as arises from the fact that they are the holders of instruments for the payment of money of a certain class payable to bearer.

The separate action of the individuals that compose the group is not before us, except in one or two instances, to which the testimony relates. The case does not contain the findings requisite to enable us to say whether any particular individual of this class under consideration has, by his misconduct, subjected himself to the rule of estoppel. As the case stands the only inquiry we can make is, whether the entire class of bond and coupon-holders, under the act of 1856, are estopped by reason of silence, when, as it is contended, they should have given active opposition to the act of 1869. It is not shown that the class in question are chargeable, as a class, with having encouraged the passage of the act. The question that presents itself at this point is very simple, and may be reduced to these simple terms: When one goes to the legislature and asks the passage of an act to take away my rights, am I bound to go there, assuming that I have knowledge of the fact, and oppose such action? Very clearly no such obligation rests upon me. If the judgment of a court cannot prejudice my rights, unless I am a party before it, even if I have actual knowledge of the pendency of the proceedings before it, much less should the proceedings of a legislative body, not primarily clothed with power to divest individual rights, have such binding force against me. The fact that the state was an interested party makes the case still stronger. The state had no right to assume the consent of the bondholders, from the fact that they did not appear in the lobbies of the general assembly in opposition to the measure. It is not to be presumed, and it does not appear, that any case exists where a party has been charged with guilty silence, as it regards a particular transaction, unless present in person or by agent, at the time and place of such transaction, or involved in correspondence connected therewith. It does not appear that the bond or coupon-holders of 1856 occupied this position, and it is for those who allege guilty silence to prove it to be such. Knowing these persons only as a class, we cannot apply to the case any

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presumption that would *even charge them with knowledge of the pendency of the proceedings before the legislature. In individual instances such knowledge may have been possessed, but it is impossible to hold that their silence was, in itself, evidence of wrong, or in any sense equivalent to fraud.

Neither the state nor the parties who have come in under the act of 1869 can allege ignorance of the legal effect of the act of 1856, for that would amount to ignorance of the law; and if ignorance of one's rights does not protect from estoppel him who actively participates in the transaction, it ought not to help those seeking such relief against others. It is clear that the holders of bonds and coupons of 1856 were not bound to oppose the passage of the act of 1869 in the legislature, but that they are justified in waiting until they could defeat its operation in the courts, and, therefore, they are not estopped on the ground claimed.

The foregoing conclusions establish the proposition that the bond and coupon-holders, under the act of 1856, took a first mortgage or lien upon all the property of the old company intended by that act to be subjected to such mortgage or lien, which the legislature had no right to destroy or postpone, as such an attempt was in violation of the provisions of the constitution of the United States and of this state, forbidding the passage of a law impairing the obligation of a contract, and which lien, as it regards this class of bond and coupon-holders, other than those refunding interest, as before stated, has not been alleged and proven.

Whether individual members of such class have lost the right to claim the enforcement of such lien, has not been determined by the report of the referee nor the decree of the Circuit Court, and cannot be considered here.

Objections have been made to the claims of the bond and coupon-holders under the act of 1856, both as a class and as individuals, that will be considered. It is alleged that coupons of that class have been paid by the defendant corporation, after the road had been rebuilt, with means derived from bonds issued under the act of 1869; and it is claimed that this worked an estoppel as affecting the individuals accepting such payments. The evidence and the findings do not show the fact to which this objection relates. If, however, it is meant by the

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objection that *payment, accepted by holders of bonds or coupons under the twentieth section of the act of 1866, constitutes an estoppel as to any other bonds or coupons held by the persons accepting such payments, then the objection is without legal force. The act of 1866, (13 Stat. 438), incorporated the defendant corporation for the purpose of exercising the rights and franchises formerly appertaining to the old company, and sold for foreclosure under a mortgage subsequent to the lien of the bonds and coupons of 1856. Section 20 of the act provides "that the company hereby formed shall assume and be held liable for the payment of the six per cent. interest-bearing bonds, whereon the guaranty of the state has been endorsed, and

the lien of the state is, in every respect, preserved and hereby reaffirmed." This provision, by virtue of the acceptance by the defendant corporation of the benefits of the act, became a binding obligation on such defendant to pay the coupons and bonds of 1856 at maturity. It was, in effect, the same as a covenant on the part of a purchaser from a mortgagor to pay the mortgage debt, although enlarged in its operation, as such, through the fact that it was made such by a public statute, and not a covenant between parties alone. The act contained nothing inconsistent with the rights of the bond and coupon-holders of 1856, but, on the contrary, expressly reserved the rights in which they were interested. Such bond and coupon-holders, in demanding and receiving interest, took nothing on any express or implied condition of waiving any antecedent right, and, consequently, are neither estopped at law nor in equity. The question whether the ability of the defendant corporation to pay arose from money borrowed under the act of 1869, or, otherwise, is altogether immaterial.

It is objected that it does not appear that the bond and coupon-holders of 1856 have made an attempt to obtain payment of the state, the endorser of their bonds. A demand, without the right to prosecute at law, would be fruitless and a mere ceremony, and, as such, its absence, if established, could not give rise to any equity.

The defendant corporation, under the twentieth section of their charter, assumed to save the state free from liability on its endorsement by contracting to pay such in-

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debtedness, and neither *the defendant nor the classes of creditors that derive their liens under such defendant corporation can claim in equity that the primary duty of payment rests upon the state and not upon the defendant corporation.

It is contended that the bond and coupon-holders of 1856 have a double security, should they be held to have a lien or mortgage under the act of 1856, namely, that lien on the one hand, and the pledge of the faith and funds of the state on the other, and that appellants have only one of their securities, and equity requires the party having a double security to first exhaust that which will not injure the other party protected by the same securities. Although the proposition is in the face of the covenant of the defendant corporation to pay, primarily, yet it will be considered. The promises of the state to pay money, incapable of enforcement by suit, cannot, with any propriety, be regarded as a security within the meaning of the rule of equity invoked. Equity cannot lay hold of and apply such a demand. It would be a much stronger case to hold that one that has a bond secured by a mortgage holds a double security within the sense of the rule of equity, so that a subsequent mortgagee might enjoin proceedings to foreclose the prior mortgage, on the ground that the prior mortgagee was bound first to exhaust his remedy upon the bond, yet such an application of the rule of equity has not been made. Much less can an imperfect personal obligation, that is, one incapable of legal enforcement, constitute such a security in the contemplation of equity.

The view taken of the rights of the bond and coupon-holders renders it unnecessary to examine those objections that raise the question of the right of a trustee to charge his cestui que trust with moneys expended for the preservation of the trust estate. Whatever rights these bond and coupon-holders acquired under the act of 1856 they acquired in their own right at the moment they became such holders, and nothing was left in the state, as it regards that class of liens on which the state could exercise the powers of a trustee.

It is contended that the holders of the bond and coupons of 1856 owed some duty to the bond and coupon-holders of 1869 which has been neglected, and, therefore, they should

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be barred *and estopped from making their demand. It is said that they stood by and saw the money obtained under the act of 1869 expended for the benefit of the security, with knowledge of all the facts, and gave no notice of their demand. This objection is substantially answered by what has already been said in reference to their silence while the act of 1869 was upon its passage in the legislature. It certainly cannot be contended that when a mortgagor, having borrowed money on a second mortgage for the purpose, undertakes to expend such money on improvements, or even for the preservation of the mortgaged premises, the first mortgagor, with a recorded mortgage, must come forward, either with objection or at least notice of his claims, at the peril of having his security postponed to the junior one.

The right of the bondholders of 1856 was derived under a public statute, of which all were bound to take notice, and stand, as to subsequent encumbrancers, on the same footing as that of a prior recorded mortgage to a subsequent one.

It is contended on behalf of the holders of the bonds issued under the act of 1869 for the redemption of coupons matured upon the bonds of 1856, and which bonds are entitled by that act to a guaranty of payment by the state, that they are entitled to a decree against the state for the amount due from the state on its guaranty. Such a decree would be collateral to the relief demanded in the present action, and, therefore, is not necessarily called for, even if admissible in itself. But the state guaranteed nothing by the act of 1869 beyond au-

thorizing an endorsement of its pledge of payment as surety on the bonds issued in lieu of coupons of bonds that previously held such pledge. Such a guaranty cannot be directly enforced by suit against the state, and, consequently, cannot be enforced in an indirect way as collateral to other issues.

There was no error in the ruling that the bonds issued under the act of 1869, for the redemption of coupons of 1856, were not entitled to any lien on the property of the company. It has already been held that the act of 1869 was, in effect, an assertion on the part of the state of exclusive control over the lien or mortgage created by the act of 1856, and that the holders of bonds and coupons, who accepted the benefit of the

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act of 1869, assented *to, and are bound by this view of the act of 1856. It would follow that they can claim nothing but what the act of 1869 recognizes by way of security. In that act the state waives its lien under the act of 1856 in behalf of the holders of bonds issued under the first section of that act which does not cover the redemption bond. Consequently the position of the redemption bonds is this: The property of the company is liable, as far as the bonded debt is concerned, in the first instance, for the payment of the bonds and coupons of 1856, where the rights of the holders have not become subsequently impaired; secondly, to the bonds issued under the first section of the act of 1869; thirdly, to indemnify the state upon its guaranty on the bonds and coupons of 1856, and on those issued under the act of 1869, which have upon them the endorsement of the guaranty of the state. This would leave the state bound as surety on the redemption bonds, and holding a third lien, wholly subject to its control for its protection from liability thereunder.

It does not appear that any case was made, or attempted to be made, in the Circuit Court for applying the principles of subrogation as between the state as surety and the holders of the redemption bonds holding the state as surety, and that question cannot be considered as opened by the appeal.

It is clear that the reasoning already applied to the act of 1856 to show that the lien of the state was intended equally for the holders of bonds as for itself, is inapplicable to the act of 1869, which has a manifest intent to the contrary, therefore there is no ground for holding that the lien of the state, reserved by the act of 1869, as it regards the redemption bonds, enured to the benefit of the holders of such bonds, so as to give them an independent right to enforce it.

It is also contended in behalf of the holders of the redemption bonds, that the state, "as surety, has a right and is bound to set up the coupons which have been paid and redeemed by its guaranty of the Savannah and Charleston railroad bonds of 1869, given for these coupons." It is certain that the state could not set up these redeemed coupons as against the bonds issued under the first section of the act of 1869, for that would violate the terms of the security giv-

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en by that act to the holders of such *bonds. Nor could such an equity be set up against the older legal and equitable right of the holders of the bonds and coupons of 1856, who have not forfeited their rights as such, as that would defeat the rule that where equities are equal the legal right will prevail.

It does not appear that this demand of the holders of the redemption bonds was brought forward until after the Circuit decree was rendered, as no reference to the subject is found in the exceptions to the referee's report, and its first appearance in the case is among the grounds of appeal. It is too late to raise such a new and distinctive equity after decree. This conclusion disposes of the further exception that the state, having failed to set up such redeemed coupons, the holders of the redemption bonds can do so by way of subrogation to the place of the state.

As it regards the claims of the estate of G. A. Trenholm and Rev. W. T. Potter, the views of the referee are approved, so far as he sustains the right of the claimant to enforce the mortgage. It remains to consider whether the conclusions of the referee, as to the relative priority of the liens under the act of 1856, and under the mortgage through which the defendant corporation claims title and the mortgage in question, are correct.

The claims of the estate of Trenholm and Potter arise on bonds secured by a purchase-money mortgage on lands sold to the Charleston and Savannah Railroad Company. The subject of this sale was a body of land, only a portion of which was required for the use of the railroad. The purchase of the land was made on the 4th of March, 1858. The date of the bonds and mortgage does not appear, but may be assumed to be the same as that already stated, namely, March 4th, 1858. At the date of this mortgage it is claimed that there were two liens outstanding against the property of the Charleston and Savannah Railroad Company, namely, that created by the act of 1856 in behalf of the state and the holders of securities issued under that act, and the mortgage to secure an issue of bonds, under which the defendant corporation obtained title.

The first question presented is, whether the lien of the act of 1856 can prevail over

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the mortgage held by the estate of Tren-

holm and Potter as a first lien on the land so purchased and mortgaged.

This will be considered, first, as it regards the portion of the land so purchased, which was required and used for the immediate purposes of the railroad, as such; and, second, as to that part of the purchased land that was not required for the direct purposes of the railroad. The lien created by the act of 1856 covers "the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs, and the whole superstructure and equipments, and all the property owned by the company, as incident to or necessary to its business." Act, 1856, § 4.

This lien was to be created and take effect "when the whole of said road shall be completed."

It does not appear at what date the whole road was completed. We are led to infer that the date of the completion of the road was subsequent to that of the execution of the bonds and mortgage of Trenholm and Potter, inasmuch as the object of the transaction was to secure the right of way for the road, and the road could not be completed in conformity with the requirements of the act of 1856 until the right of way had been acquired throughout its full extent. We are at liberty to draw this inference, as it is in support of the decree, which must be presumed right until the contrary is made to appear. Prior to the mortgage, then, the only liens actually created under the act were those that arose on each separate section of the road of twenty miles, at its completion, to the extent required by the act of 1856, and upon the endorsing of the bonds covering that section. The lien given on each section was "upon said section so prepared, as aforesaid, including the road bed, right of way, grading, bridges and masonry upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes and equipments, when purchased and delivered." This lien does not include the general property of the company. It must be concluded, for the reasons already stated, that the section that includes the land mortgaged was not completed for want of full right of way until after the mortgage was made. The case does not show to what section of the road the purchased land in

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question belonged, but *that is unimportant under the view here taken. It follows that the mortgage took effect prior to the attaching of the lien, as it regards the land included in and forming the road bed and so much lying contiguous thereto as was reasonable for the purposes of the railroad, the test as to the quantity being whether it could be separated from the railroad franchise without impairing the value and usefulness of the latter. As it regards so much of the mortgaged land as properly appertained to the railroad, as such, a question arises whether the provisions of the act do not operate to create a lien relating back to the date of the passage of the act, as it regards all other liens created or attempted to be created after that date. This question arises under two aspects of the act. The first is that the act provides that no lien shall exist at the time the bonds are so endorsed, other than that created by the act itself, and requires that evidence of the non-existence of such additional lien shall be furnished before the bonds shall be endorsed. It is not necessary to consider whether it was not competent for the legislature to frame the act of 1856 in such a manner that no other lien than that intended by that act could be effectually created after the date of the passage of the act so as to take precedence of the lien created by the act itself, for we will find that the act does not assume to accomplish any such purpose. This is evident from the fact that evidence of the non-existence of liens was required which would not be necessary if the act itself was intended to operate to prevent the possibility of the existence of any such liens. Nor can the purposes of the act be extended, in this respect, beyond the limits of necessary implication, for the reason that it would then interfere with common rights incident to dominion over land.

The other view of the act is, that all parties had notice, by means of the act, of the intention of the legislature that such act should operate to create a lien superior to any other that might exist, and having such notice could not defeat the reasonable intent of the act. The answer to this is, that the act stops short of indicating such a purpose, and can only take effect according to the purposes declared or necessarily to be implied. Besides, the parties selling the land and taking back a mortgage for the purchase money, could not, with certainty,

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know that the corpo*ration would ever apply for the endorsement of the bonds so as to interfere with a lien for the purchase money. The corporation had the right to apply for the endorsement of the bonds upon the terms stipulated in the act, but were not bound to do so. It, therefore, appears that the object of the statute was not absolutely to create a lien at all events, but to give the corporation voluntary power to bring such lien into operation on certain contingencies under their control. The act being in this respect permissive and not mandatory, there is no ground for saying that the creature of an independent lien by the defendant corporation defeated the intent of the statute, although the subsequent act of taking endorsed bonds, with such lien outstanding, may have tended to produce that effect, but of that none of the parties complain.

The next question is, whether the mortgage of January, 1858, under which the defendant corporation holds title, and which was antecedent in point of time to the purchase money mortgage in question, is entitled to priority over that mortgage.

It cannot be doubted that a railroad corporation may mortgage after-to-be-acquired property. Dunham v. Railroad, 1 Wall. 259 [17 L. Ed. 584]; Pennock v. Coe, 23 How. 117 [16 L. Ed. 436]; Pierce v. Railroad, 24 Wis. 551. So, if it makes a good mortgage of the land, and afterwards purchases personal property, giving a lien thereon for the purchase money, and such personal property becomes attached to the soil, being used for the construction of improvements upon it, the lien of the mortgage of the land prevails over that made for the security of the purchase money of the personal property. Railroad v. Cowdrey, 11 Wall. 459 [20 L. Ed. 199]. But to hold that a railroad company may make a mortgage of land to be acquired so as to defeat a purchase-money mortgage of land subsequently acquired, stands on an entirely different footing and cannot be admitted.

The grounds already presented would as well dispose of the question as it relates to the land mortgaged other than that required for the road bed and its appurtenances, but it is not necessary to resort to such reasonings, inasmuch as property held by a railroad company other than for the immediate uses of the railroad, stands on the same footing as lands in the hands of a natural person. Doubtless it might be otherwise when

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a pecu*liar character has been impressed upon such holdings by the law governing the corporation, but such is not claimed to be the case here.

The Charleston and Savannah Railroad Company having given a purchase money mortgage for the land, no obligation or lien affecting that company or its property can be interposed prior to such purchase-money mortgage. The mortgage of Trenholm and Potter was properly upheld by the decree as a first lien as to such mortgaged property. So far as it regards that portion of the mortgaged land that was requisite for the use of the railroad, as such, the claims of the estate of Trenholm and of Potter must be confined to the fund arising from the sale of the railroad as a whole, and for that purpose there should be an inquiry to ascertain what ratable proportion of the whole fund arising from such sale would properly represent the relative value of that portion of the mortgaged land. The rest of the mortgaged land in question must be sold separately, and the proceeds applied on the foregoing principles.

The next question to be considered is, the right of the state to tax the property of the defendant corporation. The act of 1869 required the road to be completed by the first of January, 1870, and provided "that no tax shall be assessed or levied upon the said road until the same shall have been completed."

It is evident that the intent of the act was that the road should become subject to taxation not later than January 1st, 1870, when it was required to be completed. But the appellants contend that it was not, in fact, completed at that time, and has not yet been completed, and that until so completed taxes cannot be levied under the act. This is virtually claiming that they may disregard one of the provisions of the act and still insist upon the benefit of another, when the two clauses cannot, from their nature, be disconnected from each other. That is to say, that they may claim exemption from taxation on the ground that they have failed to comply with the requirements in regard to the completion of the road. This would be taking advantage of their own wrong. The act cannot be construed as intending any such one-sided advantage.

The referee and the Circuit judge con-

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cludes, as matter of fact, *that the road was completed, in the sense contemplated by the act, previous to the imposition of the taxes claimed. This conclusion is based substantially on the idea that it was a substantial completion of the road when the terminus at Charleston was reached, at a point opposite to that city, on the Ashley river, and passengers and freight were transferred across the river by boat to that city, and when, by arrangement with another railroad running into the city of Savannah, it was enabled to run its trains over the track of such road for about three miles into the city of Savannah. It is evident that this arrangement put in exercise the franchise of the defendant corporation to carry passengers and freight, for hire, to its full extent, that is, from the city of Charleston to the city of Savannah. Whether the defendant corporation chose to build and own or lease their right of approach to Savannah is immaterial to the question of completion within the meaning of the act of 1869. Under such circumstances, the exemption claimed by the defendant corporation cannot be sustained by any reasonable construction of the act of 1869. That portion of the decree that sustains the imposition of the taxes, should be affirmed.

It was contended in argument that there was no creditor before the court, as plaintiff, who had the right to demand the sale of the road. The state is clearly such a creditor, and has a complaint demanding a sale of the road for the payment of its debts. Although the state has assumed to modify its original position, that fact is immaterial to the questions presented by the appeal, as it has not relinquished its claims for tax-

es, nor sought to abandon that part of its complaint that seeks the satisfaction of such taxes out of the property of the defendant corporation.

So much of the decree as orders the sale of the road should be modified by a provision that as to all that part of the permanent property mortgaged that lies within the State of Georgia, such sale must be made subject to such liens as have been, or may hereafter be, established under the laws of that state. In this manner the purchaser will acquire all the right of all parties before the court, and be enabled, if it should become necessary, to prosecute such remedies as may be requisite to become invested with that portion of the permanent property

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situated within the *jurisdiction of the State of Georgia. The movable property in the hands of the receiver, being fully within the jurisdiction of this court, is not subject to the above modification. Subject to the modifications hereinbefore indicated, the decree of the Circuit Court should be affirmed.

McIVER, A. J., concurred.

HASKELL, A. J. I am unable to concur in the construction given to the act of 1856. 12 Stat. 467.

The act is ambulatory in its character and passes over an extended period of time, providing for a succession of progressive events and separate transactions before it establishes the final provision which is to govern the whole as an entirety.

Section 3 is made, by the majority of the court, the key of the construction and to govern the act, but is strictly applicable only to the twenty-mile or fractional division of the road, and the bonds issued for its outfit and completion. For the section is partial in its nature, and antecedent, both in the act and in its legal bearing, to so much of Section 4 as becomes of force on the completion of the whole road, and applies to all the bonds endorsed by the state at any time, issued to effect the completion of the several divisions of the road. Section 4 was part of the contract created under Section 3, and even if, as is held, the lien had vested in the bond, upon its issue for the completion of each fractional division, it so vested subject to the provision of Section 4, and on the completion of the road passed over and vested again in the state, subject to its control under the power reserved in Section 5.

But no such difficulty arises in the view my mind is constrained to take of the act. Section 3 enacts that "the State of South Carolina, upon the endorsing of said bonds, and by virtue of the same, shall be invested with said lien or mortgage," &c. It is immaterial to consider whether "by virtue of the same," refers to the "endorsing" or to the bonds thus endorsed, for, under the view taken, the result would be the same. Section 4 provides that "when the whole of said road shall be

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completed *the State of South Carolina shall be invested with a lien, without a deed from the company, upon the entire road," &c.

The difference of construction arises upon the meaning of the word "constitute," in the preceding portion of Section 3, by which it is provided "that so soon as any such bonds shall have been endorsed as aforesaid, for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid," &c.

It is held that this provision, overbearing all other language used in the act, renders the lien accessory to the bond and vests it in the subsequent holder of the bond—the purchaser.

The analogy of a judgment used in the reasoning would be satisfactory if made complete. Thus, if it be enacted that A institute an action, and that the judgment, when entered up in the name of A, shall constitute a lien, and that said lien shall be for the benefit of B, and as soon as established shall vest in B, the cases would be similar. The plain interpretation is, that the judgment held by A would be evidence of the lien, but that the lien itself would be vested in B. "Constitute," in its primary sense, means "cause to stand, set up or establish;" and, in its secondary sense, "compose of, form," which latter is the construction adopted by the majority of the court. And such would be quite admissible were it consistent with the positive language used in other portions of the act, but when it produces inconsistency, the primary meaning, which is entirely in harmony with the rest of the act, should have preference. Adopting, therefore, the word in its primary sense, Section 3 means not that the bonds shall, in themselves, compose or form a lien, but that they shall, by their exclusion and endorsement, establish or be evidence of a lien. In whom that lien shall be vested is thus left open, and is determined by the second provision of Section 3, so far as regards each fraction of the road, and finally as to the whole road by Section 4, whereby the said lien is invested in the state. The bonds are thus the evidence of the creation of the lien which vests according to the statute.

The view that the vesting of the lien in the state was intended as only a temporary provision, of force only so long as the bonds, after endorsement, remained in the hands of

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the railroad com*pany, is refuted by the purpose and provisions of the act, which authorizes the bonds to be endorsed in parcels proportionate with fractional divisions of the road. The plain object is, (1) to facilitate the completion of the road by sections; (2) to enforce the application of the proceeds of the bonds at the rate per mile fixed by the act; and (3) to insure the completion of the entire road down to the last fraction before

the endorsement of the last batch of the bonds. To effect such purposes the bonds would be sold in the order in which the sections were completed in compliance with the act, and, consequently, would all be in the hands of purchasers before the final completion. What, then, could be the sense of a provision like that in Section 4, to vest in the state a lien, the title to endure only so long as the bonds remained in the hands of the railroad company, when ex necessitate, the bonds must go out of such hands before the accrual of the period to which the provision in Section 4 relates, viz., the completion of the entire road. The other reasons advanced to aid in the construction of the act are sufficiently met by the view that the guarantee by the sovereign power is superior to any and all classes of securities, so long as good faith is observed by the government; and that it will be, is always to be presumed. From such point of view it would be a detriment rather than an advantage that bondholders should be compelled to exhaust all legal remedies before they could look to the state for the fulfillment of her pledge, and such anticipation would, in 1856, the time at which the act was passed, have diminished rather than increased the market value of the bonds.

I concur in the other points decided, so far as they do not conflict with the views herein expressed.

Decree affirmed.

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*(Case No. 762.)

THE STATE OF SOUTH CAROLINA, by THE ATTORNEY-GENERAL, ex relatione W. R. CATHCART et al., v. THE CITY OF COLUMBIA et al.

(April Term, 1879.)

[1. *Trial* ⟸394.]

The failure of a Circuit judge to state his findings of fact and conclusions of law separately, is not error in the judgment, which may be remedied by appeal.

[Ed. Note.—Cited in Bouknight v. Brown, 16 S. C. 164; Chapman v. Lipscomb, 18 S. C. 230; Briggs v. Briggs, 24 S. C. 379.

For other cases, see Trial, Cent. Dig. § 924; Dec. Dig. ⟸394.]

[2. *Municipal Corporations* ⟸931.]

Bonds of a municipal corporation, issued with intent to retire, by means of their proceeds, outstanding bonds of a previous issue, having accomplished such purpose, will be held valid in equity, although the statute under whose authority they were issued contained the proviso "that before such issue the city council shall recall and cancel" the bonds so outstanding. Haskell, A. J., dissenting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1944; Dec. Dig. ⟸931.]

[3. *Municipal Corporations* ⟸921.]

Bonds of a municipal corporation issued under the authority of an act of the legislature, which provided "that no bond shall be negotiated under the provisions of this act otherwise than by public sale, notice of which," &c., and endorsed with a recital that the provisions of the act in this particular had been complied with, *held* to be valid obligations of the city, although sold on a day to which the sale had been adjourned from the day of which proper advertisement had been given, and bid in by members of the city council at a price less than a limit fixed by council, and subsequently resold privately at an enhanced price for the benefit of the city. Haskell, A. J., dissented as to those bonds which were privately negotiated for purposes, in his judgment, ultra the objects authorized.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1932; Dec. Dig. ⟸921.]

[4. *Municipal Corporations* ⟸921.]

The city of Columbia directed her mayor to borrow money to carry on the construction of a city hall and market, and for other purposes necessary for the support of the city government. A loan was effected for $75,000, secured by an issue of $250,000 in bonds, dated August 21st, 1871, deposited as collateral security. Subsequently the legislature passed an act authorizing the city to issue bonds, with a proviso "that before such issue the city council shall recall and cancel the bonds to the amount of $250,000, issued August 21st, 1871, for the erection of city hall and market," and with a further provision that the proceeds of the sale of such new bonds should be applied "first to the payment of any debts heretofore contracted for the construction of the new city hall and the new market," &c. *Held*, that the act recognized the $75,000 loan as having been made for the city hall and market, and authorized its payment, and the council were not limited to the payment of only so much of such loan as was actually so expended. Haskell, A. J., dissenting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1934; Dec. Dig. ⟸921.]

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[5. *Municipal Corporations* ⟸955.]

*In the absence of proof that the proceeds of the bonds were expended for purposes other than such as constituted proper municipal objects, it cannot be held that there was a violation of the sixth section of the act which required such proceeds to be applied "first to the payment of any debts heretofore contracted, or which may hereafter be contracted for the construction of the new city hall and the new market; and, secondly, for the improvement of the streets, the extension of the water works, and for any other improvements which shall be adjudged advisable by the said mayor and aldermen." Haskell, A. J., dissenting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2006; Dec. Dig. ⟸955.]

[6. *Municipal Corporations* ⟸911.]

Expenditures for purposes other than the construction of the city hall and market, before the completion of such buildings, were not unauthorized by this act. Haskell, A. J., dissenting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1899, 1901; Dec. Dig. ⟸911.]

[7. *Appeal and Error* ⟸1010.]

A finding of fact by the Circuit Court against the appellants, upon whom lay the burden of proof, sustained, there being no overbearing testimony to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. ⟸1010.]

[8. *Municipal Corporations* ⟸924.]

Section 8 of the act required "that said mayor and aldermen shall cause the provisions of this act, or an accurate abstract thereof, to be printed on the back of each bond." What purported to be an abstract of the act was printed on the back of the new bonds, but it omitted to state that the act required the old bonds to be canceled before the new could be lawfully issued. *Held*, that the bonds were valid obligations of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1937; Dec. Dig. ⟸924.]

[9. *Municipal Corporations* ⟸931.]

A municipal corporation having borrowed money and delivered its bonds in payment therefor, neither the corporation, nor any one in its behalf can recover such bonds, upon the ground that it was not authorized to create such debt. Haskell, A. J., dissenting.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1947; Dec. Dig. ⟸931.]

[10. *Equity* ⟸418.]

There can be no judgment against defendants failing to answer where the principal matter of the bill put in issue by other defendants, fails for want of proof; but other matters not necessarily connected with the principal matter, alleged against one only of the defendants, who did not appear to the action, will be taken as true, and judgment entered thereon against him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 959; Dec. Dig. ⟸418.]

[11. *Municipal Corporations* ⟸907.]

The character and nature of the powers, duties and restrictions imposed upon the city of Columbia by the several provisions above recited of the act authorizing an issue of bonds, discussed by Willard, C. J., and Haskell, A. J.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1895; Dec. Dig. ⟸907.]

[12. *Statutes* ⟸239.]

[Cited in Walker v. State, 12 S. C. 302, to the point that an act creating new specific rights must be regarded as an express limitation of the authority sought to be conferred by the act.]

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 320; Dec. Dig. ⟸239.]

[This case is also cited in City of Columbia v. Tindal, 43 S. C. 555, 21 S. E. 341, as to facts.]

Before Pressley, J., Richland, November, 1878.

The nature of this action and the terms of the act of March 13th, 1872, (15 Stat. 220,) construed by the court, are sufficiently stated in the opinion of the Chief Justice. The facts connected with the loan of $75,000 by J. L. Neagle, which preceded the passage of this act, are set forth in the Circuit decree.

John Alexander was mayor of Columbia from April, 1870, to April, 1874. Holders of

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bonds issued under the authority *of the act of March 13th, 1872, were parties defendant to this cause. The bonds issued under this act are called city hall bonds. They were first put up for sale at auction in the city of Columbia on June 19th, 1872, all the advertisements required by the act having been duly made. At this sale $100,000 in bonds were sold, of which C. Waring bought $10,000 in bonds, and he paid for them in claims then held against the city for work upon the city hall, and the remaining $90,000 were bid in by John Alexander for the city, under instructions from the city council not to let them go for less than a limit which exceeded the sum bid. It was then announced that the sale was adjourned to October 2d, 1872. The second sale was advertised in the Columbia and Augusta, and possibly the Charleston papers. At the second sale $50,000 in bonds were sold, some of which were bid in by third parties, and the remainder were bid in for the city. One of the purchasers at this sale was the Central National Bank, which held a note of the city for money borrowed in June, 1872, and the price of the bonds was applied in payment of this note. Public notice was then and there given that the sale was adjourned over to December 2d, 1872. The third sale was advertised to the same extent as was the second. At the third sale $100,000 in bonds were sold and were all bid in for the city.

The bonds bid in by the city were disposed of afterwards by the corporate authorities by private negotiation. Some were sold directly to purchasers, others were deposited as collateral security to secure loans made by the city, and on default of payment, some of them were placed on market and sold. Of the bonds bid in by Alexander, he retained $750 for a debt due to himself by the city. Alexander, and other defendants who were holders of city hall bonds, did not answer in this action.

This statement, together with the Circuit decree, the grounds of appeal, the opinion of the court and the dissenting opinion, fully presents the case.

The Circuit decree is as follows:

The city of Columbia is oppressed with a heavy burden of debt, and the relators seek

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in this case to relieve her from a por*tion thereof. They allege that her bonds, amounting to $250,000, issued by authority of the act of March, 1872, are void and should be canceled. In the issue of said bonds important provisions of the said act were disregarded, as following, to wit:

First. That before such issue certain other bonds previously issued were not recalled and canceled, as required by the first section of said act.

Second. That the bonds issued under the act were not advertised and negotiated "by public sale," as its third section required.

Third. That, contrary to the sixth section of said act, much of the proceeds of said bonds was wastefully and fraudulently used for the current expenses of said city.

Fourth. That "an accurate abstract" of the

said act was not, as required by its eighth section, printed on the back of the said bonds.

The first of the said allegations has reference to a fraudulent contract, which, before the passage of the said act, had been made between J. M. Allen and the city council of Columbia for building a new city hall. After that contract had been executed, the city council, under pretence of raising money for that purpose, borrowed from J. L. Neagle the sum of $75,000, and, as security for the same, pledged to him its bonds, amounting to $250,000. These bonds so pledged were, by the said act of March, 1872, to be recalled and canceled before the issue of the new bonds therein authorized, and this requirement was not performed according to its letter. The new bonds were issued and sold at public sale on June 19th, October 2d and December 2d, 1872, but the old bonds were not in possession of the city council until November 28th, and were not canceled in fact until December 8th, 1872. If, therefore, the first section of the said act be construed literally, its mandate was not complied with in the said issue.

But previous to the said issue, very soon after the passage of the act, the city council had borrowed money from R. K. Scott and the Carolina National Bank, and had paid to J. L. Neagle the debt for which the old bonds were pledged. All that time the understanding with R. K. Scott and the bank was

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that these *pledged bonds should remain as security for the new loan until bonds of the new issue could be prepared to replace them. Under this agreement the old bonds were subsequently redeemed and canceled on December 8th, 1872.

I hold that the said arrangement and its completion was a substantial compliance with the said act; the first and sixth sections must be construed together and so as not to contradict each other. If they be construed separately and literally, then the first section would require that the old bonds be canceled before the new be issued, whilst the sixth section would require a sale of new bonds in order that the proceeds might redeem the old bonds by paying the debt for which they stood pledged. Here, then, by construing the two sections separately, according to their letter, would be two priorities, each demanding precedence of the other, and that would be impossible. I therefore find it necessary to harmonize them by looking to the spirit and purpose of the act, and there its meaning seems to be that, before the new bonds be issued, some certain and positive arrangement was to be effected whereby to recall and cancel the old bonds, and so make it certain that the city should not, in any case, be liable at the same time for both issues. That arrangement having been made and successfully completed, it accomplished the full purpose of both sections of the act; it paid the debt previously contracted for the said city hall, as required by the sixth section of the act, and canceled the pledged bonds, as required by the first section. When that was done, the whole transaction, "nunc pro tunc," assumed the date of the contract which accomplished it, and the intent and spirit of the act was complied with.

2. As to the requirement that the said bonds should be negotiated only by "public sale," that, also, seems to me to have been substantially complied with. They were duly offered at public sale, but, to prevent needless and ruinous sacrifice, a limit as to the price they must sell for was fixed by the city council, and such bonds as were not bid for at that price were bid in by the mayor of the city, who afterwards, for its benefit, sold them at private sale. The testimony herein proves this to have been a wise plan; it most certainly obtained a higher price for the said bonds than unlimited public sale would

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have reached. It is, *therefore, the case of an agent authorized and directed to sell only at public sale who voluntarily incurs personal risk by bidding in the property so sold. If he afterwards sell it at a less price, he himself must pay the loss; but if he make profit by such subsequent sale and allow the benefit thereof to his principal, his conduct in that respect will not be unlawful or invalid, and a principal could rarely be found who would refuse to ratify such act of his agent.

But even if the sale of the said bonds were not according to the requirements of the said act, it could not now be impeached; its performance was entrusted to the city council, which, by its recital on the said bonds, states that they were issued by a "public sale thereof," and that recital is, under the law, a sufficient protection to any purchaser for value.

3. As to the allegation that the proceeds of the said bonds, contrary to the sixth section of the act, were applied to the current expenses of the city, it is not, to any material extent, sustained by the testimony offered in this case. Previous to the passage of the act the $75,000 which had been borrowed, under pretence of building therewith the city hall, had been recklessly squandered; only $12,000 of it can be pretended to have been paid on account of the said building, and yet not so much as $2000 of it remained in the city treasury when the act was passed. But that wasteful expenditure was cured by the act. Its sixth section expressly directs that debt to be paid out of the proceeds of the bonds therein authorized. The provision of that section cannot be supposed to refer to any debt other than the $75,000 due to Neagle, because the city had not, up to that time, contracted any other debt which could be designated as one "heretofore contracted for the construction of the new city hall and the new market." It is manifest, therefore, that though the $75,000 had been previously

squandered, yet the lender was to be paid first out of the proceeds of the bonds which the act authorized. To pay that and the interest thereon required nearly $80,000. The sale of the said bonds produced only $148,364, thus leaving less than $70,000 for the construction of the new city hall and the new market, and the improvement of the

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streets, the exten*sion of the water works, "and any other improvements judged advisable by the said mayor and aldermen."

Under these unlimited powers the most active schemer in that body could scarcely have devised any plan for spending that balance which would not have been within the vast scope of the said act. But whatever might have been the result of such effort, it is certain that the trial was not made. The testimony herein shows conclusively that more than the said balance was applied to the special purposes of the act. And the fact that certain debts due for current expenses were paid out of the proceeds of said bonds does not falsify this conclusion, inasmuch as the accounts show that these payments, thus temporarily taken from the construction fund, were afterwards restored to it, when needed, from other resources of the city treasury.

But if that had not been done, and if part of the said $70,000 had been fraudulently misapplied, that would not have rendered the bonds invalid. They are negotiable securities, and purchasers thereof, even suspecting that the proceeds are to be misapplied, are not bound to inquire of that matter. No mere suspicious circumstances or negligence of the purchaser, nothing but bad faith in him, will impair his title, and I do not find in this case any proof of such bad faith.

Lastly. The remaining allegation of the relators refers to the printed abstract of the act which was placed on the said bonds. They say that it omits the condition precedent of the first section of the act, which required the old bonds to be canceled before the new could be lawfully issued. But the act entrusted that duty to the mayor and aldermen, and made no provision for the correction of such abstract as they might prepare. They, therefore, were the sole judges of its sufficiency, and their recital on the bonds that the said abstract was in compliance with the act is a complete protection to the bondholders.

I have reached the above conclusions most reluctantly. The act was drawn with consummate skill, so as to inspire the utmost confidence of purchasers, and it seemed to contain every provision necessary for the protection of the said city, yet in its sixth section it adroitly inserts the provision which its framer intended for his own benefit. By that he has recovered the $75,000

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*which he had lent the city for wasteful and fraudulent purposes. It is very manifest that the whole city hall scheme originated in fraud and bribery. The said loan was only an ill-disguised bribe to purchase for the lender an exorbitant contract. Public clamor compelled him to surrender it, and then he devised the said act, whereby he regained the money he had lent, and retained, besides, $12,000 paid him in advance for work to be done, but not done—except to the extent of the value of $7,000. I cannot reach him by any proper decree in this case. My inclination in every case would be to inflict loss upon all who, knowingly, to the loss of the public, lend their money for wasteful purposes to reckless and dishonest rulers. But the law limits my authority, and the sixth section of the said act effectually protects those who lent their money to pay that debt, which it directed to be paid.

It is therefore adjudged and decreed that the relators be denied the relief which they seek, and that their complaint be dismissed, without costs.

From this decree the plaintiff appealed, upon the following grounds:

1. Because the decision does not contain a statement of the facts found and the conclusions of law separately, as required by law.

2. Because the court erred in deciding that the recalling and cancellation of the bonds issued to the amount of $200,000, August 21st, 1871, "after the issue of the bonds under the act of March 13th, 1872," was a substantial compliance with the said act; whereas the court should have decided that the requirement of such recalling and cancellation, "before the issue," was an indispensable condition precedent, and until the condition was complied with the power to issue such bonds did not exist, and that all bonds issued under the said act prior to the performance of the said condition precedent are, therefore, null and void, and do not constitute obligations of the said city; and the court should have decreed that such bonds be delivered up to be canceled.

3. Because the court erred in deciding that

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the negotiation of *bonds issued under the act of March 13th, 1872, so far as the same was effected at public auction not duly advertised for the period and in the newspapers designated by the act, and so far as the said bonds were bid in for the city and subsequently negotiated privately by the mayor and aldermen, was a substantial compliance with the act; and because the court erred in deciding that such negotiation cannot now be impeached, for that it "was entrusted to the city council, which, by its recital on the said bonds, states that they were issued by a public sale thereof," and

thereby gives, "under the law, sufficient protection to any purchaser for value;" whereas the court should have decided that the negotiation, as made, was not a sufficient compliance with the requirements of the act; that the sales at auction to the city were pretensive and void, and did not authorize the subsequent issue of the bonds by private negotiation; that the said statement on the bond being of a fact contemporaneous with the sale and delivery of the bond, of which all parties had equal means of knowledge, and as to which the mayor and aldermen were not invested with authority to decide, could not be made the subject-matter of recital so as to operate by way of estoppel.

That if such recital could in any case estop these plaintiffs, it cannot be pleaded by holders of the said bonds, who (not "purchasers for value" or bona fide holders within the technical meaning of the phrases) were parties to the negotiation thereof, cognizant of each and every violation of law therein and partakers of the fraud, and that in the hands of such parties the bonds so negotiated are null and void, and do not constitute obligations of the said city, and the court should have decreed that such bonds should be delivered up to be canceled.

4. Because the court erred in deciding that the sixth section of the act of March 13th, 1872, expressly directs payment of the loan of $75,000 due to Neagle out of the proceeds of the sale of the said bonds, whereas it should have been found that this amount was borrowed as well "for other purposes necessary for the support of the city government," and the court should have decided that the proceeds of the sale of the bonds were applicable only to such portion of the said loan as was actually expended in the construction of the new city hall and the

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new *market, and that the remainder of the said loan, having been negotiated without power and without authority of law, did not constitute a valid obligation of the said city.

5. Because the court erred in finding that the proceeds of the sale of the bonds issued under the act of March 13th, 1872, were not to any material extent applied to the current expenses of the city, the facts being conclusively established that the total amount received from this source is $148,364, and the amount expended on the city hall and market, from all sources, is $71,926, leaving $76,438 as applied for the most part not to "the improvement of streets, the extension of water works or any other improvements judged advisable by the mayor and aldermen," but to purposes of extravagant and fraudulent expenditure, whilst a large amount of debt contracted for the erection of the city hall is yet unpaid and the construction of the city hall has not yet been completed.

6. Because the court erred in deciding that under what is termed "the unlimited powers" in the act, "the most active schemers could scarcely have devised any plan for spending the balance" remaining after the payment of the Neagle loan "which would not have been within the vast scope of the said act;" whereas the court should have decided that under the said act an amount had been expended or set apart sufficient for the construction of the new city hall and the new market, and any and all expenditures of this fund for other purposes were unauthorized and in violation of law.

7. Because the court erred in deciding that there was no proof of such bad faith in the application of the purchase money of said bonds as would impair the title of the holders thereof; whereas the court should have found that the purchases by the Carolina National Bank, the Central National Bank and Robert K. Scott, directly from the mayor and aldermen, were made for the purpose of applying the proceeds in payment of claims against the city held by these parties respectively, which, to the knowledge of and in collusion with these parties, were contracted for and applied to purposes not contemplated by the said act of March 13th, 1872, and which, having been incurred without power and authority, were not legal and

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valid obligations of the *said city; and the court should have decided that the payment of the said claims out of the proceeds of the sale of said bonds was conclusive evidence of such bad faith as would constitute these purchasers trustees by virtue of a constructive trust, and should have decided that said bonds were issued in fraud, and are therefore null and void, and of no obligation against the city; and the court should have decreed that such bonds be delivered up to be canceled.

8. Because the court erred in deciding that the validity of the bonds was not affected by the omission to include in the abstract of the provision of the act, printed on the back of each bond, the condition precedent of the first section, "which required the old bond to be canceled before the new could be lawfully issued;" and that the mayor and aldermen were the sole judges of the sufficiency of the abstract, and that their recital on the bond that the said abstract was in compliance of the act is a complete protection to the bondholders; whereas, the court should have decided that the act not being a matter peculiarly known to the mayor and aldermen, but one of which all parties are presumed in law to have knowledge, the recital of the abstract thereof on the back of said bond could in no way afford protection to the bondholder, there being no judicial action or decision devolved upon the mayor and aldermen thereby, and the omission of any reference to the condition precedent contained in the first section, "which required

the old bonds to be canceled before the new could be lawfully issued," and of any recital that such condition had been complied with, operated as notice to all purchasers of said bonds that the said condition precedent had not been performed, and also of the purpose of the said mayor and aldermen to disregard this imperative requirement of the act, and put each and every of them upon inquiry at their peril.

9. Because the court did not find that certain bonds, as set forth in the complaint, held by the Carolina National Bank, Robert K. Scott and other defendants, had been pledged by the mayor and aldermen to the South Carolina Bank and Trust Company as collateral security for a loan created and expended for general purposes of the city government, and were purchased by the said defendants with notice; and that the bonds

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held by *Thomas B. Jeter had been pledged to him by the mayor and aldermen as collateral security for a loan created and expended for general purposes of the city government; and because the court did not decide that the city council were without power or authority to borrow money for general purposes of expenditure, or for any purpose to negotiate the said bonds by way of pledge, and the bonds so negotiated were wholly null and void and of no obligation against the said city; and because the court did not decree that such bonds be delivered up to be canceled.

10. Because the court did not find that the bonds held by the defendant, John Alexander, have never been sold or hypothecated, and were held by him without power or authority; and because the court did not adjudge the same to be null and void and of no obligation against the city, and did not decree that they be delivered up to be canceled.

11. Because the court erred in failing to find as matter of fact that the bonds held by the defendants, the Carolina National Bank of Columbia, S. C., Robert K. Scott, the Central National Bank of Columbia, S. C., the Citizens' Bank of Petersburg, Va., Clark Waring, Fanny C. Wallace, Harriet English, S. F. Trotti, Thomas B. Jeter and John Alexander, were procured by these defendants by direct and immediate negotiation with the mayor and aldermen, with notice of all the matters of fraud and irregularity alleged in the complaint; and because the court erred in deciding that these defendants are entitled to the benefit of the protection of the law accorded to bona fide holders for valuable consideration without notice, otherwise characterized by the law as "innocent third parties."

12. Because the defendants, Thomas C. Dunn, Robert K. Scott, C. J. Carroll, George A. Shields, John Alexander, John S. Wiley, The National Bank of Spartanburg, S. C., and Acacia Lodge, No. 94, Ancient Free Masons of South Carolina, having failed to answer the complaint, the court did not find the matters of fact alleged therein in reference to the bonds held by these defendants, and adjudged the same sufficient in law to render the said bonds null and void and of no obligation against the said city; and because the court did not thereupon decree

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that *the bonds held by the said defendants should be delivered up to be canceled.

13. Because the court erred in decreeing that the relators be denied the relief which they seek and dismissing their complaint.

Messrs. Melton & Wingate, for appellants.

Messrs. J. H. Rion, W. A. Clark and F. W. McMaster, for respondents.

October 3d, 1879. The opinion of the court was delivered by

WILLARD, C. J. This is a complaint in the nature of a bill by the attorney-general, in the name of the state and upon the relation of corporators and tax-payers of the city of Columbia, alleging that the municipal authorities of that city have illegally issued certain coupon bonds, claiming to have authority therefor by an act of the legislature, but having failed to conform to the requirements of such act, and demanding that said bonds may be adjudged void and decreed to be delivered up by the defendants holding the same. The Circuit Court dismissed the complaint, and the plaintiffs have appealed. Various exceptions are urged to the decree that will be noticed in their order.

It appears that bonds of the city of Columbia have been issued to the amount of nearly $250,000, under the act of March 13th, 1872, (15 Stat. 220), and as the conformity of such issues to the requirements of that act is the whole question in the case, it will be convenient, in the first instance, to inquire what are the powers of the city corporation under that act, and to what limitations and directions such powers are subject. This involves the construction of the act in question, with a view to ascertain its intention as it regards the matters in issue.

The first section provides "that the mayor and aldermen of the city of Columbia are hereby authorized and empowered to borrow money by issuing city bonds, from time to time, to an amount which, together with the outstanding indebtedness of the city of Columbia, shall not exceed the sum of $600,000, it being thereby intended that the whole

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indebtedness thereof, whether *by bonds or otherwise, shall, at no time, be increased beyond the said sum of $600,000; provided, that, before such issue, the city council shall recall and cancel the bonds issued to the amount of $250,000, issued August 21st, 1871, for the erection of the city hall and market;

and provided further, that no part of said bonds shall be used for the purchase of any franchise or corporation."

The second section provides the form of the bonds, their terms and the mode of authentication. The third section contains a clear limitation on the powers conferred by the first section, in the following language: "That no bond shall be negotiated under the provisions of this act otherwise than by public sale, notice of which shall be given for at least thirty days in one newspaper published in Columbia, one in Charleston and two in the city of New York, and that the sale of all such bonds shall be made by the treasurer of the city of Columbia; provided, that all such sales shall be conducted in accordance with such rules and regulations as the city council may prescribe."

Section 4 provides for a registry of such bonds, and for a publication by the mayor and aldermen of a detailed statement of the city indebtedness and the character of the same, at the demand of holders of bonds or corporators. Section 5 regulates the taxation to pay the interest on such bonds.

Section 6, upon which the case of the plaintiffs mainly depends, is as follows: "That the said mayor and aldermen are hereby authorized and directed to apply the proceeds of the sale of said bonds, first, to the payment of any debts heretofore contracted or which may hereafter be contracted for the construction of the new city hall and the new market; and, secondly, for the improvement of the streets, the extension of the water works, and for any other improvements which shall be judged advisable by the said mayor and aldermen; provided, that no part of said bonds shall be used for the purchase of any franchise or corporation."

Section 7 prohibits the city from increasing its public debt beyond the sum of $600,000, and gives an action to any corporator or tax-payer to enjoin such attempted increase.

Section 8 provides "that the said mayor and aldermen shall cause the provisions of

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this act, or an accurate abstract thereof, *to be printed on the back of each bond; and on the face of each bond it shall be expressed that the same is issued under the authority of this act."

The ninth section declares the privately or fraudulently issuing of any of said bonds to be a felony. The tenth section provides for creating a sinking fund on the completion of the city hall, to be obtained from the income derived therefrom, and provides that the proceeds of that sinking fund shall "be solemnly set apart for the payment of the debt and the interest thereon, contracted in the erection of said city hall," and gives a remedy to citizens in case of the failure to establish such sinking fund. Section 11 repeals all acts theretofore passed authorizing the mayor and aldermen of that city to borrow money on the bonds thereof.

The effect of the first section, standing by itself, is to authorize the city of Columbia to borrow money by bonds to a limited amount, subject to the restriction that such borrowing must not have the effect to increase the whole city debt beyond $600,000. The objects for which money shall be so borrowed are not stated in this section, although one particular object is, in terms, excluded, namely, where such money is intended to be used for the purchase "of any franchise or corporation." There is an implied object included, namely, the recalling and canceling of certain bonds alleged by the act to have been issued for the erection of the new city hall and market; but otherwise the objects of borrowing are unlimited. It was evidently intended that the bonds thus authorized should take the place, as indebtedness of the city, of the bonds referred to as having previously been issued for the erection of the city hall and market, and it is a fair inference that the authority thus conferred was to afford the means of recalling and canceling such bonds.

So far, then, as the first section is concerned, the authority to borrow was general, and for any object other than that prohibited in the proviso. This conclusion is important, for one of the fundamental questions in this case is, whether the loan was authorized for a particular object, so that a debt could only be contracted under such authority for that particular purpose, and within the limits of the authority only to the extent

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that was *requisite in order to accomplish such purpose, or whether the authority was intended to be general.

To illustrate this question, suppose that the mayor and aldermen, having such authority, should ascertain that the construction of the city hall and market, and the completion of all the objects fairly arising under the sixth section of the act should demand a sum less than the whole amount authorized to be borrowed, and they should find it desirable to include some other object not named in the act, such as funding the floating debt of the city, could they go on and make the whole issue and apply the proceeds accordingly? It is to this section, when the whole nature and scope of the authority asked for was before the minds of the legislature, that we naturally look for the solution of this question. Other parts of the act may afford such solution, but here it would naturally be found. It does not appear from this section that any such limited object of borrowing money was in the mind of the legislators when framing the language that constitutes the leading feature of the act; on the contrary, confining the exclusion to one particular object, impliedly allowed it to extend to all others fairly within the scope of

the municipal authority. It must be concluded that if the first section stood alone the authority would have to be regarded as sufficiently comprehensive to admit of borrowing for any proper municipal purpose other than the one interdicted, if that is entitled to be regarded as, in itself, a proper municipal object.

It will presently be considered whether other parts of the act have the effect to limit the authority conferred by narrowing down the objects for which it should be exercised, but that question is included in a more general one, namely, what are the express and implied limitations imposed by the act on the authority conferred.

The express limitations will be first considered. In the first place, the bonds issued for the erection of the new city hall and market must be recalled and canceled before such issue. That this was intended as an express limitation appears by the terms in which it is expressed. It is something to be done before such issues are made, and assumes the form of a proviso—a form consistent with the terms employed. This limitation, as well

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as *that precluding the use of the bonds for the purchase of any franchise or corporation, and that restricting the issue with reference to the extent of the whole debt of the city, occurs in the first section, and are the only ones made in that section.

The declaration of the third section, "that no bond shall be negotiated under the provisions of this act, otherwise than by public sale," &c., must be regarded as imposing limitations on the authority conferred by the act in the nature of a condition precedent. The language employed is negative, so that to affirm that a bond issued otherwise than as prescribed in that section was sanctioned by the authority of the act would directly contradict the declaration of the statute. The bonds, when issued, derive their actual efficacy from the act of negotiation, as that term is intended by the act, although the validity of their obligation rests upon the first section of the act, so that, certain forms of negotiation being interdicted, they cannot become the means of imparting such actual legal force to the bonds. Such a provision, having for its object the creation of new specific rights, cannot be regarded as merely directory as it regards the mode prescribed for bringing such rights into existence. This must be regarded as an express limitation of the authority sought to be conferred by the act.

The limitation fixed, with reference to the amount of the whole public debt of the city, is repeated in the seventh section, and enforced by the use of prohibitory language, and is clearly an express limitation of the authority conferred.

The next inquiry is as to what implied restrictions on the power of issuing bonds are imposed by the terms of the act. This inquiry will be confined to such restrictions as are alleged to exist by the plaintiffs, and on which they base their right to an injunction.

It is contended that the provisions of the fourth section requiring the mayor and aldermen to keep a registry of all bonds theretofore issued and outstanding, and of all bonds issued under the authority of that act, are an implied condition. The language of this section does not import a restriction in terms, but simply imposes on the officers of the corporation the duty of doing something which, so far as it relates to the bonds issued

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*under this act, could only be properly done after such bonds had been issued and had assumed full validity. It amounts to a requirement that a certain public record should be made of the transactions in regard to the issuing of bonds; and as a record of a transaction is naturally made after the transaction is consummated, it is not to be assumed that the legislature intended to make the validity of issued bonds depend on the compliance with such requirement. In other words, the making of the record of the issuing of the bonds is not an act which, in its nature, must precede the lawful issuing of the bonds, and, therefore, it cannot give rise to an implied limitation of the authority conferred by the act.

It is also contended that there is an implied restriction of the authority conferred contained in the sixth section. The language of this section is that the mayor and aldermen "are hereby authorized and directed" to apply the proceeds of the sales of the bonds to certain objects in the first instance. To authorize and direct does not necessarily imply that the matter so authorized and directed is a condition precedent to some authority already fully conferred in another and appropriate place. This is enough to exclude this section from the category of express limitations. It remains to consider whether there is evidence on the face or in the nature of the requirements of the section to warrant the conclusion that it was intended as a condition precedent, or even as a condition subsequent, to the validity of the bonds. The plaintiffs have got to make out of this section something equivalent to a declaration that unless the moneys received from the sale of the bonds are applied in a particular way, the bonds so issued, under some circumstances and in some cases at least, shall be void.

The direction is: "First, to the payment of any debts heretofore contracted, or which may hereafter be contracted, for the construction of the new city hall and the new market; and, secondly, for the improvement of the streets, the extension of the water works, and for any other improvements which shall be judged advisable by the said mayor and aldermen." The plaintiffs read this as if it directed the city corporation to

build and complete a city hall and market
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and apply the proceeds of *the bonds exclusively to that purpose until completed and paid for, and after that they must go on and devise improvements until the whole money should be consumed. In other words, they try to make a sort of trust out of it, instead of regarding it in the only light in which it can properly be viewed—as a mere provision for funding the present and future debt of the city, not exceeding a certain amount, giving preference in the funding to a class of debts of a particular character. This is the whole scope and character of the act, as is manifest by its various provisions. Whether the erection of the city hall and market should be continued or abandoned was a matter properly left to the judgment of the municipal authorities as a matter of a purely local concern. This section must, therefore, be stripped of the idea that the proceeds of the bonds were a trust to build a city hall and market.

The plaintiffs' view of the eighth section appears still more inadmissible in its application to the objects contained in the second direction as to appropriating the proceeds of the loan. The subject here is "the improvement of the streets, the extension of the water works, and for any other improvements which shall be judged advisable by the said mayor and aldermen." It would be difficult to make out of this sweeping language the case of a particular and prescribed improvement in respect to the consummation of which the money available for that purpose was to be regarded as a trust. In the first place, no defined object can be made out from the terms employed, to which, as matter of construction, the court could say the money ought to have been applied, and, in the next place, the discretion of the city authorities to enter upon such improvements and to abandon or complete them at will is fully recognized, and no attempt is made to interfere therewith. If we were required to say what was to be regarded as an improvement in the sense of the statute, we should find great difficulty in so doing. In the first place, the mayor and aldermen are to determine what are and are not to be regarded as improvements, and if their determination is subject to any limitation arising from the intended sense of the word improvements, as used in the statute, we would find it very difficult to find the key of that sense. When an assum-
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ed con*struction of an act runs out into vague and limitless questions and considerations, it may be taken to be aside from the true construction. The true construction is that which was in the mind of the legislators as evidenced by their language, and is generally characterized by the simplicity and completeness of the object in view. The view that has already been developed removes all these difficulties of construction by holding that the object of the statute was to enable the city to fund its floating debt, contracted, or which might be contracted, within a certain limit, giving preferences in such funding to certain classes of obligations.

In order to fully appreciate the consequences arising under this view of the authority conferred, it is necessary to distinguish still more clearly the difference in point of law between the present view and that held by the plaintiffs. For that purpose each will be more particularly stated. The view that the object of the loan must be regarded as intended to enable the city to fund its floating indebtedness, present or future, is based on the idea that the act conferred no new authority or duty on the mayor and aldermen as it regards the building of a city hall and market, and the other works mentioned in the eighth section, and that it does not diminish such authority or change the nature of the discretion and responsibility of the city government as it regards the initiation, conduct, suspension or abandonment of such works. The act must, then, be regarded as intending no effect upon that class of municipal powers employed in bringing into existence the classes of debts which may be funded under that act.

Without the statute the city could, at will, undertake any such work, but would be compelled to treat the debt created as calling for immediate payment, and the proceeds of its taxes and other revenues and property would be immediately liable for the payment of such debts. Now, what the act sought to do was to allow the city to maintain a permanent credit as the means of discharging such debts. This is, in effect and substance, funding such debts, and there is no more difficulty in conceiving authority granted for the pur-
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pose of funding future debts than *that to fund debts already contracted; the operation and effect is the same in both cases.

The plaintiffs' view, on the other hand, is that a fund was intended to be created in the hands of the city government for the accomplishment of certain specified objects, in which case a special trust to apply it to those objects would exist. The difficulty in the way of this view is, as already illustrated, that such trust could not exist except where there was a specific object on which it could act. In a general sense, wherever property or money is in the hands of a public agent for disbursement upon general objects of a public nature, a trust to apply it so exists. Such a trust is, in its nature, political, and in this respect differs from the special trusts that are cognizable in equity on the demand of a cestui que trust. It is true that public trusts in the hands of municipal bodies may, to some extent, be enforced through the intervention of the attorney-general, but not upon the idea that the equity of the cestui que

trust demands such enforcement, but upon the more general ground that the public authority, whether vested in the king or in the state, has a supervisory control over all trusts of that nature, as in the nature of public charities. In this country the application of this principle is necessarily much modified by the more distinct recognition of the principle of local self-government, that tends to a liberal construction of the legislative powers vested in municipal communities.

The plaintiffs' view, in effect, makes the state the beneficiary of the powers conferred upon the city authorities, instead of the municipal body itself. It is clear that all the restrictions imposed on the city authorities were intended for the benefit of the municipality. Hence the plaintiffs call the parties into a court of equity on the same footing as if a trust had been created in which the state had a beneficial interest, and demand a remedy that leaves out of view both the interest and the duty of the municipality, as will be made to appear.

It is clear that the provisions of the sixth section are not to be regarded as creating a condition on which the validity of the bonds should depend, but as merely giving a direction as it regards the disposition of the pro-

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ceeds realized from the sales of *such bonds. The statute assumes that when the period arrives for disbursing the proceeds derived from the sale of the bonds, that bonds will have previously been issued and in full force and effect. It is not to be assumed that it was intended that the lender of the money to the corporation should be responsible for the rightful application of such money; hence we must conclude that it was no part of the scheme or intention of the act that the validity of the bonds should depend upon the due application of the moneys to be derived from the sale thereof, and therefore there is no implied condition of that character imposing restrictions on the authority conferred. If a party happens to get possession of the bonds while still the property of the city, without compensation or lawful authority, that, no doubt, would be a conversion for which an action would lie, and the bond, would be worthless in the hands of one so holding without negotiation and consideration; but that is very different from the proposition advanced by the plaintiffs, that the bonds in the hands of such wrong-doer are void in virtue of an express or implied limitation of the authority to issue them, as it regards the use of the money arising from the sale thereof.

Then, as the object of the statute was that of enabling the city to fund its floating indebtedness, with a preference of the debt incurred, or to be incurred, of a certain class, it would follow that when the proceeds of the loan were realized the disposition of these funds ought to be made upon the following principles: First. The debt already created for the erection of the city hall, and for which bonds had been already issued, should be paid. Second. A sum should be set apart sufficient to pay for all the work intended to be put upon the city hall and market. Third. Any debt arising from the class of improvements mentioned in the second clause of the sixth section should be paid, and if any contracts or obligations for any such improvement are outstanding, to fall due in the future, should be set apart for the payment of the same. Fourth. If the mayor and aldermen determine at that time that any further improvements of that class should be undertaken on the faith of that fund, then a proportionate part thereof should be set aside accordingly. If, on the other hand, the municipal authorities do not con-

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tem*plate or intend any such such further works of improvement, or if they do intend improvements of that character, but conclude that the same should be paid for out of current income of the city, then all further requirements of the statute as it regards the disposition of the fund, are satisfied, and the balance of the fund could, consistently with the general purpose of this act, its special directions being satisfied, be applied to funding the existing outstanding indebtedness of the city.

Assuming, then, that this present complaint could be maintained by showing that the statute has not been complied with, its equity would consist in the statement that debts of the character provided in the sixth section were outstanding at the time of the filing of the complaint. In fact the only debt alleged or proven to exist at that time of the class referred to is a balance on account of the construction of the city hall, now in judgment against the city, which will be considered hereafter.

It is contended that the duty imposed by the eighth section, as it regards the endorsement on the bonds of the provisions of the act, or an accurate abstract thereof, constitutes an implied restriction of the power of issuing bonds in the nature of a condition precedent on which the validity of the bonds must depend. The terms employed do not expressly warrant such an inference, and if it arises it must be from the nature of the act required to be performed by the city authorities. It cannot be assumed that the rights of the lender were to be made dependent upon the good faith and diligence of the borrower. Such a presumption is inconsistent with all principles of fair dealing. The purchasers of the bonds were bound to know the provisions of the statute, and whether in point of fact they did know them or not they are clearly chargeable with such knowledge. The only object, then, in view was, in point of fact, to give them actual knowledge of that which the law assumed them to know independently of such special means of informa-

tion. Publishing the statute, or an abstract thereof, did not enlarge or in any way change the legal responsibility of the purchasers of the bonds, but only enabled them to provide against the full measure of their responsibility. It was, therefore, a provision wholly for the benefit of the purchasers of bonds, and if

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neglected by the *opposite party the purchasers are the only losers, and should not be put in a worse position by reason of such neglect. It must be concluded that the requirements of the eighth section are not a restriction upon the authority to issue bonds, and that the validity of such issue does not depend upon their fulfillment.

Having obtained an understanding of the intention of the legislature, it remains to consider the various exceptions that have been taken to the Circuit decree.

The first exception has been previously disposed of by this court, holding that the neglect of the referee or Circuit judge to present distinct findings of fact and conclusions of law is not error. It is to be regretted that so little regard is paid to this salutary requirement, but the remedy is not by appeal to this court on the ground of error in the judgment. What might be the effect if a motion refused to correct such irregularity as a foundation of an appeal, we are not called upon to say, as that is not the present case.

The second exception is based upon the ruling that the issuing of the new bonds while the old bonds were still unrecalled and uncanceled did not necessarily, under the circumstances, destroy the validity of the new bonds from and after such recalling and cancellation had actually taken place. The plaintiffs are in equity where mere technical forfeitures are not considered but only substantial rights and injuries. Whether the new bonds could have any legal efficacy until the old bonds were recalled and canceled is not the question here. The true question is whether the allegation of the invalidity of the bonds in the complaint was true when it was made. In this respect the conclusions of the Circuit judge appear to be substantially correct. It must be assumed that the new bonds were issued with the intent to recall the old bonds by means of the proceeds realized from them, for that is what the statute required and was in fact done. It is reasonable to conclude that this was the only way in which it was practicable to retire them. Such an issue did not necessarily violate the ultimate intent of the statute, and, therefore, is not reprehensible. It is true it did not conform to the requirements of the act, and could not create the rights intended to be created by the act. When the plan was consummated and

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the *old bonds retired and canceled, there was no impediment to the new bonds assuming validity. Under such circumstances, equity will look to the substantial rights of the parties, and, as the plaintiffs have sought a remedy in equity, they must submit to have the validity of the bonds determined upon equitable principles. This exception should be overruled.

It is objected that the sales of the bonds were not made at public auction, as the act required. The Circuit judge finds otherwise, in point of fact, and there is good ground for such finding. The parties who purchased at the auction sales must be regarded as legally bound by the consequences of such purchases, so that had the bonds subsequently sold for a less sum they would be responsible for the difference. The fact that they purchased for the benefit of the city made them volunteers, but not necessarily agents, and, as such, the legal undertaking was binding, and the bonds must be regarded as sold in the sense of the statute.

As it regards the advertisement, it appears that due advertisement was made before the commencement of the sales. It appears from the testimony of Mayor Alexander that the first sale was regularly adjourned to a day certain, at which it was resumed, and again adjourned to a further day, when the balance of the bonds were sold. It was not necessary to repeat the original advertisement, as the adjourned sales are, for all legal purposes, a continuation of the original sale, which was properly advertised. The conclusions of the Circuit judge should be sustained in this respect.

The plaintiffs' fourth exception is not well taken. In the first place the act itself fixes the character of the indebtedness arising on the $75,000 note. It is undisputed that the bonds previously issued, as referred to in the act, were hypothecated for the security of this note. The first section of the act declares that such issue had been made "for the erection of the city hall and market." There is no other transaction than this to which the statute could refer, and the identity of the transaction is made apparent by the terms of the resolution of the council under which the loan was negotiated. This resolution gave authority "to borrow money from time to

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time, as may be neces*sary, to carry on contracts for building the proposed extension of the market and erecting a new city hall," &c. It appears in evidence that the loan was negotiated under authority derived from this resolution. It is contended that the actual intention in making the loan was to raise money for other purposes than those expressly named in the resolution, but this is immaterial to the present view, which is that, as it regards the disposition of the proceeds derived from the sale of the bonds, direct statute authority existed for applying such proceeds to the payment of this loan. It is not a question of the general satisfaction of this transaction, but merely of the proper disposition of the proceeds of the bonds under

the statute. The fundamental requirement of the statute was that these previously-issued bonds should be recalled and canceled. Unless this should be accomplished the purpose of the act becomes entirely ineffectual. To recall implies to get back by treaty or contract. That this was the intent of the statute is made evident by the sixth section, which provides for the debts theretofore contracted for the very purpose which in the first section is declared to have been the purpose of the previous issue of bonds. The conclusion is irresistible that the statute intended that the debt for which the previous issue was a security should be paid out of the proceeds of the new issue, and as the $75,000 note is without doubt the obligation referred to, abundant authority to pay it existed. This view disposes of all the questions relating to the validity of the payment of that note.

The fifth exception is based upon an obvious misconception. It is assumed that moneys disbursed for "current expenses" of the city, cannot be regarded as disbursed in accordance with the requirements of the sixth section of the act. But, for the passage of the act, all the debts created for the purposes specified in the sixth section would have been necessarily liquidated as part of the current expenses of the city. The chief object of the act was to provide a means of defraying certain current expenses of the city by means of a resort to a permanent credit, instead of having recourse to current annual income. These current expenses are equally such, whether to be paid for in the one way or the other. The proof, then, that

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money derived from the *sales of the bonds was applied to "current expenses," is in itself wholly indecisive, whether it was properly applied or misapplied, as part at least of these current expenses were the very object of the statute for which authority to borrow money was given. It was for the plaintiffs, on whom the burden of proof rested, to show that the current expenses thus paid were not of the class that the statute contemplated, and this the plaintiffs have altogether failed to do. The plaintiffs offered no proof that any part of the money was expended for purposes other than such as constituted proper municipal objects, and all charges of fraudulent misapplication are unproved and no attempt was made to prove them. There is, therefore, no ground in the evidence to reverse the conclusion of the Circuit judge, who finds no substantial diversion of the fund, although his conclusion would have been strengthened by placing it altogether on the defect of proof to show that improper current expenses had been paid out of the fund.

The court could not have decided against the defendants the proposition advanced in the sixth exception, that any and all expenditures of the fund for other purposes than for the construction of the new city hall and the new market were unauthorized and in violation of law. In the first place, the proposition ignores the duty of paying the debt for which the old bonds were hypothecated. In the second place, it erroneously treats the city government as under an obligation to build a city hall and market in the nature of a trust. And, finally, it advances the erroneous conclusion that there could be no lawful expenditure of the money raised until the city hall and market were actually paid for, or a sum actually set apart to pay for them when completed.

The seventh exception cannot be maintained. There is no ground to set aside the finding of fact by the Circuit Court that the defendants, who were purchasers of the bonds, were innocent holders for value, a finding fairly embraced within the conclusions of the Circuit decree. Such a fact can only be reversed upon overbearing testimony, as the onus of proving such to be the case rests on the plaintiffs. So far from the conclusion of the Circuit Court being overborne,

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there is no evidence of the fact of *the misapplication of the moneys, and, therefore, nothing of which to charge the bondholder with knowledge prejudicial to his claim. The evidence that the money was paid, or, what is equivalent, that the bonds were specifically delivered to satisfy debts existing for current expenses of the city, is, as we have seen, wholly indecisive of any such misapplication. No other evidence was offered that could be the foundation of a charge that the persons taking these bonds had knowingly connived at a breach of trust on the part of the municipal officers. There is no proof that any of the defendants knew, at the time they took their bonds, that there were not adequate funds in the hands of the city, derived from the bonds, to meet all outstanding demands under the sixth section of the act. The city had it in its power to stop all improvements of the class named in the sixth section, and, on paying what was due up to the time of so stopping, could expend whatever remained in their hands for the funding of any part of its floating debt, and, having such ample powers, no reason exists why third persons should not deal with them accordingly. Such persons would have the right to assume that the city, having authority to make good its dealings in that respect, would do so. The position of bona fide holders can only be decided upon the ground of evidence and as against the presumption of innocence. It is not possible to wield against them the argument of general corruption, even if it had proved to exist. The greater the evil resulting from maladministration, the greater the importance that it should not invade the administration of justice, and to take away the rights of citizens on general charges and suspicions, would be as corrupt, as a judicial act, as any charged in this case against the municipal author-

ities, and more dangerous to the community.

The eighth exception is mainly disposed of by the conclusion that the endorsement of the abstract on the bond was not a condition on which the validity of the bonds depended.

The ninth exception has, in part, been disposed of by the conclusions already stated. It raises, however, a question whether the corporate authorities had power to borrow money for the use of the city and to bind the city for the repayment thereof. This question is not raised by the pleadings and proofs

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in such man*ner as to call for a decision upon it. It appears, by the admission of the complainant, that the various obligations of the city that were discharged by a delivery of the bonds in question, were contracted for the benefit of the city. Several of these obligations appear to have arisen on account of money borrowed for the use of the city. The main point made by the complaint is, that the purposes for which the money was borrowed in that class of cases, were not such as those indicated by the sixth section of the act, the object of this averment being to show that the issue of bonds under the act had been made for debts contracted for other purposes than those contemplated by the sixth section. Incidental to this averment of the complaint are allegations that may be construed as questioning the right of the corporate authorities to borrow money. The ground thus alleged for invalidating these debts is, that the city had no authority to borrow money in such cases. It appears, however, that these debts have been paid by the delivery of bonds for that purpose, and the question arises whether the authority of the city officers to create such debts can be questioned after their actual payment. This question will be next considered. The bearing of this question on the case made by the plaintiffs is this: It amounts to an allegation that part of the bonds issued under the act in question were issued by the city authorities upon no consideration, and, therefore, without authority of law. And their conclusion is that such issue is illegal and void. If the debts that were discharged in this manner were not legal debts, the consequence would be that the city would have an action against the parties who had received either money or property of the city in discharge thereof from the city authorities to recover back such money or property or its value. It is clear that if the city could not maintain such a cause of action, then the plaintiffs, in behalf of the city, cannot allege that the debts were invalid, for that would be allowing indirectly that which could not be done directly. The question, then, resolves itself into that of the right of the city to recover from the parties these amounts paid to them in discharge of debts, the validity of which is questioned. Assuming the simplest form in which this question can be stated, we will suppose that the city authori-

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ties borrow money for the use of the *city and subsequently repay the amount so borrowed. Has the city, in an action to recover back the amount so repaid, a right to show that the original act of borrowing was without legal authority? The city having got the benefit of an illegal transaction was bound—morally if not legally—to refund the same. Such would be the rule of moral duty that would force itself upon the mind of any conscientious person in a like situation, and the moral duties are the same in their application to individuals and communities of individuals. Such a moral obligation is a good consideration to support the payment that rests upon it. Hence, money voluntarily paid to discharge an obligation cannot be recovered back upon the allegation that such obligation was without legal force. If, after such payment, the city could not, in its own behalf, allege the invalidity of the original act of borrowing, it cannot be done by the attorney-general or any one else in behalf of or in the interest of the city. It follows that if the attorney-general had filed a bill specially framed to compel the defendants who had received money or property under such circumstances to repay the same on the idea of a breach of public trust or duty, he would have failed, for the reason that equity pays the same respect to moral obligations that is paid at law, but goes further than the law can go to enforce them, and as the law would deny such a remedy on such grounds, equity would, at least, do as much. The present bill, so far as it can be regarded as attacking the consideration upon which the bonds were issued, has this aspect and effect. The ninth exception should be overruled.

The complaint charges that John Alexander individually appropriated certain of the bonds in suit to his individual use, without consideration, and retained bonds that had not been issued to the amount of $1-000. Alexander does not appear to have answered the complaint, in this respect, and its allegations must be taken as true. As these allegations are not necessarily connected with the principal matter of the complaint, in regard to which the plaintiffs have failed to make due proof, they are unaffected by such fact. The tenth exception is, therefore, well taken, and the decree should be set aside, so far as it regards the matters alleged against

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the defendant, Alexander, individually, *and the cause remanded for a judgment, in accordance with the prayer of the complaint, as affecting defendant Alexander alone.

The matter of the eleventh exception has already been disposed of.

The construction that has been put upon the act of 1872 leads to the conclusion that the only possible equity of the complaint would be in an allegation that debts preferred by this act in the order of funding had not been so discharged, and remained un-

paid at the commencement of this suit. It might still be a question whether that equity does not belong exclusively to the parties in behalf of whom such preference was given, but that question has not been raised and need not be considered. It does not appear by the allegations of the bill that any such preferred debt existed at the commencement of this suit. It appears, however, in evidence, that there is a demand outstanding for the erection of the city hall, in behalf of C. Waring, which has been put in judgment against the city. Waring is made a party defendant, but instead of insisting on any equity under the act of 1872 resists the plaintiffs' demand for relief.

As it regards the unpaid demand of Waring, now in judgment against the city, it must be concluded that the city is in possession of a fund especially devoted by the act of 1872 to the payment of such debt, namely, the "annual income derived from such parts of the said city hall as may be leased from them, the proceeds of which sinking fund shall be solemnly set apart for the payment of the debt and the interest thereon, contracted in the erection of the said city hall." It might well be a question how the creation of this sinking fund can be reconciled with the construction put by the plaintiffs on the sixth section, that that debt was to be paid absolutely and at all events out of the proceeds of the sale of the bonds. If that had been the intention of the act it would hardly have named another and distinct fund for that purpose. But it is not important that this question should be considered, for it is clear that the act intended that if that debt should not be paid out of the proceeds of the bonds that it should fall on the sinking fund, and that contingency has actually happened. This leads to the conclusion that the city

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*having in possession the fund thus solemnly pledged, ought to appropriate that fund to pay the Waring judgment.

The defendants, who failed to answer, lost the benefit of the right to set up their claims as bona fide holders; but as the principal matter of the bill fails for want of proof, and the case alleged against all these defendants, except Alexander, is necessarily connected with that aspect of the complaint, there cannot be judgment against them.

The decree of the Circuit Court should be affirmed as to all things, except the dismissal of the complaint as against defendant Alexander, and as to said defendant, the cause should be remanded for a decree against that defendant, in accordance with what has been already held in that respect.

McIVER, A. J., concurred in the result.

HASKELL, A. J. I dissent from the conclusions reached by a majority of the court, and proceed to present my reasons.

The action is brought in the name of the state, by the attorney-general, ex rel. taxpayers and corporators of the city, against the said city, its public officers and others. It seeks injunction and relief on the ground that breach of trust has been committed: that onerous taxes are about to be and have been imposed to pay the interest on illegal bonds, and that the holders of said bonds, or many of them, being parties to the legal fraud, should be made to deliver up the bonds. The right of the state to institute such a proceeding, in such behalf, cannot be successfully disputed, nor is that question made in the pleadings or by exception. But comments are made and grounds taken in the opinion, which decides the case, which so narrow the scope of such a proceeding as to deprive it of all efficacy, and to take away from the members of municipal corporations the substance of the remedy by which they have hitherto been protected when fraud or illegal acts have been perpetrated by the corporation, its officers or parties dealing with them. It does not seem to be denied that the act of March 13th, 1872, creates a trust by conferring power to borrow money, and directing to what purposes the money shall be applied; but it is said that the trust

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is political *in its nature, and differs from special trusts, which are cognizable in equity on the demand of a cestui que trust. The meaning of that is that the only remedy possessed by corporators is to be found in the power of electing better officers. To support such doctrine it is said that municipal corporations, in republican governments, possess powers of local self-government which create a wide distinction between the jurisdiction of chancery in England and that in this country on such subjects. The question is serious in its character, and the majority of the court having concurred only in the results reached, it is left entirely open to conjecture what are the processes of reasoning by which such conclusions were reached. I shall, therefore, devote some attention to the jurisdiction which equity has in such cases. The original jurisdiction conferred upon the Court of Chancery in this state was as large as that exercised at the time by the said court in any of the American provinces. See acts 1712, 1721 and 1746, 7th vol. Statutes.

It is shown in the case of Attorney-General v. Jolly, 1 Rich. Eq. 99 [42 Am. Dec. 349], and in Vidal v. Girard, 2 How. 127 [11 L. Ed. 205], that the jurisdiction was equal in extent to that exercised by the Court of Chancery in England. The difference being not in the jurisdiction of the courts in the two countries, but in certain powers vested in the Chancellor personally, when he administered for the king, and that the statute of 43 Elizabeth, on charitable uses, not being of force in this state, does not take from the court any of the subjects which it contains, because

it conferred no additional jurisdiction on the court of England, which already had jurisdiction of those subjects, but only gave a new or ancillary remedy. Our court, therefore, in the exercise of its original jurisdiction, has charge not only of the subjects recited in the act of Elizabeth, but of many others of like nature not therein mentioned. We can, therefore, with manifest propriety, place great reliance upon the English authorities in such cases when those of like nature come before us. No authorities, English or American, have been cited to sustain the proposition that the jurisdiction over municipal corporations, in cases of public trust, have been modified or diminished, and none can be found in our constitution or statutes;

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nor any to show that such corporations *have any right of local self-government independent of the grant contained in the charter.

On the other hand, Judge Dillon, in his work on municipal corporations, Section 736, says: "That there appears to be no difference of judicial opinion as to the right of the taxable inhabitants, wherever the threatened illegal corporate act will increase the burden of taxation, to the aid of equity to prevent it. The difference is as to the proper party plaintiff in a bill of this character. * * * But it is agreed that any taxable inhabitant, or, perhaps, any citizen of the municipality, has such an interest to prevent or to avoid illegal corporate acts; that he may be a relator, on whose application the proper public officer of the commonwealth may, on behalf of the public, file the requisite bill to enjoin the menaced illegal act, or, if it has been consummated, to have relief against it." He is fully sustained by the authorities which he cites. That questions which affect at large the interest of the inhabitants of a municipal corporation are "public" in their character, flows from the nature of the corporation. It is the creature of legislation, brought into being to share in the civil government of the country, having power, not over specified persons, but over the fluctuating population as it comes within its limits. Such power is held in trust, subject at any time to be revoked by legislative repeal; and its exercise, while it continues in existence, is as properly the subject of judicial supervision and control as the conduct of any person or other legal entity.

While corporations and their officers may be parties to proceedings at law, they are in many cases peculiarly within the province of equity. For, as is said incidentally by Wardlaw, Chancellor, (Ex parte Greenville Academies, 7 Rich. Eq. 483): "In truth, nearly all corporations are trustees, as an incorporated bank for the stockholders."

And as is more fully said by Denio, C. J., (Darlington v. Mayor, &c., of New York, 31 N. Y. 197): "It is the representative or trustee of somebody, or of some aggregation of persons. We cannot conceive the idea of an aggregate corporation which does not hold its property and franchise for some use, public or private. The corporation of Dartmouth

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was held to be the *trustee of the donors, or of the youth needing education and moral and intellectual training. The corporation of New York, in my opinion, is the trustee of the inhabitants of that city. The property, in a general and substantial although not in a technical sense, is held in trust for them. They are the people of this state, inhabiting that particular subdivision of its territory—a fluctuating class, continually passing out of the scope of the trust by removal and death, and as constantly renewed by fresh accretions of population. It was granted for their use and held for their benefit. The powers of local government, committed to the corporation, are precisely of the same character. They were granted and have been confirmed and regulated for the good government of the same public; to preserve order and obedience to law, and to ameliorate and improve their condition and subserve their convenience as a community."

The corporation thus holding a trust, and that trust being of a public character, the suit in equity, instituted by the state, is appropriate. Trusts for the benefit of the public have been always held in this state to be within the jurisdiction of equity, (Attorney-General v. Jolly, 1 Rich. Eq. 99,) and come within the rules which govern in all charitable uses. That gifts for general public improvement, utility, ease or convenience are charitable is fully sustained by the authorities. Perry on Trusts, § 704, and cases there cited. The suit, in such case, to enforce the trust or restrain its abuse, and for relief, may be brought by the state, where the government is the only party concerned, or by the state at the instance of relators where the rights of the government are not immediately concerned, but the interests of the public are affected. See remarks of Harper, Ch., in Attorney-General v. Jolly, supra, and Story's Eq. Pl., § 8.

It remains to be shown, in support of the position I hold, that all funds put into the hands of municipal corporations for public purposes constitute public or charitable trusts, cognizable in equity, and that the relators are, therefore, not confined to the ballot box for relief, but are entitled to the aid of equity. The general answer to this proposition is that while it may be true as to a gift, it does not apply to funds raised by taxation, or by bonds payable by taxation,

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which amounts to the same thing. *Or as it is expressed in Hill on Trustees, *454, the fund must proceed from the gift or bounty, either of the crown or state, or some private person, otherwise it will not be charitable, and, therefore, rates or assessments, levied

under an act of parliament by the inhabitants on themselves for the improvement or benefit of their town, are not charitable funds to be administered by the court, for there is no gift or bounty in the creation of such fund. The authority cited by Hill is Attorney-General v. Heelis, 2 Sim. & Stu. 77, decided in 1824. It is true that such language is there used by the Vice Chancellor, Sir John Leach, who says that he is "of opinion that it is the source from whence the funds are derived, and not the mere purpose to which they are dedicated which constitutes the use charitable;" and he then proceeds to illustrate by supposing the instance described by Mr. Hill, as above. But that was not the case before him, for he held the funds to be charitable, and his opinion is a mere dictum, although it is referred to with great respect. Examination of the authorities will show that the opinion thus expressed by Sir John Leach was never admitted to be law, for, in Attorney-General v. Mayor, &c., of Dublin, 1 Bligh (N. S.) 312, decided in the house of lords in 1827, the very instance supposed by the Vice Chancellor arose, and the doctrine which he had announced was entirely disapproved by Lord Eldon and Lord Redesdale, who, in the case of the city of Dublin, delivered the opinion of the house of lords. All the cases are reviewed in the more recent case of Attorney-General v. Eastlake, 45 Eng. Ch., 11 Hare, 205, which is very similar to the case before us, and quite in point. It is there held that the city of Dublin's case had clearly established the principle that, in a suit brought by the attorney-general at the relation of rate-payers of the city, the court had jurisdiction to compel the corporation to account for funds raised by taxation under an act of parliament to supply the city with water works, and to compel the replacement of funds which had been improperly applied. The language of Lord Eldon in Attorney-General v. Browne, which preceded Attorney-General v. Heelis, is cited at length in Eastlake's case. Only the conclusion need be repeated here. "I have heard nothing," says Lord Eldon, "which prevents

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my concurring in *the opinion that a parliamentary grant, destined to such purposes, (public benefit of a town,) is a gift to charitable uses. If that doctrine is to be contradicted, it must be done by higher authority than mine." The grant was a power to collect toll to be applied to public purposes, and all the cases cited show that a grant of power to collect a tax for such purpose is precisely similar and governed by the rule laid down by Lord Eldon. The language used in Attorney-General v. Eastlake is a conclusion drawn from the leading cases, and is very clear on both the above points. "The difference of reasoning to which the remarks of Lord Eldon in Attorney-General v. Corporation of Dublin apply, consists in the distinction taken by Sir John Leach, that you are to look at the source from which the funds proceed, and not merely to their object. However, Lord Eldon, in the case of Attorney-General v. Corporation of Dublin, adheres distinctly to the view which he had taken in the earlier case, (Attorney-General v. Browne); and there can be no doubt that the conclusion of the house of lords was that the mode in which the rate was levied was not to be looked at, but the purpose to which it was to be applied, and I apprehend the purpose must be the real criterion." The purpose was, in Eastlake's case, paving and lighting the town. "It is sufficient to say it is a large and general purpose for this town, although not beyond the limits of the town, and that for that purpose certain moneys are to be levied. I cannot see that the source from which those moneys are here derived, namely, from taxation, can make any difference as to the charitable and public nature, and which would be attributable to the funds if they proceeded from a more limited sphere of bounty; and if there be no distinction on that ground the attorney-general is the proper person to represent those who are interested in that public and general or charitable purpose." See, also, Beaumont v. Oliveira, 4 Eng. Ch. App. Cas. 310; Attorney-General v. West, 10 Hart, Jury Com., Eng. Eq. Cas., *152.

So much for the jurisdiction and the propriety of the form of action brought. If these views are sustained by the authorities, it follows that the grounds on which relief may be demanded, and the relief itself are

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of vastly greater extent than is allowed *in the opinion which represents the majority of the court. In Attorney-General v. Eastlake it was admitted that the money was applied to purposes within the range of the ordinary powers of the body acting; but because the funds were diverted from the purposes for which they had been collected the court enjoined further misapplication, and ordered that the fund so expended should be replaced by the defendants. So, in Attorney-General v. Aspinall, 2 Myl. & Cr. 613, which is, in principle, exactly similar to the case before us, parties with whom the corporation had been improperly dealing, were brought in, and it was held that the application of the funds to purposes other than those named in the act was a breach of trust; that the parties so dealing had notice; that the appropriation must be rescinded, and that the funds thus misapplied must be recalled and delivered up. Instances might be multiplied without end, but the above are sufficient to show what are the usual principles of law and practice by which courts are governed in such cases.

I come now to the points properly presented by the pleadings and the exceptions, and on which my conclusion differs very

materially from that of the majority of the court. Among the most important differences are those which arise from the constructions put upon the act of March 13th, 1872. It is said (1) that among the primary objects for which money shall be borrowed under the power conferred by the act is an implied object, namely, the recalling and canceling of certain bonds referred to in the act as having been issued in 1871 for the erection of the new city hall and market.

The first section of the act authorizes the city council to borrow money by issuing bonds, but provides, "that before such issue the city council shall recall and cancel the bonds issued to the amount of two hundred and fifty thousand dollars, issued August 21st, 1871, for the erection of city hall and market." It is a condition precedent, as absolute as words can make it, for it directs what must be done before the power previously conferred can be exercised. Yet it is contended to mean exactly the reverse, and that the new bonds shall be issued prior to the recall and cancellation of the old, in order that by the sale of the new bonds the city council might acquire means, and out

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of the pro*ceeds of the new buy in the old bonds. Such interpretation negatives the power of words to express thought, and renders futile any attempt on the part of the legislature to attach conditions to its grants. The construction, however, really rests for its support upon a clause in Section 6 of the act, which directs that the proceeds of the bonds shall be applied "first to the payment of debts heretofore contracted for the construction of the city hall," &c. It is said, in substance, that because Section 1, in its proviso, states that the $250,000 in bonds, issued August, 1871, were "issued for the erection of city hall and market," that those bonds, or any loan for which they may have been pledged, represented the "debt heretofore contracted," mentioned in Section 6; and that Section 6, therefore, entirely superseded the provision in Section 1, and rendered the old bonds the prime object of the new bonds; whereas, from the ordinary sense of the words used, the act would seem to condemn the old bonds, and orders the cancellation of the same before the city shall be allowed to exercise the new power which it sought and obtained by the act of March, 1872. The legal result of the construction given to the act by the court is the recognition of the validity of the old bonds, and the practical result would have been, if any such idea had then been entertained, that the old bonds would in all probability have been as good as the new, and consumed the latter, dollar for dollar, in the cancellation of the former. The answer is that the old bonds had been hypothecated to a limited amount, and were under control of the city on payment of that sum. That may be true, but the price obtained for the new bonds may not have been in excess of that sum. The true reply, however, is that there is no evidence of that fact in the statute; and when a court is seeking the legislative intention, it must confine itself to the language used by that body, and not be influenced by extrinsic facts. Sedg. 241.

It is only by the evidence given at the trial that it is shown that the old bonds had been pledged for a debt outstanding at the time the act was passed, yet it is by that fact alone that the clause in Section 6 has been linked to the proviso in Section 1, and thus the true purpose of each portion of the act utterly defeated. It is hardly necessary to

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say more. The proviso is a *condition precedent, which must be performed before the trust fund could come into existence. Section 6 is a direction subsequent, and undertakes to dispose of the application of the funds. The latter could not go into force until the former had been done, and it is unjustifiable to suppose that the legislature meant a thing so flagrantly contradictory to what the words express.

The true and fair presumption is, that the issue of the bonds in August, 1871, was regarded as an illegal act, and for that reason the recall and cancellation was made a peremptory condition. This view does not arise from the evidence of extrinsic facts, but is a conclusion of law, for the Statutes at Large show that there was no law in existence in August, 1871, authorizing the issue of bonds for the erection of the hall or market, or any kindred purpose. And it is manifest that such was the view taken by the legislators; for, while they ordered the bonds of August, 1871, to be recalled, they by Section 5 of the act, laid a tax sufficient to pay the interest on the new issue, "and all heretofore issued by authority of law." If the August, 1871, bonds had been regarded as issued by authority of law, they would have come within the provision of Section 5, and if not recalled and canceled, would have enjoyed its benefit. That, clearly, was not the intention.

The record of the points to which I express dissent is that, as is said, Section 6 of the act must be stripped of the idea that the proceeds of the bonds were a trust to build a city hall and market. I hold that, under Section 6, such proceeds do constitute a trust fund, to be applied in the manner prescribed in Section 6, and in no other.

"Section 6. That the said mayor and aldermen are hereby authorized and directed to apply the proceeds of the sale of said bonds, first, to the payment of any debts heretofore contracted, or which may hereafter be contracted, for the construction of the new city hall and the new market; and, secondly, for the improvement of the streets, the extension of the water works, and for any other

improvements which shall be judged advisable by the said mayor and aldermen."

The ground that Section 6 constitutes no trust, is taken because the section does not,

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in terms, order the hall and market to *be built, the improvement of streets to be completed, and the water works to be extended, &c.; and because it does not explicitly declare that the bonds are issued for such purposes. What force, if any, such argument may have had, had the objects named in Section 6 never arisen, it loses all force the moment such objects come into existence. That debts for the hall and market had been contracted prior to the passage of the act, and large debts for the hall, subsequently, is shown by the evidence throughout the case, and, in fact, is admitted. Further, streets and water works were in existence when the act was passed, and their improvement and extension were clearly specific objects. But the direction to proceed with the city hall and market, which are treated by the act, (Sections 1 and 6), as then being in process of erection, is plainly impliable from the whole act. Indeed, the act differs in little from an ordinary deed of trust. Section 1 creates and vests the trust fund: Section 6 directs how it shall be applied. Each object named in Section 6 was then in being, or has arisen since. It is argued that this plain dedication of the fund does not specify and limit the objects to which the money shall be applied, because it names no object which was not already within the scope of the authority of the mayor and aldermen, and to which they might not have applied the surplus of the ordinary revenue of the city; and that the act, substantially, did nothing more than confer a power to increase the revenue for current purposes. The result would be that the mayor and aldermen could avail themselves of all the other portions of the act, but could cut off Section 6, and hold or spend the money at their sole discretion. I can see no difference between this act and a deed conveying to trustees, already exercising a trust over certain property, additional funds dedicated to the payment of specified debts already incurred and to be incurred in the improvement of the trust property, and then to certain specified, and then to general, improvements. Such a deed is never construed to give license to the trustees to disregard the instructions and spend the money at their pleasure, leaving to the cestui que trust, and to the donor, no remedy. There is no substantial difference, in principle, between this trust and that contained in the will of Stephen Girard. Vidal v. Girard, 2 How. 127 [11 L. Ed. 205]. The

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city of Philadelphia, with *its own funds could, if it had seen proper, have executed many of the purposes named in that will, but it has never been for a moment contended that this gave it the right to disregard Girard's instructions. Like this act, it names several objects in successive order, the two latter of which are the maintenance of a police force and the "improvement of the city property and the general appearance of the city itself." But, as is held in Vidal v. Girard, supra, and Girard v. Philadelphia, 7 Wall. 1 [19 L. Ed. 53], the first object has the first claim upon the fund, and until that object has been accomplished the city has no power to devote the money to any other purpose. In the case before us, the very first and great object referred to throughout the act, is not near completion; heavy debts are outstanding, and yet the mass of the bonds have been wasted and misapplied. It is needless to argue the point further.

Reference to Perry on Trusts, § 704, will furnish ample authority to show that when a deed, devise or statute endows a corporation or its officers with funds, by direct gift or by power to levy a tax, such funds to be used for the improvement of the town in general terms, or for public water works or buildings, or works of any kind as enumerated in Section 6, such direction constitutes a specific express trust; the funds are held subject to the trust, and the trust can be enforced or protected by the court of equity. See, especially, Attorney-General v. Eastlake; Attorney-General v. Dublin; Attorney-General v. Aspinall, supra.

The third ground, to sustain which it is said that the object of the statute really was to enable the city to fund its floating debt, &c., giving merely a preference to certain classes of obligations, appears to me to be sufficiently refuted by the act itself, and I have already, under the second division of my objections, said all that I have to say on that subject.

As a fourth ground, to sustain the conclusions reached by the court, it is said that the sole equity would consist in the statement that debts of the character provided for in the sixth section were outstanding at the time of the filing of the complaint; that the only debts of that class are debts on account of the city hall, and that as to them there is no equity, because such debts have an additional provision made for them by the

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tenth section of the *act, which directs that the income derived from lease of portions of the building shall be made a sinking fund for the payment of such debts. To answer the latter part first—that provision in Section 10 plainly either refers to the bonds devoted to the erection of the hall, or, more properly, is an additional security to the parties contracting to build the hall, for there is nothing in the act limiting the amount which might be expended on the hall. It is inconceivable that it was intended as a shield to cover the trustees in their breach of the trust imposed by Section 6, for such intention certainly

is not expressed and ought not to be presumed.

To say that the equity of the case, or the right for relief, is limited to the debt now outstanding on the city hall, is a total disregard of the position occupied by a trustee, and of all the other objects mentioned in the act. It is a fixed rule that a trustee, and all parties dealing with him, with notice of the trust, are liable to account for the entire trust fund. Even if all the objects named in the act had been completed, and there remained a surplus of the proceeds of the bonds, the corporation had no right to devote it to purposes foreign to those named in the act, Merchant Taylors Co. v. Attorney-General, 11 Eng. Ch. Cas. 34, and could be held to account. Whether the act of such a trustee, if done in good faith and for a good purpose, could be confirmed by the court, or would need legislative confirmation, is a question which it is needless to discuss; but that one or the other would be necessary is very clear. If I understand the law, as laid down by the authorities, the plaintiff is entitled to relief against all misconduct of the corporate officers and parties dealing with them in the professed exercise of the powers contained in the act. I readily admit that the court should not go within the scope of the authority conferred, and interfere with its discharge, upon the ground that it is unwise or injurious to the public, but its plain duty is to keep the corporate officers within the scope of their authority, and when they go outside of it to treat them, and all dealing with them, exactly as it treats other parties committing or aiding in breaches of trust. "So long as those functionaries strictly confine themselves within the exercise of those powers which are confided to them

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by the law, this *court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct, is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property, which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority." Freeman v. Lewis, 4 Myl. & Cr. 249.

The fifth point which compels dissent is the assumption by the court below, and sustained on appeal, that when the legislature directed that debts "heretofore contracted for the construction of the new city hall and market" should be paid out of the proceeds of the bonds, it meant that a certain note to J. L. Neagle, for $75,000, should be so paid. The note to Neagle is not mentioned in the act, and if the court goes outside of the act to extrinsic facts to ascertain the intention, it violates the settled rule of construction. The general assembly did not mean a debt to any particular person, nor any particular debt, for it did not say so; but it did mean debts of a specified class, viz., debts theretofore contracted for the construction of the hall and market. It devolves upon the court to decide what debts come within such description, and to do that the court properly resorts to evidence, and has no right to say that the legislature has preadjudicated the question of fact, unless that body has done so in explicit language. The evidence is conclusive that the note to J. L. Neagle for $75,000 did not, to that full extent, represent a debt under Section 6.

The note was given in August, 1871, for money loaned to the city council. The loan was negotiated under and by authority of proceedings of the board of mayor and aldermen, which, by law, are published; and it is admitted in the evidence "that the proceedings of council, referred to in the testimony in this case, were published in the newspapers of Columbia, S. C." The proceedings are as follows (July 11th, 1871, p. 99, minute-book of proceedings of city council of Columbia): "Resolved, that the mayor and committee of ways and means be authorized to borrow money from time to time, as

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may be necessary to carry *on contracts for building the proposed extension of the market, erecting new city hall, &c., and to secure any advances for this purpose, to dispose of and hypothecate city securities."

On August 17th, 1871, (minute-book, p. 213,) the following report was made by the committee of ways and means: "That in furtherance of the duty confided to them to raise money to build city hall and market, and for other purposes necessary for support of city government, they negotiated with various parties, and are able to borrow seventy-five thousand dollars ($75,000) at current bank rates, which loan is to be secured by hypothecating two hundred and fifty thousand dollars' ($250,000) worth of city bonds. This mode of raising money the committee regards as preferable to the sale of the large amount of bonds that would be required now to raise the money needed. The committee believe that there will be such an advance in city bonds, in a few months, as to enable council to sell bonds sufficient to liquidate the debt now created, without suffering the discount and great loss that the sale would now entail upon the city. The committee would, therefore, recommend that the mayor, with the advice of the committee of ways and means, be authorized to execute a note of the city of Columbia for the sum of seventy-five thousand dollars, and to secure the said note by a pledge of two hundred and fifty thousand dollars ($250,000) of city bonds, which bonds he is hereby directed to issue."

It is proven that under a resolution of the

said city council, adopted on the said 17th day of August, 1871, (see p. 212 minute-book,) the report was adopted, and thus became a resolution of council. The date of the note, the sum and the security prove that the loan was obtained under the authority conferred by the latter resolution of August 17th, and not under the resolution of July 11th, 1871, as is said by the majority of the court. And the chairman of the committee of ways and means testifies that "upon the resolution of July 11th, 1871, we negotiated the loan with Dr. Neagle. After the adoption of the report made August 17th, we closed the transaction."

The testimony further shows, and it is admitted by both sides, that the proceeds of the note were disposed of by January 1st, 1872, prior to the passage of the act, as follows:

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*For city hall	$14,494 66
For market	6,302 70
Total	$20,797 36

For the ordinary current expenses of the city government, having nothing to do with the hall or market, $53,917.08, leaving a balance of $285.56 unaccounted for.

It thus appears that the transaction was not completed under resolution of July 11th, which is construed to refer solely to hall and market; that the power to borrow money, conferred by that resolution, was not exercised, but that the committee came back and said that they might be able to borrow $75,000 for the hall and market and other purposes necessary for the support of the city government, but that for this loan securities were demanded which were not in their hands, and recommended that instead of their acting as under July 11th resolution, the power be confided in the mayor, under their advice, to give a note of the city of Columbia; to hypothecate as security for said note $250,000 in bonds, and to enable him to do the latter he be forthwith directed to issue the said bonds, which had thus to be brought into existence before they could be pledged. It is as plain as words can make it that the loan rests on the authority of the resolution adopted August 17th, 1871, and the resolution of July 11th has no more to do with the contract of loan and the note as perfected than if it had never existed. It was insufficient to support the scheme, and it was set aside, and one of far greater magnitude put in its place. The money was thus borrowed for several purposes, of which the hall and market were the two minor, and the sum necessary for the support of city government the major, as the testimony shows. It is useless to say that J. L. Neagle loaned under the resolution of August 11th, 1871. His own demand for $250,000 in bonds, which had not then been put in the committee's hands, shows that he was the very person who objected to the July 11th resolution, and required better and stronger note and security than that resolution authorized. He was satisfied with the resolution adopting the report on August 17th, 1871, because it was in full compliance with his requirements as therein set forth, and forthwith completed

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*the transaction on those very terms, of which he had full notice in the published resolution. He cannot now, with any merit, claim that he thought the loan was for the city hall, nor can his assignees, for the legislature did not make that the measure by which the object of the debt should be determined, but left it to be fixed by the ordinary rules of evidence. So much only as was paid for the hall and market is a debt contracted for their construction; the residue is a debt contracted for other purposes "necessary for the support of city government."

As to other points in the case, I concur in the following:

1. That the validity of the bonds is not impaired by the defective "abstract" of the act endorsed thereon.

2. That the failure to recall and cancel the $250,000 in bonds, referred to in Section 1, prior to the sale of the new bonds, does not, per se, invalidate the sale. No objection was made at the time the sales were made, and the bonds in question had been recalled and canceled before this action was brought. The plaintiff may be considered as bound by acquiescence, or with length of time having elapsed as estopped by laches. The failure to recall was a gross irregularity, but, no one having complained, the city was able afterwards to make amends by recalling the bonds, and thus, substantially, did comply with the results contemplated by the act. This view does not at all affect the right on the part of the plaintiff to object to the use of the proceeds of the sale of the new bonds to recall the old. The two questions are entirely disconnected—one is an irregularity which may be waived or repaired, the other is a plain breach of trust, and stands on a different footing.

3. That the bonds were advertised and put up at public sale substantially in compliance with the act (Section 3.) The first advertisement and sale was literally in compliance; the two subsequent, being on days fixed by public adjournment, were regarded as mere resumptions of the first sale. The public stood by, acquiescing to such construction, and it is too late now to complain.

I concur, therefore, so far as concerns the public conduct of the sales, but I differ widely from the view which is taken of the completion of these sales by subsequent negotia-

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tion. The *intention of Section 3 of the act was to secure the best market price, by attracting public attention, and to prevent fraudulent private negotiation. The evidence shows that this intention was fully carried out. The city council, to prevent sacrifice, limited the price at which the bonds should

be allowed to go, and had large amounts thus bid off by its agents. But bidders at auction sales do not perfect their titles until they have complied with the terms. The city, which was both vendor and vendee, when it bid off the bonds by its agents, held them still subject to the same trusts as before, and the same limitations, with this exception, viz., that, having complied with the requirements of the act, intended to fix a fair market price, it was left to the discretion of the city officers whether they would put the bonds up again for public sale, or transfer the city bid to third parties at the same or an advanced price for the benefit of the city, subject to the purposes of the act.

The bonds were bid off at the three sales as follows:

Clark Waring, for himself	$ 10,000
R. K. Scott (per Donaldson)	20,000
Central National Bank (per Gambrill)	10,000
City of Columbia (per Alexander, Waring & Wilder.)	210,000
	$250,000

The question is whether the sales were perfected by payment, for, unless payment was made, (the sales being made in pursuance of a statutory trust, of which all had notice,) the title would not pass, and the bonds, in the hands of original purchasers, or persons having notice, are affected by the trust, and should be delivered up. To answer this inquiry it must first be fixed what, under the act, is a payment. The act, Section 1, empowers the mayor and aldermen "to borrow money by issuing city bonds," and directs that the issue be made by public sale. Section 3. One buying in the manner prescribed by the act, and paying money, is responsible for nothing which may occur in the future by reason of the conduct of the corporate officers, provided, always, that he is not particeps. Therefore, if the bonds had been sold for money, and the money paid, bondholders would not properly be parties to this action.

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The sole question would *be as to the application of the money, and in that only the corporation, its officers and parties dealing with them, could be concerned. But not $1 of money was paid for the $250,000 in bonds thus bid off, and the whole transaction is thereby opened to inquiry where the original parties are before the court. Money is the only payment technically admissible, because the express purpose of the issue is to "borrow money" by sale of the bonds. There may, nevertheless, be an equivalent for money. Debt, to the payment of which the money is dedicated by the act, is an equivalent. Section 6 defines such debt. A debt contracted for the construction of the hall and market was, from the first, an equivalent of money, and could be delivered up, satisfied, in payment for bonds. It matters not whether such debts were in the hands of original creditors, assignees or the city council, which had borrowed money to pay them, and remained liable for the amount. The proceeds of the bonds would be applicable thereto, and any obligation representing such debt could be taken as money. But an obligation for money previously borrowed by the city council, on the mere pretence that it was for a purpose, such as the act afterwards named, and not actually so applied, occupies no such position, and cannot be used in payment for bonds, for the council is a mere trustee under the act; the relators are the true parties in interest, are liable on the bonds, and should not be made to bear any burthen, or suffer any loss but such as results from the act, strictly construed. Therefore, in testing the validity of the sales, the payment for the bonds must be subjected to the rule thus laid down; it must be in money, or what, under Section 6, is its equivalent. The evidence shows, as already stated, that the city hall is not yet completed and that debts contracted for its construction are still outstanding to a large amount. The city council has, therefore, up to this time, had no power to apply the proceeds of the bonds to any other purpose, (Vidal v. Girard, Girard v. Philadelphia, supra,) and, consequently, no other class of indebtedness or obligation has been receivable in lieu of money.

I will now pass upon the sales in detail.

Clark Waring, who was then the contractor charged with the construction of the city hall,

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bid off $10,000 in bonds, and paid *for them by crediting the amount on the debt then due to him on city hall account. The payment was valid under Section 6, and those bonds are free from objection.

The Central National Bank bid off $10,000 in bonds, and for payment delivered up a note held against the city council and a small parcel of city coupons. The note was for money loaned to the council and expended for ordinary purposes, not included in Section 6. The payment was not good, and the bonds being in the hands of the original purchaser, should be delivered up, and the parties restored to their original position, leaving the bank to such remedy as in law it might have.

R. K. Scott bid off $20,000, and for payment entered a credit to the amount of his bid on a note he held against the city council for money previously loaned to aid in paying the $75,000 note held by J. L. Neagle. The credit was prima facie no payment, and the bonds should be delivered up; but another feature in the transaction will be subsequently noticed. The remaining $210,000 were in hands of the city officers, as vendors and bidders at the public sales, still subject to the conditions of the trust, and negotiable thereunder, but with the right, on the part of the council, to transfer their bids to purchasers on the terms and in the manner above laid down. The fact that the bonds were still in the hands of the city officers refutes the idea that purchasers from them

can be regarded as holders of negotiable instruments, without notice. Possession by the city was notice that the bonds had not been issued, and none put up such defence except the Carolina National Bank. As to that defendant its own evidence and transactions conclude it by showing that it was intimately acquainted with the whole matter, and recognized the bonds as unissued and still the property of the city.

The city officers undertook to sell the bonds, as follows, to—

R. K. Scott	$ 50,000
Carolina National Bank	100,000
John English	3,500
Clark Waring	4,500
John Alexander	750
Union Savings Bank	15,000
	$173,750

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*And pledged as collaterals—

South Carolina Bank and Trust Company	$29,250
Thomas B. Jeter	6,000
Leaving in hand	1,000

The sale to John English was bona fide; the money was paid, and the bonds are free from objection.

The sale to Waring was likewise unobjectionable. Valid payment was made by credit duly entered on his account for work done on the city hall.

The sale to John Alexander was void, for payment was made by credit on an account not within the objects named in the act. As to the rights of the subsequent holder, who has not answered, the court has disposed of them generally, and it is unnecessary to discuss the question in a mere dissent.

The second sale to R. K. Scott, is of the same character with the first, and should be set aside, except to the extent hereinafter indicated.

The sale to the Carolina National Bank is good in part, and as to the residue, is of the same character, in part, with the sales to R. K. Scott, and in part is without any legal or equitable validity. The amount professedly given for the bonds was $66,000. It was paid by crediting on obligations held against the city council to the amount of $52,420.30, and by putting to the credit of the city $13,579.70. The latter was a valid payment, and to the extent that amount covers the bonds the sale is unobjectionable. Of the remaining $52,420.30, the amount, $35,513.25, represents money which the bank had loaned to aid in taking up the note to J. L. Neagle. R. K. Scott loaned $40,000, which was applied to the same object. Scott and the bank, therefore, represent any equity which was attached to Neagle's note. As already indicated, that note was to the extent of $20,797.36, entitled to be paid out of the proceeds of the sales of the bonds. The right to that sum, or rather to bonds which would represent that amount, is held by R. K. Scott and the bank in the proportion of $40,000 to $35,513.25, and in the additional proportion of the price at which they respectively bought the bonds. As to the balance of the bonds bought by Scott and by the bank, the sale should be set aside and the

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bonds *delivered up, and the parties restored to their respective rights as they stood at the time of the attempted sales, except in so far as the sales are confirmed by the rules above laid down.

The sale commonly called a sale to the Citizens' Bank of Petersburg, Va., was, in fact, a sale to the Union Savings Bank, as is shown by the testimony of the then mayor and treasurer, whatever may have been the intention in the mind of the purchaser, an agent, who represented both banks in the transaction. Parties dealing through agents are bound by the acts and by the knowledge on the part of their agents, within the scope of the authority. The testimony is that the sale was made to pay demands held by the Union Savings Bank as against the city. It makes no difference whether the agent paid by check on the Union Savings Bank, which he represented, and paid the check by crediting the amount on demands against the city, or paid down the money of the Citizens' Bank of Petersburg, Va., with one hand and took it up in the other, to satisfy the demands of the Union Savings Bank. In either course of conduct he colluded with the city council in the misappropriation of the proceeds of the bonds to debts not comprehended by the terms of the trust, and the law should fall, not upon the innocent relators, but upon the principal, who should be made to deliver up the bonds, and go for remedy against its agent and the Union Savings Bank.

The hypothecation of $29,250 of the bonds with the Carolina Bank and Trust Company was clearly illegal, and, in the hands of the original holder, the bonds could have been at once recalled; but being negotiable in their character, and having passed into the hands of others by subsequent pledge, and then by public sale, and there being no evidence of notice, they have passed beyond the reach of the power of the court, and are valid obligations. There seem, however, to have been other bonds sold at the same time that were of the number delivered to R. K. Scott. They were pledged by his agent and were bid in by himself. As to these, no change was effected, and they are open to the original objection, and have been already disposed of. R. K. Scott was the owner of the pledge, and had notice of the defect in the title. It cannot be held that by pledg-

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ing the bonds *and suffering them to be put up at public sale he could perfect his title by bidding them in, when he had full notice.

The hypothecation with Thomas B. Jeter to secure a loan, was without authority and

ought to have been rescinded, and the bonds delivered up. It is alleged in the answer that they have been pledged in the Central National Bank, but there is no evidence that the pledge was made prior to the commencement of this proceeding.

The result of these views would be to reverse the judgment of the Circuit Court, and to order a decree confirming the sales of bonds to the amount of about $55,000 in bonds, and establishing the validity of the $29,250, which are made valid by their character of negotiability.

The power of the city council to borrow money and thus impose burthens on the city, is questioned in the case, but the court has not deemed it raised by the pleadings, and has not passed upon it. I am inclined to think the point does arise, but have already gone to such length that I am indisposed to say more than that very sound authorities seem disposed to lean against the exercise of such power by a corporation. The power to borrow money is distinct from the right to give certificates or evidence of indebtedness for services rendered, &c., and the case of Neely v. Town of Yorkville, 10 S. C. 141, by no means settles the former question.

Decree.

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12 S. C. 422

(Case No. 763.)

J. H. BROOKS, Executor of Whitfield Brooks, and of Mary P. Brooks, v. M. C. BROOKS et al.

M. C. BUTLER, Assignee, v. J. H. BROOKS, Executor, and J. C. BROOKS.

(April Term, 1879.)

[1. *Wills* ⇐727.]

A testator, by his last will, declared: "All and singular the rest and residue of my estate, both real and personal, of every description, I give devise and bequeath to my beloved wife,

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M., for and during the term of *her natural life; and, after her death, it is my will and desire that the same shall be sold and the proceeds thereof equally divided among my children in fee, share and share alike." Other provisions of the will clearly showed that the sale of this residuum was not to take place until after the death of M. *Held*, that the estate was to be enjoyed specifically in mass by M. during her life.

[Ed. Note.—Cited in Robinson v. Ostendorff, 38 S. C. 74, 16 S. E. 371.

For other cases, see Wills, Cent. Dig. § 1748; Dec. Dig. ⇐727.]

[2. *Life Estates* ⇐11.]

In such case the only duty of the life-tenant is to maintain and preserve the estate as a whole, in as good condition as to productive capacity as when received, and she is not responsible for deterioration occurring without fault on her part. Cases considered.

[Ed. Note.—Cited in Orr v. Orr, 34 S. C. 280, 13 S. E. 467.

For other cases, see Life Estates, Cent. Dig. §§ 29, 30, 42; Dec. Dig. ⇐11.]

[3. *Life Estates* ⇐23.]

Hence, a sale of two slaves, a small proportion of the estate, by such a life-tenant, is not improper.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. ⇐43; Dec. Dig. ⇐23.]

[4. *Life Estates* ⇐20.]

The burden of proof rests upon the remaindermen to show deterioration, improperly permitted, in the value of furniture and like property in the hands of the life-tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 41; Dec. Dig. ⇐20.]

[5. *Life Estates* ⇐15.]

The consumable or vendable products of such life-estate, over and above what are needed for the current support of the property, should, when adequate, be applied to the reasonable maintenance of the life-tenant, and to maintain the estate in as good condition as when received; when inadequate, they should be applied equally to the maintenance of the life-tenant and of the estate. Cases considered.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. ⇐15.]

[6. *Life Estates* ⇐15.]

Of the produce on hand at death of testator, such as is proper to be consumed for the benefit of the estate is properly only a part of the estate, to be accounted for as a whole by the life-tenant; a surplus of such produce not so needed, is to be accounted for as of its pecuniary value at testator's death. Property not consumable is to be regarded as a specific bequest, to be preserved in proper condition for the remaindermen. Cases considered.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 34; Dec. Dig. ⇐15.]

[7. *Life Estates* ⇐14.]

Where a life-tenant dies before the agricultural year is completed, the produce of such year belongs to her estate, subject to her accountability for the life-estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 33; Dec. Dig. ⇐14.]

[8. *Life Estates* ⇐20.]

In the absence of special circumstances warranting a charge upon the estate by a life-tenant, money expended by her therefor cannot be made a claim against the estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 41, 42; Dec. Dig. ⇐20.]

[9. *Life Estates* ⇐17.]

Permanent improvements put upon land by a life-tenant, are to be considered under the general question of the condition of the estate as a whole, and cannot be otherwise made a charge against the estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 38; Dec. Dig. ⇐17.]

[10. *Executors and Administrators* ⇐266.]

A life-tenant, who was also executrix, receiving the residuum of an estate, is entitled to credit for a debt of testator paid out of her individual property, but not to interest thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1029; Dec. Dig. ⇐266.]

[11. *Executors and Administrators* ⇐66.]

A life-tenant, who is also executrix, is not bound to return an inventory of the property held by her in her character of life-tenant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 315; Dec. Dig. ⇐66.]

[12. *Executors and Administrators* ⇐130.]

Where an executor has an election to take a tract of land at a valuation, and doubts as to the construction of the will and the mode of valuation require a determination by a court of equity, the executor may await the decree before making his election, and may, meantime, retain the land in his own possession, and should be charged therefor only a fair rental value, and should not be held accountable for the profits derived from its use.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 537; Dec. Dig. ⇐130.]

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[13. *Wills* ⇐705.]

*Where the court is asked to construe a will, it is competent to require, by decree, that releases should be executed by the legatees according to the direction of the will, before receiving their legacies.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1682; Dec. Dig. ⇐705.]

[14. *Assignments for Benefit of Creditors* ⇐175; *Judgment* ⇐780.]

Where land is given to A for life, and after her death to be sold, and the proceeds divided amongst testator's children, share and share alike, a judgment obtained against one of these children during the lifetime of A, constitutes no lien upon his share in the remainder; and when sold under the direction of a court of equity, the share of such child in the proceeds, passing under an assignment, previously executed for the benefit of his creditors, will be regarded as equitable assets.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. ⇐547; Dec. Dig. ⇐175; Judgment, Cent. Dig. § 1348; Dec. Dig. ⇐780.]

[15. *Assignments for Benefit of Creditors* ⇐202, 293; *Limitation of Actions* ⇐102.]

Equity will enforce the terms of an assignment for the benefit of creditors, although not legally complete under the act of 1759, by reason of the failure of the assignee to accept the trust. Creditors in interest may seek the aid of a court of equity to enforce its terms, and the statute of limitations is no bar to the trust thus created.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 850, 851, 889; Dec. Dig. ⇐202, 293; Limitation of Actions, Cent. Dig. § 499; Dec. Dig. ⇐102.]

[16. *Assignments for Benefit of Creditors* ⇐48.]

Where an assignment made under the act of 1759 for the benefit of creditors, fails to convey the legal title for want of acceptance by the assignee of his trust, a subsequent assignment of a portion of the same property to others, will be upheld, the validity of such second assignment not being made a question in the cause.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 69; Dec. Dig. ⇐48.]

[17. *Assignments for Benefit of Creditors* ⇐295; *Creditors' Suit* ⇐13.]

Under a bill which cannot be regarded as a general creditors' bill, as the legal remedies were not exhausted, but retained as a bill to carry out the trusts of an assignment, the plaintiffs have no right to have the interests of the debtor in property not embraced in the assignment, defined.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 865; Dec. Dig. ⇐295; Creditors' Suit, Cent. Dig. § 67; Dec. Dig. ⇐13.]

[18. *Assignments for Benefit of Creditors* ⇐202.]

A payment of a portion of the assigned estate to one who had made an assignment for the benefit of his creditors, under the act of 1759, sustained, as, the assignee having refused to accept the trust, there was no one else to whom payment could be made.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 491, 688–690; Dec. Dig. ⇐202.]

[19. *Wills* ⇐705.]

When property at a fixed valuation is offered by the will to one of the children of testator, the decree which declares the right of such child to this property should, at the same time, provide for equalization of shares among all the children, as contemplated in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1682; Dec. Dig. ⇐705.]

[20. *Gifts* ⇐66.]

The gift by a mother to her son, during her last illness, of a certificate of deposit, payable to bearer, upheld as a donatio causa mortis.

[Ed. Note.—For other cases, see Gifts, Cent. § 136; Dec. Dig. ⇐66.]

[21. *Executors and Administrators* ⇐89.]

An executor is not responsible for failing to collect a note of the estate from a party proved to have been insolvent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 394; Dec. Dig. ⇐89.]

[22. *Executors and Administrators* ⇐500.]

An executor is not entitled to commissions for years in which he filed no returns.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2134; Dec. Dig. ⇐500.]

[23. *Appeal and Error* ⇐1154.]

This court will direct a decree to be opened to enable the Circuit Court to correct a clerical error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4497; Dec. Dig. ⇐1154.]

[24. *Executors and Administrators* ⇐111.]

Allowance of counsel fees to an executor is a matter within the discretion of the Circuit judge; and the refusal of one judge, at an early stage of a cause to allow them, cannot control the judgment of another judge who finally hears the cause.

[Ed. Note.—Cited in Walker v. Killian, 62 S. C. 489, 40 S. E. 887.

For other cases, see Executors and Administrators, Cent. Dig. § 459; Dec. Dig. ⇐111.]

[25. *Executors and Administrators* ⇐104.]

Where questions of doubt prevent an executor from lending or paying out the moneys of the estate, he should not be charged with interest until the end of a year after his qualification.†

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 428; Dec. Dig. ⇐104.]

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*Before Carpenter, J., December, 1875, and Pressley, J., October, 1878, at Edgefield.

In the action first above stated, John Hampden Brooks, as executor of the will of his father, Whitfield Brooks, and as executor of his mother, Mary P. Brooks, asked for a construction of both wills and the instruction of

† See Koon v. Munro, (4), 11 S. C. 140.

the court as to the several questions arising thereunder. All other parties in interest were made defendants, who by answer demanded an accounting of both estates. This action was commenced in 1871.

The second action was instituted in 1872 by M. C. Butler, assignee, and others creditors of James C. Brooks, a son of Whitfield and Mary P. Brooks, against James C. Brooks, J. Hampden Brooks, executor, and W. P. Butler—the last-named having been named as assignee under an assignment for the benefit of creditors, but who refused to act. This action claimed the benefit of the assignment made by James C. Brooks of his interest in the estate of his father after the termination of his mother's life estate therein, and demanded an accounting by J. H. Brooks, executor, and the payment to them of J. C. Brooks' interest.

Whitfield Brooks died in 1851, leaving of force a last will and testament. After making some specific bequests, the will proceeds:

9. If any one or more of the negro slaves hereby specifically bequeathed to my beloved son, John Hampden Brooks, shall die before he has attained to the age of twenty-one years, the loss of the slave or slaves so dying during the minority of the said John H. Brooks, shall be made up to him by substituting in the stead of the slave or slaves so dying another slave or slaves of like value, or a sum of money equal to the value of the slave or slaves so dying to be taken from the residuum of my estate, and I desire and direct that during the minority of my said son, John Hampden Brooks, all and singular the property and estate hereby devised to him shall be and remain in the custody and possession of his mother, and that in respect to the income and profits thereof during his minority she shall therefrom defray and discharge all the charges and expenses of his

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maintenance *and education, but beyond that shall not be in any wise accountable or chargeable therefor.

10. The portion and share of the estate of my lamented mother-in-law, Mrs. Mary Carroll, deceased, which in and by her last will and testament is devised to my beloved wife for the term of her natural life, with remainder to her children; I do hereby, give, devise and bequeath to my beloved wife, Mary P. Brooks, to be had and held by her not merely for and during her natural life, but absolutely and in fee forever, with power to dispose of it by deed or will, and to do all other acts respecting the same as fully and perfectly to all intents and purposes as though she were the unqualified and unrestricted owner thereof; and for the purpose of making this disposition valid and effectual, I hereby provide and declare that all and singular the devises and bequests in favor of my children and each of them, in this will contained, are and shall be held and taken to be upon the express condition that they and each of them shall assign, release and relinquish to my beloved wife absolutely and unreservedly all and singular their and each of their said rights, interest and estate in remainder accruing to, or vested in them in and by the will of their said grandmother, Mrs. Mary Carroll, deceased, as aforesaid.

11. All and singular the rest and residue of my estate, both real and personal, of every description, I give devise and bequeath to my beloved wife, Mary P. Brooks, for and during the term of her natural life; and after her death it is my will and desire that the same shall be sold and the proceeds thereof equally divided among my children in fee, share and share alike.

12. I request of my beloved wife that she will annually make certain gifts and presents to the negro slaves bequeathed to her for life, according to a memorandum that I deliver to her.

13. I authorize and empower my beloved wife, out of the estate hereby devised to her for life, to make such advancements as she may choose to any one of our children, always provided, however, that within six months after any such advancement or advancements shall have been made to any one of them, she shall make advancements of

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like value to the others of our *children; and provided further, that this restriction shall not be construed to extend to small gifts or presents not exceeding $20 in value.

14. It is my will and desire that my beloved son, John Hampden Brooks, shall at the death of his mother be entitled to take as parcel of his portion of the residuum of my estate, and at the valuation to be placed upon it by five disinterested persons to be appointed by the executors of my will, all that portion of my lands comprehended within the following boundaries, that is to say, a straight line running from the oak corner on the Mims tract to the grape-vine corner next to G. W. Holloway's land, the dividing line between my land and the lands of Z. W. Carwile, A. P. King, Dr. John Mobley and James Dorn, the Matthews road, and the dividing line between my lands and the lands of Wiley Kemp, Thomas Payne and James Mims.

15. All the residue of my lands lying between the parcel of land carved out for my son, John Hampden Brooks, as provided for in the preceding clause, and the tract of land I have already given to my beloved daughter, Ellen Dunovant, I desire and direct shall be taken at the death of my beloved wife by my said daughter as parcel of her share of the residuum of my estate, and at a valuation to be fixed upon by five commissioners, disinterested persons, to be appointed for that purpose by my executors, if my said daughter chooses.

16. I nominate constitute and appoint my beloved wife sole executrix of this my will for and during the term of her natural life,

and after death I confide the execution of the same to my three sons, Preston S. Brooks, James C. Brooks and John Hampden Brooks, as the executors thereof; and I do hereby invest my said executrix and executors with full power and authority to sell and to do all other acts necessary to the execution of this my last will and testament.

Whitfield Brooks left a large estate, consisting of plantation, negroes, horses, mules, cattle, &c., besides silverware, furniture, &c. His widow, Mary P. Brooks, and four children, survived him, viz., Preston S., James C. and John H. Brooks, and Ellen Dunovant. Mary P. Brooks qualified as executrix, and took possession of the estate. Shortly there-

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after she paid the claim of *Cornelia Cross, as stated in Judge Pressley's decree. She sold two slaves belonging to the life estate. Other sales and purchases by her, and improvements added, are stated in the Circuit decree.

In 1860 judgments were obtained against James C. Brooks, upon which writs of capias ad satisfaciendum were issued, and in 1861 he was arrested, and having applied for the benefit of the insolvent debtor's act, and made an assignment of his entire estate, was discharged from custody. His schedule contained inter alia the following: "Whatever interest I may have, in remainder or otherwise, in my father, the late Whitfield Brooks' will, after the death of my mother, Mary P. Brooks." William P. Butler, the assignee, declined to accept the appointment, and never acted as assignee, and no one else was ever substituted in his stead.

In October, 1871, James C. Brooks assigned to J. H. Brooks so much of his interest in his father's estate as would amount to $1500, and to John E. Bacon so much of the same as would amount to $500. In 1872 he assigned to J. H. Brooks, as executor of Mary P. Brooks, all of his interest in his father's estate.

Before that time, in December, 1870, Mrs. Mary P. Brooks died. Her son, Preston S. Brooks, and her daughter, Ellen Dunovant, had survived their father, but predeceased their mother—the former leaving a wife and four children, the latter a husband (R. G. M. Dunovant) and four children. Mary P. Brooks left a will, and appointed J. H. Brooks sole executor, who qualified as such, and also then became executor of his father's will. She gave a plantation of nine hundred and fifty acres, called Turkey Creek, to her son, J. C. Brooks, in trust, after paying for his own maintenance, for his children. Her remaining estate, after a few specific legacies, she divided among her son, J. H. Brooks, and the children of her deceased son and daughter—to each one-third. Clause 12 reads as follows:

"If the debt due me by the said R. G. M. Dunovant for the purchase of my said house and lot in the village of Edgefield, of which he is now in possession, shall not be paid by him within one year next after my death,

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then, and in that event, the con*tract to him for the sale of the last-mentioned premises shall be on my part renounced and forever abandoned; and the said house and lot, to be valued at the sum of $5000, shall belong to and vest in my said daughter and her children as parcel of her and their share of my said residuary estate; if such share shall be worth more than $5000, and if such share shall be of less value than that sum, then the said house and lot shall stand charged in favor of the other shares, with so much money as shall suffice to produce equality in value among all the residuary shares."

Mrs. Brooks, before her death, held a certificate of deposit for $2000 in a bank in Columbia. It was claimed by J. H. Brooks, after her death, as his property, by gift from his mother, and he received the money. The only testimony upon this point (his own being objected to) was that of his wife. She testified as follows:

"Witness is the daughter-in-law of Mrs. Mary P. Brooks; resided in the house with her from the time of witness' marriage until Mrs. Brooks' death—about three years; Mrs. Mary P. Brooks spoke to witness more than once about the indebtedness of Chancellor Carroll to Mrs. Brooks, and said that she intended to give it to J. H. Brooks; that she had written to Messrs. Pope & Haskell about it, and that she intended to arrange the matter when she went to Columbia, which she expected to do soon; witness does not remember that Mrs. Mary P. Brooks ever mentioned the amount of the indebtedness; it was some thousands; during her last illness Mrs. Mary P. Brooks asked for the certificate of deposit of the amount due by Chancellor Carroll, when it was brought to her, and she gave it to J. H. Brooks; witness does not remember exactly what she said, but it was something equivalent to 'now it is done;' Mrs. Mary P. Brooks always made the impression on witness' mind that she intended to give this particular money to J. H. Brooks, saying 'that she felt he would need all she could give him, as he had lived so long with her without a home of his own.'

"+ Witness does not remember seeing Mrs. Mary P. Brooks take the paper in her hand and deliver it to J. H. Brooks; saw J. H. Brooks take the paper.

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* "++ Upon reflection, saw Mrs. Preston Brooks bring the paper and give it to Mrs. Mary P. Brooks, who gave it to J. H. Brooks."

Shortly after Mrs. Brooks' death, J. H. Brooks had the lands of Whitfield Brooks' estate appraised, and also procured an appraisement of the rent for the year 1871. He continued in possession for several years afterwards. There was a great deal of testimony upon the question of rents. A number of witnesses testified as to the sum for

which, in their judgment, it would have rented at public outcry. It was also shown what were the products of the place during these years, and what rents were received by J. H. Brooks from his tenants.

After the death of M. P. Brooks, the executor made payments to J. C. Brooks, on account of his interest in his father's estate out of the proceeds of the life estate which had fallen in, and without notice of the general assignment made in 1871. Among the assets of Whitfield Brooks' estate was a note on A. P. Blocker, which was never collected by the life-tenant or her executor, and never could have been enforced by legal proceedings.

At the time of W. Brooks' death he was indebted for the purchase money of certain slaves. His widow paid the debt out of moneys received from her mother's estate. She did not return these slaves upon the inventory of her testator's estate filed by her in the proper office. Her executor claimed the amount so paid as a credit upon her accounts as executrix, which was refused by the referee.

S. B. Griffin, Esq., being referee, made his report, submitting the testimony taken and his conclusions of fact, with a statement of accounts. Exceptions taken thereto by plaintiffs and defendants were heard by his Honor Judge Carpenter, who filed his decree in December, 1875. He directed all the lands of W. Brooks to be sold, sustained the gift of the certificate of deposit, subject to the rights of M. P. Brooks' creditors, approved the charge of the rent for 1871 at the amount fixed by the appraisers, and allowed the counsel fees paid by the executor to be credited on his accounts, but directed that no more should be allowed. Upon all other matters the decision was reserved, and the report was recommitted.

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*Exceptions to the second report of referee Griffin were heard by his Honor Judge Townsend in October, 1877. In February, 1878, Judge Townsend resigned his seat upon the bench before rendering his decree. By order he was afterwards appointed referee in the causes, and, as such, submitted his report, accompanied by a statement of accounts, in which he allowed credit to the executor for counsel fees paid after the date of Judge Carpenter's order.

On exceptions to the report of Townsend, referee, his Honor Judge Pressley heard the causes at October Term, 1878, and January 2d, 1879, filed the following

Decree:

The facts of this case bearing on the legal issues discussed by the referees are fully stated in their reports, and from the mass of testimony attached thereto, I gather other facts which bear on some legal points in which I differ from the referees.

Judge Carpenter has decided the point that the $2600 given to J. H. Brooks, by his mother, was a valid gift. All other points in the case are yet undecided.

The plan of the referees for estimating the rent to be paid by J. H. Brooks, for Rose lands, is doubtless the best under the circumstances, but I add $100 a year to their estimate for the last four years. This is done, not as overruling their finding on the facts, but only as enforcing that policy which, in the case of doubt, charges the highest rate to an executor who uses his testator's land without having tested its rental value at public auction.

The referees rightly award to the creditors of J. C. Brooks his share of his father's estate. They take his portion of the land, furniture and silver-plate, according to the priority of their judgments. The other assets which had no corporeal existence in 1861, when he took the benefit of the insolvent debtor's act, must be divided pro rata amongst his other creditors of that estate. His said share has not been forfeited for want of the release to his mother which his father's will required; her payments and advances to him under the said will conclusively prove that he did deliver the said release.

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I do not agree with *the referees that J. H. Brooks, executor, is responsible to the creditors of J. C. Brooks for so much of his share as was paid to him in 1871 and 1872, before they filed their complaint. He cannot be presumed to have had notice of the said assignment made so long ago.

In the matter of the accounts of J. H. Brooks, executor, I find in all the reports of Mr. Griffin a very serious error, which Townsend, referee, also adopts. They charge the said executor with the whole indebtedness of his mother to his father's estate, whereas he should have been charged with only the cash balance of his mother's estate in his hands. Also, there is too much interest charged against him; he could neither have lent out the money on interest nor have paid it to the devisees whilst so many questions of doubt remained to be settled. Under such circumstances reasonable time for proper action is always allowed, and in that case an executor is not usually charged with interest until the end of the twelve months after his qualification.

As to the indebtedness of Mrs. Brooks as life-tenant and executrix under the will of Whitfield Brooks, I differ from both of the referees. They both charge her with the whole inventory, and crediting her with certain payments and advances, and with the value of the emancipated slaves, hold her responsible for the rest of the said inventory. This balance is further reduced by referee Townsend, who allows her the value of such articles as were consumable in the use. To this allowance exception has been filed.

The class of decided cases which charge the inventory of the personalty to the life-

tenant are not applicable to this case. They all rest upon the presumed intention of the testator that the life-tenant should sell such articles, invest the proceeds, and use only the income, thus leaving the principal intact to the remainder-men. But no such intention can be presumed in this case; the testator expressly directs that his estate shall be sold after the death of the life-tenant. The said estate, therefore, falls under the case of Calhoun v. Furgeson, 3 Rich. Eq. 160, which holds that where a plantation, with the slaves, provisions and other articles thereon, is bequeathed in mass to a life-tenant, he or she is trustee for the remainder-

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men, and is bound by proper care *and diligence to keep up the whole estate to its original value. But, if such care and diligence be used, and nevertheless a deficiency in the value of such estate should arise from causes beyond the control of the life-tenant, then he or she is not responsible for such deficiency. Under this rule the referees do not charge the value of the emancipated slaves, and, by the same rule, they should not have charged any depreciation in the value of the vehicles, implements of agriculture, or of the work animals, which, as one of the results of the late war, fell upon this estate no heavier than upon others the best managed in this state.

I can see no reason why a life-tenant should be held chargeable for losses which other persons, the most prudent and the most careful, had to suffer, and could not prevent in their own estates. Holding that this life-tenant is not so chargeable, unless for default of care and lack of proper prudence, I have carefully examined the mass of testimony attached to the referees' reports, and find therein no shadow of proof that Mrs. Brooks was ever wanting in faithfulness to her trust. There is no evidence, and not the slightest probability, that she applied to her own use any of the money on hand at the death of Whitfield Brooks, or any of the proceeds of the notes, accounts or cotton which he left. The whole of these was about $5700. He must have owed some debts, such as physician's bill, overseer's wages, and other items incident to a large family and several plantations with numerous slaves. Besides these were the usual expenses of administration, including the usual and necessary counsel fees. As the executrix kept no account, it would scarcely be possible to prove payments of this character after the lapse of more than twenty years, and after the death of the said executrix. But if, notwithstanding the almost positive certainty that she did make payments of considerable amounts in that behalf, credit for the same be denied for her want of proof, yet even the items now proved to have been paid by her, including her lawful commissions, exceed the money which she received by more than $1500. In making this estimate I include her commissions, not only on the said $5700, but also on the proceeds of a large amount of real and personal property, which, soon after the death of Whitfield Brooks, she sold and divided as his will di-

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rected. Town*send, referee, supposed that she did not account for that property in her lifetime, but at the hearing of this case it was admitted by all the parties that immediately after the sale the proceeds were fully divided.

Following these commissions is a payment by her of $1690, the legacy to H. Brooks; also, an advance of $1000 to J. C. Brooks to equalize his share with others who have received slaves to that amount. Then follows a payment of $3662 to Cornelia Cross. Concerning this item, it appears in the testimony that Whitfield Brooks, only six months before his death, filed his last account as executor of his father. It showed that he was then indebted to that estate in the sum of $6167.52, to wit, $2871.26 to the share of William Gillison and wife, and $3296.26 to the share of Charles Cross and wife, both the said items bearing interest from November 21st, 1849. There is no proof as to the time when the share of Gillison and wife was paid, or by whom it was paid, but the proof is very clear that Mrs. Brooks paid the share of Cornelia Cross, which with the interest and counsel fee, amounted to $3662.

But the referees raise the legal presumption that the payment to Cornelia Cross was made out of assets which Whitfield Brooks in his lifetime had reserved for that purpose from his father's estate. I fail to find in the testimony any proof whatever of the existence of such reserved fund, and the idea of its existence is completely rebutted by the fact that the decree of the court, under which said payment was made, did not order the transfer of any reserved fund or the collection of any assets of which Cornelia Cross was to have the proceeds; on the contrary, its direction was that Mrs. Brooks pay the amount, principal and interest, and that direction is consistent only with the supposition that Whitfield Brooks, as executor, owed that amount to his father's estate, having previously mingled its assets with his own. It is, therefore, very manifest that this payment was or should have been from the assets of the estate of Whitfield Brooks, and that, adding it to the other payments of his executrix and to her lawful commissions, it makes the amount of her payments for his estate greatly exceed what she received in money, even omitting the very considerable payments that she must have paid, but which

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*have not been proved, and thus a large portion of the income of her life estate was dedicated to the benefit of the remaindermen.

After this she further freely used her income to build on the plantation five cabins for the slaves, a large wheat barn, an ad-

ditional stable for the work animals, and a large shed for the other stock. She also purchased brood mares to keep up the supply of horses, and introduced improved breeds of cattle and hogs; she sold five of the old mules, and replaced them with five young and more valuable; and she kept such constant care of the slaves that they had increased, at the time of their emancipation, forty more than when she received them. Thus by her constant care and diligence the whole estate was improved, until further improvement was rendered impossible by the late war. That left this estate as it did all others within its sweep. Her means to restore its losses perished with confederate money. She reserved from year to year unsold portions of her cotton crop, and after the war her own money, the proceeds of this cotton, was very largely expended by her in restoring the plantation, organizing labor, replacing the work animals and other stock upon the same. At the time of her death the cattle, hogs and sheep on the said plantation were appraised at more than those left thereon at the time of the death of her testator, but the mules, horses, plantation vehicles and other implements, were deficient. So, also, was the provision crop made during the last year of her life. For these deficiencies I hold that she is not chargeable. So far from having been a faithless trustee to the remaindermen, she did more after the war to restore and keep up the value of the estate in her hands than it was reasonable to expect of her, and very few planters in this state did so much for their own estates as she did for this.

I therefore adjudge and decree that her estate be charged only with the sum of $816, the value fixed by the referee on the furniture and silver plate which she bequeathed to J. H. Brooks; also, that the proceeds of the work animals, cattle, hogs, plantation vehicles and tools left on hand at her death be carried to the credit of her testator's estate. That being done, I hold her estate no further liable.

The provisions of the will of Mrs. Brooks

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do not require *special detail; after some small legacies, it directs an equal division of the rest of her property among her children. Her house and lot in Edgefield has been surrendered by Gen. Dunovant, who held it under a contract to purchase; his children now have possession of said house, and at a price named in the said will they are to keep it as a part of their share. Its rental value for the time they held it, to be fixed by appraisement or otherwise, must be added to that price.

J. C. Brooks, for his children, is in possession of the Turkey Creek plantation, bequeathed to them; it also must be appraised, and its rental value fixed in order to equalize all the shares, as the said will directs.

Let J. H. Brooks restate and file his accounts as executor of each of the said estates, in accordance with this decree.

The parties to this cause, all or any of them, may apply to me or to the judge of the Fifth Circuit, at chambers, for such other and further orders as may be necessary to execute this judgment and decree, and to settle the said estate in accordance therewith.

From this decree appeals were taken by plaintiffs and defendants in both causes, upon the several grounds stated—

By J. H. Brooks, as executor of W. and M. P. Brooks, and J. C. Brooks.

1. His Honor erred in adding $100 to the estimate of the referees, report upon the rents of Roselands, for the last four years, such decision being contrary to law and evidence in interfering with the findings of facts by the referee, and also arbitrary and without foundation.

2. His Honor erred in deciding that J. C. Brooks has executed the release required by the tenth clause of Mr. Whitfield Brooks' will, there being no evidence of such execution, and the same being denied in the answers of the said J. C. Brooks and J. H. Brooks, executor.

3. That his Honor erred in deciding that J. C. Brooks' creditors can take at all in the present state of the pleadings, that portion of his land, furniture and silver plate, under his father's will, and that the same is distributable among his creditors according to the priority of their judgments—in-

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asmuch as the said *J. C. Brooks takes no such property, and that all such interest as he does take under said will of whatever description, is but equitable assets in the hands of the executor, to be distributed pro rata among all of his creditors.

4. His Honor should have dismissed the amended complaint of M. C. Butler, as assignee; J. C. Lark, survivor, et al., v. J. H. Brooks, executor, and J. C. Brooks, upon the grounds stated in the answer thereto, and in the ninth exception of the defendants J. H. and J. C. Brooks.

5. That his Honor erred in decreeing that the children of Gen. Dunovant should take the house and lot in Edgefield at $5000, "as a part of their share" under Mrs. Brooks' will, without decreeing further, as said will directs, that should that sum ($5000) be more than they were entitled to under said will, the said house and lot should stand pledged for the payment to the other legatees of such a sum as would equalize all the parties interested.

6. His Honor should have decided the point made by the answer of J. H. Brooks, executor, and J. C. Brooks, and insisted upon in argument; that the assignment by

J. C. Brooks to John E. Bacon and J. H. Brooks, of so much of his interest in his father's estate as would amount to $1500 and $500 were valid, and should prevail as against the assignment under the insolvent debtor's act, by said J. C. Brooks to his creditors. The facts being, that the said J. H. Brooks had no notice of the latter assignment made over ten years before the former, and never acted upon in any way by the assignee or the creditors; that property enough was assigned under the insolvent debtor's act to pay the debts of the said creditors, and that they took no steps for a period of over ten years to enforce the collection thereof; and that the said J. H. Brooks accepted the said assignments to the said Bacon and himself in good faith, and is bound to pay the same, and upon the grounds set forth in the pleadings and exceptions.

7. That Judge Carpenter, in his decretal order of December 13th, 1875, should not have overruled the executor's second exception, but should have decided that the life-

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tenant should not *be held accountable in any way to the testator's estate in remainder.

8. That Judge Carpenter errs in the sixteenth paragraph of said decretal order, in deciding, that although the gift of the $2000 certificate by Mrs. Brooks to J. H. Brooks was valid, still that he should account therefor in case of the insolvency of her estate.

9. That Judge Carpenter, in the seventeenth clause of the said decretal order, errs in deciding that J. C. Brooks and his children hold the Turkey Creek place subject to the creditors of Mrs. Brooks, and should have decided that they hold it absolutely and in fee.

10. That his Honor should have decided the issues made by the executor in the first and fourteenth exceptions to the report of C. P. Townsend, referee.

By R. G. M. Dunovant and his children, and James C. Lark, survivor, a creditor of J. C. Brooks—

1. Because his Honor erred in not holding that the estate of the life-tenant should be charged with the entire inventory of 1852, including provisions and articles consumable in the use, with the exception of the slaves not sold by her.

2. Because in stating the accounts in reference to the liability of the life-tenant no credit should be allowed the life-tenant for abrasion and use of the furniture, plate, &c., the difference in value resulting from abrasion and use not having been determined by a sale of said furniture, plate, &c., at the death of the life-tenant nor by any lawful appraisement, and his Honor should have so held.

3. Because in stating the account in reference to the liability of the life-tenant, the estate of the life-tenant should have been charged with the value of the two slaves sold by said life-tenant, and his Honor should have so held.

4. Because the estate of the life-tenant should have been charged with the Blocker note, and his Honor should have so held.

5. Because the executor, J. H. Brooks, should have been charged with the rents

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actually received by him for the years *1871 to 1877 inclusive, and said rents should not have been determined upon by the speculative testimony and opinion of witnesses; and their Honors Judges Carpenter and Pressley, erred in holding that said executor was not chargeable with the rents actually received by him.

6. Because the executor should not be allowed any commissions for the years in which he made no returns, and his Honor Judge Pressley should have so held.

7. Because in the statement of the accounts of the executor by Referee Townsend, he should not have been allowed credit for $1363.24 paid out in 1871 and 1872, when the payments for said years actually amounted to only $331.71, if so much as that, and it was admitted at the hearing before his Honor Judge Pressley, that the same was a clerical error, and his Honor should have held that said clerical error should be corrected.

8. Because the crops made by the life-tenant in the year 1870 on the lands held by her as life-tenant constituted a part of her testator's estate, and his Honor should have so held.

9. Because no counsel fees should have been paid by the executor without leave of the court, after the order of Judge Carpenter refusing to allow further counsel fees, and his Honor Judge Pressley should have so held.

10. Because his Honor Judge Carpenter erred in holding that the certificate of deposit of $2000 was a gift to J. H. Brooks by his mother, Mrs. Mary P. Brooks.

11. Because his Honor Judge Pressley erred in holding that the life-tenant was entitled to credit for the amount paid to Mrs. Cornelia Cross under an order of the court, the proof being that it was not paid out of the life-estate, and there being no proof that it was paid out of the life-estate.

12. Because his Honor Judge Pressley erred in holding that the life-tenant was entitled to credit for the negro cabins and other improvements erected by her on the life-estate during her life-tenancy.

13. Because his Honor Judge Pressley erred in holding that the life-tenant was entitled to commissions, and more especially that she was entitled to commissions on property sold by her, and of which she made no returns.

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*14. Because his Honor erred in holding

that the children of R. G. M. Dunovant are chargeable with the homestead lot in Edgefield village at $5000 and the rent, the proof being that said property was sold by the executor, who is chargeable with the proceeds thereof and with interest upon the same, and in any event said children are not chargeable with the same.

15. Because his Honor Judge Pressley erred in holding that the Turkey Creek place is vested in James C. Brooks and children, it having been decided by Judge Carpenter that they hold it under the will of Mrs. Brooks and subject to her debts.

16. Because his Honor Judge Pressley erred in holding that the estate of the life-tenant is only chargeable with $816 as the value of the furniture, plate, &c., received by her when she took charge of the life-estate after giving her credit for the decrease in value from use and abrasion.

17. Because his Honor erred in holding that the executor, J. H. Brooks, is not chargeable with interest on the funds received by him as executor until after the expiration of one year.

18. Because if the rule adopted by his Honor is the correct one for ascertaining the rent, then for the reasons stated by him he should have charged the executor with a larger amount for rent for the years stated by him, and a larger amount should have been charged for the years previous to those stated.

19. Because his Honor erred in holding that the executor should only have been charged with the cash balance of his mother's estate in his hands.

20. Because his Honor erred in holding that the estate of the life-tenant "should not have been charged with any depreciation in the value of the vehicles, implements of agriculture, or of the work animals," she being bound under the law governing the case to keep the estate in all its departments up to the condition it was in when she received it.

By R. G. M. Dunovant—

1. Because, by the decree, his Honor does not hold that the executor, J. H. Brooks, should be charged with the difference between the appraised value of the lands of testator and the price for which they sold, he having held said lands until they were

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*greatly depreciated in value, and contrary to the provisions of the will.

2. Because J. H. Brooks should have been charged with the difference between the appraised value of the property sold by him January 5th, 1871, and the price for which he purchased it.

By J. C. Lark—

1. Because he holds that the share of J. C. Brooks should be distributed among his creditors according to their legal priority, and not as equitable assets.

2. Because his Honor holds that J. H. Brooks, executor, is not responsible to the creditors of J. C. Brooks for what he paid over to J. C. Brooks before said creditors filed their complaint.

By James Mansfield (creditor of J. C. Brooks.) Because his Honor held—

1. That Judge Carpenter had never decided but one point in the case, to wit, that the gift of $2000 by Mary Brooks to J. H. Brooks was valid.

2. That while recognizing the principle of law that an executor should be held liable to the highest rate of rent who uses his testator's land without having tested its rental value at public auction, he only partially enforced the same, whereas he should have carried out said principle to its full extent, which would make the rent at $1000 per annum.

3. That J. H. Brooks is not responsible to the creditors of James C. Brooks for paying him, in 1871 and 1872, certain sums of money out of his father's estate as a part of his share of the same.

4. That the executor, J. H. Brooks, should not be charged with the indebtedness of his mother to his father's estate; that referees should not have charged her with the inventory; "that the class of decided cases which charge the inventory of the personalty to the life-tenant is not applicable to this case."

5. That executrix did not apply to her own use the money on hand at the death of the testator, as also the proceeds of the notes, accounts and cotton on hand, while not accounting for the same, amounting to about $5700, and that the executor did not receive.

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*retain and appropriate entire commissions on each and all transactions when she was entitled to the same.

6. That the proof is very clear that Mrs. Brooks paid the share of Cornelia Cross out of her own funds; whereas it is more than probable that she paid it out of the funds of testator, and that, with her usual prudence, reserved her commissions, while the pecuniary means and business character of testator totally negatives the idea that he had commingled said share and his own property, or did not leave a distinct and designated fund to settle it.

7. That the crop of 1870 did not go to testator's estate.

8. That life-tenant should not account for the two slaves sold by her.

9. That life-tenant should have credit for erecting negro cabins, barns, &c.

10. That the house and lot in the village, now in possession of R. G. M. Dunovant and his children, and the Turkey Creek plantation now in possession of James C. Brooks' children, are not liable for indebtedness of life-tenant to testator's estate; that the children of each (R. G. M. Dunovant and J. C. Brooks) hold the same.

11. That the executor's estate is only

chargeable with $816, on the value of the furniture, plate, &c.

12. That the executor should be allowed credit for $1363.24, as paid out by him in 1871 and 1872, instead of $331.71.

13. That the scrip or certificate of deposit in bank was a valid gift.

14. That both referees, Judge Carpenter and his Honor, erred in not holding the life-tenant, Mrs. Mary P. Brooks, and J. H. Brooks, her executor, to that strict accountability as trustees which the law requires; while recognizing the doctrine, neither has fully enforced the same.

[For subsequent opinions, see Ex parte Dunovant, 16 S. C. 299; 16 S. C. 621.]

Messrs. J. E. Bacon, M. L. Bonham and L. E. Le Conte, for J. H. Brooks and J. C. Brooks.

Mr. H. W. Addison, for James Mansfield.

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*Messrs. A. J. Norris and J. C. Sheppard, for R. G. M. Dunovant and his children, and J. C. Lark.

October 3d, 1879. The opinion of the court was delivered by

WILLARD, C. J. A question of construction upon the will of Whitfield Brooks is fundamental to the present accounting.

After making various specific devises and bequests and pecuniary legacies, the testator, in the eleventh clause of his will, provides as follows: "All and singular the rest and residue of my estate, both real and personal, of every description, I give, devise and bequeath to my beloved wife, Mary P. Brooks, for and during the term of her natural life; and after her death it is my will and desire that the same shall be sold and the proceeds thereof equally divided among my children in fee, share and share alike." The question arising in the first instance on this clause is whether Mary P. Brooks was to take a life-estate, to be specifically enjoyed by her as such, or was she simply to enjoy the interest of a fund equivalent to the value, at the death of the testator, of the estate that passed to her under the residuary clause—the principal of such fund to pass to the children of the testator at her death?

It is clear that Mary P. was not intended to take independently, as specific devisee and legatee, each of the items of which the mass of the estate was composed, for, in the first place, the form of the devise precludes such construction, it being in its character residuary, implying primarily that that which passed was to be taken as a whole; and, in the second place, part of the residue of the estate consisted of personal property in its nature consumable in the use and not reproductive, in which a life-estate with remainder could not be created by way of an independent specific bequest, so that the only mode in which the residuary devise could operate, with full effect as to all that was intended to be included in it, was by treating the residue of the estate as intended either to be specifically enjoyed in mass or as a fund producing interest according to its value. Calhoun v. Furgeson, 3 Rich. Eq. 160; Patterson v. Devlin, McM. Eq. 459.

Was the estate, then, intended to be enjoyed specifically in mass, or as an interest-bearing fund, its value to be computed at

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*the death of the testator? The fact that it was devised as a remainder standing by itself would lead to the conclusion that the testator intended that the whole residue should, at his death, be converted into money and enjoyed, after payment of debts, according to the terms of limitation, as a fund. But this inference, in the case of a devise of a residuum to a tenant for life with remainders, is rebutted by the expression of an intention that the sale shall be postponed until after the death of the life-tenant. The reason of this conclusion is that the motive of postponing the sale must be assumed to be a desire that the tenant should have the specific enjoyment of the property itself. Calhoun v. Furgeson, 3 Rich. Eq. 160; Glover v. Hearst, 10 Rich. Eq. 329.

In the present case, the sale of what passed to Mary P. under the residuary clause was postponed until after the death of the life-tenant. That the provision for the sale of the residue after the death of Mary P. was intended as a postponement of such sale, and not merely as a provision for the final disposition of what had not previously been sold, is apparent from other clauses of the will. As it regards the realty part of such residue, the sale could not take place at an earlier day than that of the death of the life-tenant, because, as to certain parcels of such real estate, J. H. Brooks and Ellen Dunovant were to have at that time an election to take such parcels specifically at a valuation to be ascertained, and accordingly a sale could not take place until such election was made or declined. As it regards the slaves, two distinct clauses of the will contemplate their remaining specifically in the hands of the life-tenant during the whole or a considerable part of her life. Clause 9 provides for the substitution, out of the slaves of the estate, in the case of the death during his minority, of certain slaves bequeathed to John H., and thus contemplates the permanence of the source from which such substitution was to be made for a considerable period after his death. Clause 12 contains a request that the life-tenant should make annual presents to the slaves bequeathed to her for life, thus contemplating their indefinite continuance specifically in her service.

It is beyond doubt that the sale intended

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was to embrace both *realty and personalty

together, so far as their union was essential to maintain the value of the estate as a whole, and therefore the provisions that tended to postpone the sale as to part of the property in the residuary clause must be regarded as fixing a construction on the eleventh clause as it regards the sale.

Having concluded that the life-tenant, at the death of the testator, took, under his will, a life-estate in the residue of his estate, to be enjoyed specifically, it is necessary to state the principles that should govern an accounting by her executor, after the termination of such life-estate.

It is necessary here to recognize the fact that John H. Brooks, as the executor of Mary P., is properly called upon to account, in addition to his own doings, for those of his testatrix, in her individual right, and as executrix of Whitfield Brooks. In order to state such an account accurately, it is necessary to know what part of the estate of Mary P. that came into the hands of her executor was assets of her individual estate, and what part, if any, assets of the estate of Whitfield Brooks.

As to each of these distinct parts, separate rules of accounting are to be applied. It is necessary to consider, then, in the first place, the rules governing an accounting by the executor of a tenant for life of an estate held for specific enjoyment in mass.

In the first place, the time to which the accounting relates is the death of the life-tenant, and not that of the testator. In this respect, an accounting by a life-tenant differs from that of an executor. The life-tenant is entitled to hold the whole estate for his own profit, subject to certain conditions or obligations. His primary duty is to maintain the estate in as good condition as when it came into his hands. If this estate is one of a productive character, as in the present case—being a plantation—that productive character must be maintained. It is self-evident that the utmost duty of the life-tenant, in this respect, is to apply the product or increase of the estate to its maintenance, so as to be in a productive condition when it passes into the hands of the remainderman. So far there is no conflict among the authorities. The question affecting the liability of the estate of the life-tenant at his death is, whether the estate, at that time, was, as a whole, in a proper condition as to value

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and productive capacity. As *it regards value apart from productive capacity, the test is not a comparison between its pecuniary value at the death of the testator and at that of the life-tenant. The value of property of that class may have undergone change, and the non-productive property of the estate may have undergone deterioration from natural causes, or from accident, without the fault of the life-tenant, in which case it appears that the estate of the life-tenant is not accountable for such loss or deterioration. These principles are clearly recognized and illustrated in Calhoun v. Furgeson, 3 Rich. Eq. 160. The question is not whether each article of a class of articles that went to make up the estate as a whole is in the same condition as to preservation, value and productiveness as at the death of the testator, but whether the estate, as a whole, is in a similar condition. In making such an inquiry the condition and value of the parts of the estate must necessarily be considered, for the value of an estate is the sum of the value of its parts considered in their relation to the whole.

Johnston, Chancellor, says in Calhoun v. Furgeson: "I think the inquiry should be made into the particulars of the estate and their value at the time the remainder takes effect, for the purpose of discovering whether that which is to go over is substantially the same estate which was received by the life-tenant, and of the proper value, and whether, upon the whole, it is in as good plight, though not in the exact plight as when the life-tenant took possession." He holds that the increase of one species of stock should be balanced against the diminution of another, and says that if, upon the whole, the life-tenant "has been faithful and diligent and judicious, and has not deteriorated the substantial parts of the estate as a whole, he should not be made to suffer."

It is easy to perceive that under this view lies the consideration that the business conducted with a view to profit should be capable of modification to suit the various conditions that may arise affecting the question of profit. A large planting or farming estate usually embraces several distinct sources of profit, not necessarily connected together and not equally profitable at all times and under all circumstances. Its produce may cover a wide range of animal and

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vegetable products, and embraces that *intended for home use and consumption, as well as that intended for sale or barter. Adaptation to the ever-changing wants of mankind is the condition of profit, imposing changes of internal economy.

In addition to this the means and methods of production undergo changes. Such causes operate to occasion changes in the relative adjustment of permanent property, stock and implements. It is evident, then, that what concerns the interest of the remainderman is that the tenant for life of such an estate should exercise a reasonable judgment in maintaining the general capacity of the estate for production, without improperly lessening the value of that which constitutes the capital invested with a view to such profit. The rule laid down in Calhoun v. Furgeson fairly conforms to this view. The strength of these conclusions will appear in Glover v. Hearst, 10 Rich. Eq. 329. In that

case, although the life-tenant was limited to taking a mere support from the profit of an estate devised in mass, and as to all profits over and above what was needed for her support was a trustee for the remainderman, yet the general rules, as to the duty of the tenant for life to maintain the estate, were laid down in substantial accordance with the doctrines of Calhoun v. Furgeson. In Finley v. Hunter, 3 Strob. Eq. 78, the estate was not regarded as devised in mass, but the life-tenant was regarded as holding the several classes of property devised, by distinct specific devises, so that the question of the value and profitableness of the estate, as a whole, was not involved; still, the same general rule as that already stated, was applied, as it regarded such class separately devised.

The devise in Patterson v. Devlin, McM. Eq. 459, does not appear to have been regarded as a single devise of an estate in mass, although the nature of such devises is recognized in the opinion of Nott, J.; consequently we should not look to the discussion in that case for the rule applicable to devises of productive estates in mass, nor can that case be regarded as touching directly this subject.

The duty of the life-tenant, as it regards the application of the consumable products of the estate to its maintenance as a whole, and of the several parts of which it consists,

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has been the *subject of much discussion and apparent contrariety of opinion. The question has generally been stated in our own reports as that of the duty of the life-tenant in applying the consumable property of the estate to its maintenance, but probably the word merchantable or vendable would best describe the class of property entering into that question, as those terms would embrace such property, the product of the estate over and above what were needed for the current support of the estate as was disposable by sale or barter, and thus was available as a means of supplying deficiencies in the permanent property, stock and implements considered as the capital of the estate.

There are two aspects of this question, first, as with regard to the produce of the estate in hand at the death of the testator and that passed as part of the gift to life-tenant; and, second, as it regards the produce of the estate while held by the tenant for life. The last of these questions will be first considered, as furnishing the simplest illustration of the principles that enter into the solution of the other.

The question of the duty of the life-tenant, as it regards the produce of the estate made in his hands, is necessarily connected with that of the proper disposition of such of the produce of the estate, arising while in the hands of the life-tenant, as may remain in specie at his death.

If the product of the estate in the hands of the life-tenant is reasonably sufficient for the maintenance of the life-tenant, it is clear that any surplus over this amount should go to keep up the value and productiveness of the estate to the condition in which it came into the hands of such life-tenant. There can be no doubt as to this proposition upon the authorities. The question becomes now completed when there is an inadequate production for the reasonable maintenance of both the life-tenant and the estate.

When one devises an estate for life to one with remainder to another, each must be regarded as equally the object of his bounty. Not that they will necessarily have equal enjoyment of such bounty, for their gifts necessarily differ as to time and quantity, but the object sought by the testator to be attained by the respective gifts should be regarded as

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standing in equal im*portance before his mind. The one object is near to him in point of time and represents his present wishes, while the other, though more remote, is presumably more permanent. It is not difficult to conceive such gifts as connected by equality of importance in the mind of the testator, nor to see the relation of such an idea to the habitual ideas of equity. We have, then, two objects to be accomplished by the application of the produce of the estate—one intended to benefit the life-tenant and the other the remainderman. The one looks to it for present maintenance and the other as a capital capable of future productiveness for his benefit.

It is clear that it would be a violation of the principles of equality to hold that whatever fortuitous event diminishes the productiveness of the estate, such mischance should be thrown wholly upon the tenant for life by requiring him to make good any amount taken for his necessaary support, in order to maintain the value and productiveness of the estate to the full measure it had when it came into his hands. Such a construction could only be based on the idea that the testator intended a bounty for the remainderman, not only differing as to time and quantity, but in its nature, considered as an act of bounty. This, as we have seen, is an inadmissible conclusion; but its evil tendency is fully illustrated when it is considered that the labor and skill of the tenant for life has entered into that produce, and to that extent it would be seizing the property of one to confer it upon another.

It is equally clear, on the other hand, that the tenant for life should not be permitted to appropriate to his own purposes the whole product of the estate, making no provision for the future maintenance of the estate, for this would violate the plainest rules of ordinary prudence as well as equality. It would follow that the produce of the estate ought to be equally applied to the reasonable mainte-

nance of the life-tenant and of the estate itself, and if that prudence should, without the fault of the life-tenant, be inadequate to fully accomplish both objects, the life-tenant and the remainderman should submit to equal inconvenience. The application of such a rule may at times be difficult and involve intricate questions of fact, but the difficulty of ap-

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plying *a sound principle ought not to be balanced against the wrong of refusing its application. It remains to consider the bearing of the authorities on this question.

An expression contained in the Circuit decree made by Chancellor Caldwell in Calhoun v. Furgeson, 3 Rich. Eq. 160, is in point. He says: "It would seem that the testator intended that the property should support him" (the life-tenant) "and itself, so that she should not impair it." This inference as to the intent of the testator is drawn from the nature of the estate created in that case, namely a life-estate to be specifically enjoyed in mass. The question we are now considering did not directly arise in that case, still the remark is significant, and it will be observed that it was not called in question on the appeal. Johnston, Chancellor, after speaking of the general duty of the tenant for life of an estate in mass to keep up the consumable but reproductive property, such as flocks and herds, says: "I will not say that he is bound at all hazards for the original stock, for the relation he bears to the remainderman is that of a trustee, a relation of confidence, and though he is prima facie bound for the property, and the burden must be upon him to show diligence and integrity in the performance of his duties, yet it is not clear upon principle that he is liable if he does show fidelity to his trust, and that the flock has perished, not by his fault, but by the act of God, as by pestilence, earthquake or other unavoidable providence." If the Chancellor had recognized the rule, that whatever might be the cause of the diminution of the original stock the tenant must make it good to the extent of the whole product of the estate, without deducting anything for his own maintenance, he certainly would not have discussed the question in the form in which it appears to have been treated by him. The question of making up the loss out of the produce would, it may be presumed, supersede that of responsibility for the original loss, or, at all events, so modify it as to become a necessary part of its discussion. It must be concluded that the idea was not entertained at the time Calhoun v. Furgeson was decided that the life-tenant was bound to apply the whole produce of the life-estate to make good losses to the capital of the estate occurring without his fault.

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It is proper to *remark that the argument from the relation of the trustee, between the life-tenant and the remainderman, should not be carried too far. The life-tenant primarily holds the legal title for his own beneficial enjoyment, and in that respect does not sustain the relation to the remainderman that gives rise to a technical trust. But as it regards the preservation of the value and productiveness of the estate, he owes a clear duty to the remainderman which may fairly be said to be in the nature of a trust, and as such cognizable in equity. Glover v. Hearst, 10 Rich. Eq. 329. In order to understand the application of the remarks made by the court in that case, it is necessary to have in mind the peculiarity of the interest of the life-tenant there. What was given to her there was "to enjoy all the benefits and profits arising merely from the use of the same, after fully supporting and supplying all the wants of the plantation during her natural lifetime." The will adds: "And here let it be understood that all future increase will not be regarded as profits, but will remain and be regarded as part of my estate." To carry out this plan the testator gave to his executor a certain supervisory power as it regards the management of the life-tenant. According to this provision the produce of the estate was devoted in the first instance to meeting the wants of the estate itself; second, to supporting the life-tenant; third, to accumulate as part of the estate to go to the remainder. Such a case does not test the principles on which the rights of a life-tenant are to be determined who has the whole usufruct during the life-tenancy, though coupled with the implied duty of maintaining the estate. Wardlaw, Chancellor, says: "The tenant for life must, therefore, be considered as a trustee for the remainderman, and must preserve the estate, with all its appurtenances, in the situation in which she received it." This, as applied to the situation of the life-tenant in that case, is undoubtedly correct, if it be added that such liability to make good the original stock should not go beyond the amount of the product of the estate. It is remarked in that case that the devise there was similar to that in Calhoun v. Furgeson, but while the two agree in the fact that both estates were devised to be specifically enjoyed in mass, in the one case the tenant of the life-estate had an unrestricted beneficial inter-

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*est, as in the present case, while in the other such beneficial interest was not only restricted in quantity, but burdened with the express duty or trust of maintaining out of the produce of the estate its original condition. It was natural that in such a case the general rule requiring the estate to be maintained should be considered, without noticing the ordinary limitations of that rule, as such limitations were inapplicable under the terms of the devise in that case. Having in view this fact, we must understand that when it is said, as in that case, that the tenant "must keep up the stock of cattle, horses and pro-

visions, and implements of husbandry in the condition in which he received them," it is meant that such is his general duty, but not that such duty is unqualified by any exceptions or restrictions. What these exceptions and restrictions are, that case does not attempt to show, inasmuch as they were not applicable to the peculiar case then before the court.

Finley v. Hunter, 3 Strob. Eq. 78. The court withdrew that case from the rule governing estates in mass in the hands of a tenant for life, and placed it on particular expressions of the will. The duty of the life-tenant to apply the produce of the estate to repair losses, is not considered. It is easy to see that that case manifests a tendency quite contrary to that of fixing the duty of making reparations to the full extent of the product of the estate. The fact that the rule was found stated in the previous cases, apart from its qualifications, may have had an influence in the withdrawal of that case from the rule. Robertson v. Collier, 1 Hill Eq. 370. That case cannot be regarded as involving the rights of a tenant of an estate in mass to be specifically enjoyed. It was granted by a residuary clause which the court recognized as primarily implying that the estate was to be sold and enjoyed as an interest-bearing fund. In that case there was no clear intent that the sale of the estate should be postponed until the end of the life-estate, from which an intent could be gathered that it should be specifically enjoyed by the life-tenant at her will, but on the contrary, power was expressly granted to his executor and executrix (the life-tenant) to sell during the life-tenancy, in terms that implied that the interest of the estate was to be solely consulted as to such sale, and not

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the interest or *inclination of the life-tenant. This placed the life-tenant, as executrix, in a position of responsibility differing essentially from that of one who enjoys the specific use of the estate for life, according to the will of the devisor.

On the whole it must be concluded that the cases in our reports afford some support to the rule that has been stated above, and contain nothing necessarily impugning its correctness. The rule can, therefore, stand, if its reasonableness has been made apparent.

The next question to be considered is, as to the right and duty of the tenant of an estate specifically enjoyed in mass and productive in its nature, as it regards the produce of the estate realized at the death of the testator and passing under the devise of the life-estate. The true inquiry in this connection is, whether such produce is merchantable or otherwise. The produce of an estate, as a general rule, certainly ought to go, in the first instance, to maintain the estate. There can be no doubt about this proposition, either on principle or on authority. It cannot well be considered as separable from the estate when that separation would tend to impair the value and productiveness of the estate. It is, therefore, reasonable to consider that the produce of the estate on hand at the death of the testator, to the extent that is proper to be consumed or used for the benefit of the estate, should be considered as a part of the estate, and, as such, to be accounted for only as a part of such estate as a whole. On the other hand, a surplus of produce on hand at the death of the testator, over and above what was reasonably needed for use or consumption or for the benefit of the estate, would naturally assume a merchantable character as commodities suitable for sale or barter. If such vendable property is, in its nature, consumable in the use, being no necessary part of the estate as a productive whole, the only mode in which a life-tenancy with remainder could be enjoyed in it, as held by the cases already cited, is by treating its pecuniary value as an interest-bearing fund.

If such property is not consumable in the use, the tenant for life would stand to it in the same position as if it had been the subject of an independent specific bequest; that is, would have its use for life, exercising reasonable diligence to preserve it for the remainderman who would take it in the condi-

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tion it was in *at the death of the life-tenant. This result would flow from the mere fact of regarding such property as detached from the estate by a natural process, like that which detaches the ripe fruit from the parent stem.

It would follow from these principles that if the tenant for life takes property of this class at the death of the testator for his own use, that his estate at his death would be liable to account, in a corresponding manner, for a reasonable quantity of like property on hand at that time. It would also follow that when the life-tenant dies before the agricultural year is completed, the produce of such year should be realized to the estate of the life-tenant, subject to such accountability as that just stated.

It remains to consider what support these conclusions have from the authorities.

Calhoun v. Furgeson, 3 Rich. Eq. 160. It was held in that case that although the life-tenant of an estate devised in mass is only accountable for causing or permitting the deterioration of the estate as a whole, still, in making this inquiry, regard must be had to the several kinds of property of which the estate is composed, and the rules applicable to each kind. It would follow that the produce of the estate on hand at the death of the testator may be considered as if the subject of an independent specification, subject, however, to the consideration that if found a necessary part of the estate as a whole, any loss or deterioration may be balanced by corresponding gain in other parts of the estate

as a whole. It is clear, then, that a discrimination must be made between that part which cannot be separated from the estate without loss to the latter, and that part which may be regarded as the merchantable product of the estate. The former would be considered under the general question, whether the estate, as a whole, has suffered improper deterioration; the latter part would be considered as the subject of an independent specific devise, and the life-tenant would be answerable for it if of the nature consumable in the use as a fund, according to the value which was or ought to have been realized for it; and if not consumable in the use, then for such property specifically in its condition at the death of the life-tenant and for damages for improper deterioration.

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*In the case of Calhoun v. Furgeson, which we are now considering, it would appear that the Circuit decree held the life-tenant "liable to reproduce, at the expiration of her life-estate, the same amount of corn which she received with the estate or account for the value of the deficiency."

This part of the decree was properly reversed. It does not appear in that case that the corn upon the estate at the death of the testator exceeded what was required to supply the current wants of the testator. Chancellor Caldwell holds that it was not in proof that she had used such consumable property as merchandise. We must, therefore, conclude, as the doctrine of Calhoun v. Furgeson on this point, that a reasonable amount of the produce of the estate on hand at the death of the testator must be regarded as part of the estate as a whole, and accounted for only in the manner in which the estate, as a whole, is accounted for, and we cannot fail to conclude that if it had appeared in that case that the life-tenant had separated from the estate and sold or otherwise disposed of the produce left by the testator, or had allowed it to go to waste when it might have been sold, Chancellor Caldwell's decree would have ordered an account thereof. The Circuit decree in that case applies to the life-tenant the provisions of the act of 1789, (5 Stat. 111), as it regards finishing the crop incomplete at the death of the life-tenant. Such an application is eminently reasonable in view of the duty of the life-tenant's estate to turn over to the remainderman a reasonable amount of produce to maintain the future operations of the estate. But Calhoun v. Furgeson properly holds that the amount received by the life-tenant is not the measure of the amount required to be left, for that must depend upon the state and productiveness of the estate, for which the life-tenant is not necessarily responsible.

Glover v. Hearst, 10 Rich. Eq. 329. The result of that case is in harmony with the rule above stated, although the case does not assume to lay down the precise rule on the subject. The life-tenant received, at the death of the testator, a large amount of former produce of the estate, which must be assumed to have been largely in excess of the amount needed to carry on the estate. It was reasonable, therefore, that the life-tenant should

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be held *accountable for such excess, and so the court held in effect. The case, as it stood on the final appeal, was complicated by the fact that the Court of Appeals had, in a previous decision in the same case, held that the life-tenant was not accountable for the produce of the year in which the life-tenant died. The grounds of this conclusion do not appear, but as it was the law of the case the final decision had to be accommodated to it.

This led the court to say that it was unreasonable that the life-tenant should have the entire product of both years, and led to the conclusion that she must account for what was received by her at the death of the testator. It is clear that the court, in its final decision, did not intend to lay down any general rule. It cannot be affirmed that that case was decided upon the rule under consideration, but it is not inconsistent with the principles of that rule. It may be further contended that it was not the intention of the court to state the general rule of accountability in such cases, or to put forth that case as an illustration of the true rule. It should also be observed that there is a material difference between the rights of the life-tenant in that case and in cases of the class to which the present case belongs, as there the profits of the estate, over and above the maintenance of the estate and the support of the life-tenant, were directed to be accumulated for the benefit of the remainderman.

Robertson v. Collier, 1 Hill Eq. 370. In that case the life-tenant was held accountable for produce received at the death of the life-tenant, the consumable property being treated as convertible into a fund. It appears that the amount of produce received was large—upwards of $4000—and must be assumed to be largely in excess of what was required for use or consumption upon the estate. The question is not raised or discussed whether the life-tenant should be liable for as much of the produce on hand at the death of the testator as was requisite for the maintenance of the whole. The consequence is that the rule applied in that case, though not complete in its statement, is in harmony with that under consideration.

It must be concluded that the authorities in this state do not preclude the application of the rule above presented, which is recommended by its simplicity and reasonableness.

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*The matter of the various exceptions taken by the parties will next be considered.

The findings of the referee as to the annual value of the rental of Roselands appear to

have been approved by the Circuit judge so far as they represented what would be a fair valuation as between parties standing on an equal footing. The Circuit judge, however, adds $100 per annum, on the principle of charging an executor with the highest rate who uses his testator's land "without having tested its rental value at public auction." Cases may exist where even a decree in equity may impose consequences in the nature of a penalty, but the present case is not appropriate for the exercise of that extreme function of equity. The executor had an election to take Roselands at a valuation to be fixed in the manner pointed out by the will. It is clear that the executor was not blamable for allowing his right of election to depend upon the result of a suit to settle the construction of the will, the various conflicts of right, and the precise mode of ascertaining such valuation. In the meantime there was a manifest propriety in the executor's retaining the cultivation of the estate in his own hands, leaving the question of the proper allowance, either by way of interest or rent, to be determined in the controversy. The determination of the referee appears to coincide with this view of the case, and should stand.

As the principal bill now before this court seeks a construction and execution of the will of Whitfield Brooks, it is competent that the conditions as to releasing contained in the tenth clause of the will should be carried into effect through the decree. If, therefore, the parties called upon to release have not effectually done so, either in form or by their answers, the decree should be so modified as to call for an election whether they will take under the tenth clause of the will of Whitfield Brooks, and release accordingly, and, in case of such election, should call for the releases provided for by that clause.

J. C. Brooks cannot be regarded as having taken a vested remainder in the lands devised to Mary P. for life, so that the judgments against him can have a lien on his interest in such lands. The direction is that at her death the lands shall be sold and the money divided. J. C. Brooks had nothing

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that he *could alienate, except as executor under the power contained in the will, and, therefore, there was nothing to which the lien of the judgments could attach. If it is assumed that the title to the land by way of remainder passed to the heir-at-law, and thus to J. C. Brooks as to his proportional share, subject to the execution of the power, still, as the execution of the power was one of the objects of the principal bill, the judgments cannot be regarded as having any lien as it regards the land. The creditors of J. C. Brooks must, therefore, so far as it regards the property claimed under the will of Whitfield Brooks, come in under the assignment of their debtor upon an equal footing, as upon assets made by a creditor's bill in equity. In the present will there are no words of conveyance under which J. C. Brooks could take a vested interest in the land as such. The disposition of the remainder after the death of the tenant for life is under the power of sale given by the will, and is absolute in its character. In such cases the recognized authority of a testator to convert land into money is regarded as fully exercised. Fletcher v. Asburner, 1 Lead. Cas. Eq. 497; Wilkins v. Taylor, 8 Rich. Eq. 291, Mathis v. Guffin, Id. 79.

There was no ground for dismissing the bill of the creditors of J. C. Brooks. The object of that bill, so far as that object can be accomplished at the present time, was to set up a trust, under the assignment of J. C. Brooks, for the benefit of his creditors. It is true that at law nothing passed under the assignment for want of an accepting assignee, and consequently of delivery. In equity, however, there was an inchoate trust which could be upheld and a trustee appointed. It is true that the assignment was an incident of a strictly legal proceeding, the defect of which equity cannot aid; still, the assignment was voluntary in the sense that it was not constrained or rendered necessary by law, but could be made or withheld, according to the will of the debtor. It is to be assumed that the motive that led the debtor to assign was that of obtaining a release from his debts. That end was not attained for want of compliance with the statute (4 Stat. 86) by an actual delivery to the assignee of the property assigned. Wall v. Wardens, 1 Bay 434. But the character of the assignment as

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the basis of the rights of creditors *in equity, at least, must be determined by the state of things that existed at its execution, and at that time, by such act of assignment, the debtor obtained substantial advantage as against his creditors, as it was not competent for any such creditor to obtain a lien on the property so assigned from and after the date of such assignment, so long as the debtor chose to pursue his remedy for a discharge. There was, therefore, a consideration for the assignment such as equity can notice, and the abandonment of the proceedings subsequently by the debtor could not affect the character obtained by the assignment at the time of its execution. If a different view was taken it would place it altogether in the hands of a debtor, with a conniving assignee, to bind or release himself at his pleasure, and thus to hinder, delay and defraud his creditors. The declaration of trust thus being a free act of the debtor, upon adequate consideration, is capable of being put in force by a court of equity, and the creditor's bill before the court is framed so that such remedy may be had under it. As a trust existed in equity, as between the assignee and the creditors beneficially interested, lapse of time is not a bar.

So much of the decree as declares that the

children of General Dunovant should take the house and lot in Edgefield as part of their share should have provided for the equalization of the shares of such children with the other devisees upon the valuation of $5000 fixed by the will of Mrs. Brooks on such property. In taking the property the will intended that Mrs. Dunovant and her children should take as purchasers at the fixed valuation, the amount of their proportional share of the estate being determined by other provisions of the will, and they to be charged with the $5000 and credited with the amount of their distributable share, and the account adjusted accordingly. The contract of sale having been abandoned, and an election to take under the will having been made, the title passed by the words of the devise contained in the will, and it only remains to equalize the shares according to the direction of the will, and decree accordingly.

The assignments made to J. H. Brooks and J. E. Bacon should be upheld. The legal title of the assignor not having passed to the assignee under the assignment made by J. C.

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Brooks *for the benefit of his creditors for want of acceptance or delivery, it remained in him, (Belden v. Pate, 12 Rich. 358,) and his assignees, under subsequent assignments, took such legal title. The creditor's bill does not make J. E. Bacon a party, and does not make J. H. Brooks a party otherwise than as executor, and does not seek to set aside the assignments to J. H. Brooks and J. E. Bacon, nor is the question of the validity of such assignments a proper incident of the matter of either of the bills, but of an independent equity. The parties against whom this independent equity is asserted had a right to be impleaded in respect thereof, and to make a formal defence of the bar arising from the lapse of time. The course of proceeding in this respect tends to deprive them of this right. After so great a lapse of time, apparently sufficient to bar an equity of that character, and a failure to proceed formally for the enforcement of any equity they may possess, it should not be asserted in an informal and incidental manner to obtain a decree against the parties named.

Upon the principles already stated, it is clear that the proposition advanced in behalf of the executor of M. P. Brooks, that "the life-tenant should not be held accountable in any way to the testator's estate in remainder," is inadmissible.

Several objections have been raised to the decree as to the gift of $2000 by Mrs. Brooks to J. H. Brooks, shortly previous to her death, which will be considered together. There is a concurrence of conclusion between the Circuit judge who decided that question and the referee, that the delivery of the certificate of deposit to J. H. Brooks was intended as a gift. As that conclusion was inferentially drawn from somewhat vague statements made by Mrs. Brooks at the time of the alleged gift, the concurrence of the views of the Circuit judge and the referee should conclude this court, unless such conclusion violates some rule of law. The certificate must be assumed to be payable to bearer, and thus the delivery of the certificate would be a complete delivery of the money payable under it. There can be no doubt as to the sufficiency of the circumstances attending the gift, assuming it to be intended as a donatio causa mortis to maintain the character of such a gift. Such being the case, the devisees and legatees of Mrs. Brooks

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cannot avoid the gift. As the *insolvency of the estate is not alleged, the case is not in such a position that the question of the responsibility of J. H. Brooks for the whole or any part of this amount can be considered as affecting creditors. The decree is somewhat vague on this question, but should be construed in accordance with the conclusions just stated.

There is no error in the decree as it regards Turkey Creek plantation. The decree does not assume to define the exact interest of J. C. Brooks, nor whether that interest can be reached by his creditors.

The bill of the creditors of J. C. Brooks cannot be sustained as a general creditors' bill for the reason that it does not appear that the creditors have exhausted their remedy at law. Ragsdale v. Holmes, 1 S. C. 91. The only ground for maintaining that bill is to enforce the trusts of the assignment. The Turkey Creek place is not embraced in the assignment as to the interest of J. C. Brooks in that place—was not acquired until long after the assignment was made. The creditors filing the bill have no recourse thereunder against the estate of J. C. Brooks not embraced in his assignment. It was, therefore, unnecessary to define the exact interest of J. C. Brooks in that place as between himself and his creditors or children.

It appears by the report of the referee that Whitfield Brooks purchased negroes at the sale of the estate of Mrs. M. C. Carroll, deceased, part of which were originally purchased by J. B. La Borde and transferred to W. Brooks, and that after the death of W. Brooks, Mrs. Brooks paid for such purchases out of a legacy coming to her from the estate of Mrs. Carroll. The presumption is that these negroes thus purchased formed part of the estate of W. Brooks at his decease, and, therefore, passed under the clauses of his will. This, however, is unimportant. It is not disputed that the debt was a legal demand against the estate of W. Brooks, and was paid by Mrs. Brooks out of her individual estate; she is accordingly entitled to credit therefor. She is not entitled to interest on such payment, as she had the use of the property of the estate under the life-ten-

ancy which was subject to the discharge of such debt. The referee is clearly in error in holding these negroes to be the property

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of Mrs. Brooks, on *the ground that they were not included in the inventory of the estate. They must be assumed to have formed part of the estate that went under the residuary clause to Mrs. Brooks as tenant for life. She was not bound to return an inventory of property held by her as life-tenant and not in the character of executrix. If such an inventory was in fact made it was unnecessary. The rights of the remainderman to demand an inventory depends upon an allegation of waste or the like. The inventory spoken of in Patterson v. Devlin, McM. Eq. 459, is clearly a specific inventory, distinct from that required of an executor as to property of his testator held in that character.

In Robertson v. Collier, 1 Hill Eq. 370, the inventory that may be required of a tenant for life of an estate in mass is spoken of as one of the remedies of the remainderman for the preservation of the property.

There is no evidence that Mrs. Brooks treated the slaves in question as her individual property, or in any way denied the rights of the remainderman in respect thereof. She is entitled to the credit claimed.

The decree is correct in not allowing to the estate of Mrs. Brooks money expended in keeping up the estate held by her in life-tenancy. It does not appear that the estate has received such enhancement of value as to give occasion for such an inquiry, but improvements made by the tenant for life cannot be charged against the remainderman unless special circumstances appear warranting such charge. No such circumstances appear in the present case, and the life-tenant must be regarded as having made a voluntary advance for the benefit of the estate and cannot claim reimbursement.

The exception that the referee erred in not charging the life-tenant's estate with the original inventory has already been disposed of and should be overruled.

The referee properly allowed for the difference in the value of the furniture and like property arising from natural and usual deterioration. The proof of such deterioration should come from the remainderman, and if such proof is deficient, as in this case, the life-estate cannot be charged.

The two slaves sold by the tenant for life

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do not appear to *have been disposed of to the detriment of the estate. The slaves are not to be regarded as the subjects of an independent specific devise and to be accounted for specifically. They formed part of the estate as a whole, and the whole question is disposed of by the finding that the estate was in a reasonably good condition at the death of the life-tenant. The question of emancipation need not, therefore, be considered as bearing on this question. There is no error in the decree as it regards the Blocker note.

The exception that J. H. Brooks should have been charged with the actual amount derived from Roselands is not well taken. The ground of this conclusion has already been specifically stated. It is not the case of an executor seeking to make a profit to himself out of the estate, but of a provisional management pending a controversy in which the executor had a personal interest as a beneficiary under the will.

It appears that commissions were allowed by the referee for years in which no returns were filed by J. H. Brooks, as executor. The decree is erroneous in this respect and should be corrected.

It is alleged that a clerical error occurred in the accounting that was overruled in the decree, in consequence of which the executor was allowed a credit in excess of the proper amount. The decree should be opened so far as to enable the Circuit Court to correct any clerical error that may be found.

The question of the crops of the year in which the life-tenant died has already been disposed of, and the exception of Dunovant and Lake as to that matter should be overruled.

The allowance of counsel fees is a matter belonging in a proper case to the discretion of the Circuit Court. The refusal of a judge at an early stage of a cause to allow counsel fees cannot control the judgment of the judge who hears the cause finally, nor is he bound by a previous order attempting to regulate in advance demands of that class, unless such order is in form or effect an agreement among the parties in the cause in a form binding on them.

The tenth exception of Dunovant and Lake has already been disposed of and should be overruled. The decree is entirely correct as it regards the credit for the

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amount paid to Mrs. Cor*nelia Cross, and the reasons assigned by the Circuit judge therefor are satisfactory.

The exception charging the decree for allowing the life-tenant for the cabins and barns erected by the life-tenant is not well taken. There does not appear to be any such charge allowed by the decree. Permanent improvements put by the life-tenant upon the land go to the remainderman as part of the estate, and are to be considered under the general question as to the plight and condition of the estate, but are not the subject of specific allowance as against the remainderman. No account appears to have been stated in conformity with the final decree. When that account is stated the estate of the life-tenant should only be entitled to commissions as executor for the years in which returns were filed.

The fourteenth and fifteenth exceptions of Dunovant and Lake have already been considered and should be overruled.

The sixteenth exception of Dunovant and Lake should be overruled. It results from the conclusion already stated, that the life-tenant is not bound for furniture, plate and other articles of that class at the value when received by her, but only for deterioration improperly caused or permitted by her, and there is no proof of any such ground of charge.

The postponement of the charge of interest against J. H. Brooks, as executor, until the expiration of a year from his qualification, is not in violation of the established rules. The seventeenth exception should be overruled.

The decree, as it regards the account against J. H. Brooks, as executor, is correct in making the amount received by him as executor the basis of the account against him. The indebtedness of his testator is not his indebtedness as executor, the latter arising solely from the receipt of assets or neglect to call them in.

The eighteenth and twentieth exceptions of Dunovant and Lake are overruled, on the grounds already stated. As it regards the separate exceptions of Dunovant, no proper foundation is laid for the charges claimed by such exceptions, and they should be overruled.

The separate exceptions of Lake have already been disposed of and should be overruled.

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*The first and second exceptions of Mansfield are controlled by what has already been held, and should be overruled.

The payments made by J. H. Brooks, as executor to J. C. Brooks, were properly sustained. The assignment not having passed the legal title to J. C. Brooks' estate, J. H. Brooks could settle the interest of J. C. Brooks in the estate with no one but himself. The equity of the creditors, as it regards the interest of J. C. Brooks, can only follow that interest into the hands of J. C. Brooks, but cannot undo the legality of transactions between parties as it regards a party paying that which might have been recovered of him as between the immediate parties.

The fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth exceptions of Mansfield have been sufficiently considered and should be overruled.

The fifth misconceives the purport of the decree, and should be overruled.

The decree should be modified to conform to the foregoing conclusions.

Decree modified.

McIVER and HASKELL, A. J.'s, concurred.

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(Case No. 764)

J. D. TIBBETTS, as Administrator of Sarah Melton, v. THE LANGLEY MANUFACTURING COMPANY et al.

(April Term, 1879.)

[1. *Dower* ⟸79.]

The recitals made in a mortgage deed of lands executed during coverture by a husband some days after obtaining a legal seizin, are not admissible in evidence to affect the wife's right of dower in such lands, she not having been a party to the mortgage.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 299, 302; Dec. Dig. ⟸79.]

[2. *Evidence* ⟸248.]

After the right of dower has attached, the wife's interest is independent of the husband, and she is no longer a privy in estate with him, and is not bound by his admission, subsequently made, of an agreement at the time of purchase affecting her right of dower. Cases cited.

[Ed. Note.—Cited in Whitmire v. Wright, 22 S. C. 452, 454, 53 Am. Rep. 725; Shell v. Duncan, 31 S. C. 566, 10 S. E. 330, 5 L. R. A. 821; Bradley v. Drayton, 48 S. C. 245, 26 S. E. 613; Pruitt v. Pruitt, 57 S. C. 162, 35 S. E. 485; Elder v. McIntosh, 88 S. C. 292, 70 S. E. 807; Dowling v. De Witt, 96 S. C. 438, 81 S. E. 172.

For other cases, see Evidence, Cent. Dig. §§ 953–964; Dec. Dig. ⟸248.]

[3. *Dower* ⟸46.]

A judgment of foreclosure and a sale under

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proceedings against the hus*band alone in his lifetime, do not bar an action by the widow for her dower in the land so sold.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 92, 145–153; Dec. Dig. ⟸46.]

[4. *Dower* ⟸69.]

The jurisdiction of Probate Courts in matters of dower, is not limited to cases where no dispute exists as to the right of dower or as to title. Stewart v. Blease, 4 S. C. 37.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 240; Dec. Dig. ⟸69.]

[5. *Costs* ⟸277.]

This court, on appeal, will not disturb the determination of a Court of Probate, whereby it refused to stay the prosecution of an action for dower in that court, until the costs of a former action in a Court of Equity, which had been stricken from the docket, were paid.

[Ed. Note.—Cited in Hadwin v. Southern Ry., 67 S. C. 466, 45 S. E. 1019.

For other cases, see Costs, Cent. Dig. § 1058; Dec. Dig. ⟸277.]

[6. *Dower* ⟸72.]

A widow is not barred of her action for dower by reason of a former action upon the same claim, not prosecuted to judgment. The act of 1744, (3 Stat. 612), has no application to cases of dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 252; Dec. Dig. ⟸72.]

[7. *Abatement and Revival* ⟸56.]

Where a widow has a decree establishing her right to dower, with leave to apply for the necessary orders to carry the decree into effect, and dies pending an appeal therefrom, her administrator is entitled to an account from defendant of rents and profits.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 356; Abatement and Revival, Dec. Dig. ⟸56.]

[8. *Dower* ⟸46.]

A widow has a clear right to have her dower assigned to her in the surplus value of lands which were sold for the satisfaction of a mortgage, to which her right was subject, but in respect to which she has made no formal relinquishment. Per Maher, Circuit judge.

[Ed. Note.—Cited in Shiell v. Sloan, 22 S. C. 157; Grube v. Lilienthal, 51 S. C. 452, 29 S. E. 230; Groce v. Ponder, 63 S. C. 167, 41 S. E. 83.

For other cases, see Dower, Cent. Dig. §§ 92, 145–153; Dec. Dig. ⟸46.]

[This case is also cited in Columbia Water Power Co. v. Columbia Land & Investment Co., 42 S. C. 497, 20 S. E. 378, 540, without specific application, and in Hutzler Bros. v. Phillips, 26 S. C. 151, 1 S. E. 502, 4 Am. St. Rep. 687, as to facts, and in Seibert v. Todd, 31 S. C. 211, 9 S. E. 822, 4 L. R. A. 606; Bradley v. Drayton, 48 S. C. 234, 26 S. E. 613, and distinguished therefrom.]

Before Maher, J., Aiken, December, 1875.

This was an action instituted in July, 1872, by Sarah Melton, in the Court of Probate for Edgefield county, against eight defendants, each one of whom had in possession a portion of a tract of land of which her husband, Wiley Melton, had been seized during coverture. Wiley Melton died in December, 1865. In October, 1873, the cause was transferred to the new county of Aiken, which included that part of old Edgefield county, in which the land lay.

It appears that a former action had been commenced in 1867, in the Court of Equity for Edgefield district, and that on the dockets of that court there appears the entry made in 1868, "stricken from the docket." There was no other evidence of the proceedings in or disposition of the former action.

The other facts of the case are fully set forth in the decree of Judge Maher, which is as follows:

This is an appeal from the Probate Court in a proceeding for the allotment of dower. Both parties appeal on questions involving the merits. The defendants have presented other grounds, which will first be considered.

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*The position, that the jurisdiction of Probate Courts in matters of dower can be exercised only in cases where the right is not disputed, and, particularly, when no dispute exists in relation to title, is completely disposed of by the decision of the Supreme Court in Stewart v. Blease, 4 S. C. 37; see, also, Faust v. Bailey, 5 Rich. 107.

It is considered quite plain from the provisions of the act of 1871, (14 stat. 695), taken as a whole, that until the organization of the new judicial and election county of Aiken, in October, 1872, the jurisdiction of the Probate Courts of the several counties from which Aiken was formed, remained without change. The proceeding was, therefore, properly instituted in the Probate Court of Edgefield county, and the transfer to the Probate Court of Aiken county was expressly authorized by Section 7 of the act; see, also, act of 1874. 15 Stat. 652.

As to the stay of proceedings herein until the payment of the costs of the former suit in equity, the ruling of the Probate judge is affirmed for the following reasons:

1. There is no inflexible rule by which a plaintiff is compelled to pay the costs of a former action before he is suffered to proceed with the second. The rule is intended to prevent vexatious repetitions of actions, and is administered with a view to the circumstances of the particular case and in the exercise of a large and liberal discretion. 2 Tidd Pr. 538; Youle v. Brotherton, 10 Johns. 363; Miller v. Grice, 2 Rich. 27 [44 Am. Dec. 271]. If the action of the Probate Court in a matter resting in discretion, is not conclusive, it should, at least, not be disturbed without special reasons for the interference of this court, and the case presents no such reasons.

2. It is necessary to the proper application of the rule that the first suit should be at an end, and in such a state that the defendants are entitled to receive and the plaintiff bound to pay costs. Graham Pr. 555. The entry, "stricken from the docket," does not necessarily import that the suit was at an end. It might have been restored to the docket on motion. The case may have been struck from the docket because the pleadings were not completed, (Equity, Rule 29;) costs could not have been taxed upon the footing of a mere

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entry of this character. It could not be *considered as a dismissal of the bill, under Rule 33, upon which an execution or attachment for costs would have been authorized, for it does not purport to be such; and, besides, an order of the court was indispensable to terminate the suit, whether by dismissal of the bill or a voluntary discontinuance; without such order costs could not be taxed and the payment thereof be enforced. Moreover, courts of law have not considered the rule applicable when the former suit was in a court of equity. 2 Tidd Pr. 1233; 3 B. & Ad. 602; Stebbins v. Grant, 19 Johns. 196.

The act of 1744, (3 Stat. at L. 612), has uniformly been considered by our courts as confined to the action of ejectment, and its statutory substitute, the action of trespass, to try title. The widow's claim of dower is a mere chose in action, not even assignable at law. Lamar v. Scott, 4 Rich. 516. She cannot enter upon her dower until it is assigned to her, and may be pursued as a trespasser if she tary beyond her quarantine. McCully v. Smith, 2 Bail. 103. "It is not until her dower has been duly assigned that the widow acquires a vested estate for life, which will enable her to maintain her ejective suit." 4 Kent 62. It follows that the act of 1744 has no application to the present case.

In relation to the principal questions to be considered, the facts of the case are briefly as follows: Melton, the husband of the demandant, purchased, during the coverture, a tract of land, parcels of which are now in the possession of the defendants, for the sum of $8000, which he paid in cash, and received a conveyance of the land on December 30th, 1833. On January 18th, 1834, he executed and delivered a mortgage of the same land (with certain exceptions) to Bland, Frazier and Jeter, wherein it is recited that Melton had lately made such purchase for the price stated; that in order to procure a part of the purchase money he had given his note with said Bland, Frazier and Jeter as sureties, payable to the order of one Drake, at the Bank of Augusta, for $6480, the proceeds of which had been actually appropriated in payment of the land; and that it had been explicitly understood and agreed between the said parties that Melton, so soon as he obtained a deed for the land, should execute a mortgage of the same to indemnify and se-

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cure said sureties *from any loss they might sustain on account of their securityship, and the premises are thus conveyed by way of mortgage professedly "in pursuance of said agreement, and for the better securing the said Avery Bland, Benjamin Frazier and John S. Jeter from all liabilities on account of said securityship, and in order to indemnify them from any loss which they may sustain as aforesaid." The sureties having been compelled to pay part of the note, brought suit against Melton and obtained judgment for $3759.45, and an order for foreclosure and sale of the mortgaged premises. Avery Bland became the purchaser at such sale for the sum of $7100, which he paid, and received a conveyance from the sheriff, dated May 4th, 1840. The defendants severally hold under him through mesne conveyance. Melton died in 1865—the demandant never relinquishing her dower in the premises.

An agreement to execute a mortgage for specific enforcement, is considered in equity as actually performed before a decree for the purpose. 1 Story Eq., § 649; Adams Eq. 135. Such agreement constitutes an equitable lien, which will prevail against subsequent purchasers and creditors with notice. Dow v. Kerr, Speers Eq. 413; Massey v. McIlwain, 2 Hill Eq. 421; Boyce v. Shiver, 3 S. C. 515. If the agreement be entered into prior to the acquisition of the property, it would attach instantly upon the vesting of the title, in preference to the lien of a judgment then impending. Allston v. Bank, 2 Hill Eq. 235. The execution of a mortgage after the time stipulated therefor would not supersede the equitable lien, so far, at least, as its continued recognition might be necessary for the protection of the holder against intermediate encumbrances affected by notice. For this purpose there need be no relation of the mortgage to the date of the agreement, or to the time of the acquisition of the title. A continuous lien, at first equitable and afterwards legal in its nature, would not rest upon the land from the inception of the title.

Whether Melton's agreement with his sureties was in writing or merely verbal, does not appear from the recitals in the mortgage. If, in a suit for specific performance, the agreement had been set forth in the bill

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in the precise terms recited in the mort*gage, and Melton had either failed to answer, or, answering, had confessed the agreement without setting up the statute of frauds, the validity of the agreement would have been presumed without further inquiry, and a decree have been made accordingly. And the result would have been the same if the bill had explicitly stated that the agreement was verbal, and Melton, by his course of pleading, had relieved the sureties from the necessity of proving the agreement. 2 Story Eq., § 755; Reeves Dom. Rel. 50; 1 Lead. Cas. in Eq. 527; [Seabrook v. Hammond] 5 Rich. 170. "If," says Mr. Justice Story, "the defendant does not insist on the defence, he may fairly be deemed to waive it; and the rule is, quisque renuntiare potest juri pro se introducto." Persons who may have dealt with Melton in respect to the property, intermediately the vesting of the title in him and the execution of the mortgage, would doubtless have good ground to resist the force of any subsequent written acknowledgment of a parol promise as affecting their rights. But certainly creditors holding general liens at the time the title vested, could successfully urge no such objection; and persons deriving interests in the land under Melton, if not in a position to avail themselves of want of notice, would be as effectually concluded as if the writing had been executed at the time the agreement was made. Whether, then, it be presumed that the agreement was in writing, by analogy to the rule in relation to unqualified admission in an answer, or the statements in the mortgage be taken as an acknowledgment of a mere parol promise, the result, it is apprehended, must be the same. It was Melton's privilege to waive the immunity of the statute, and his fulfillment of the promise, though tardy, was an act of honesty and good faith which is to be commended. The same effect must be given to his voluntary act, which would have followed a compulsory decree enforcing a parol agreement confessed by answer, without reliance on the statutes of fraud. The effect of such a decree would have been to set up the agreement as an equitable lien coincident in its origin with the acquisition of the legal title and such, in the judgment of the court, is the equitable view of the transactions between Melton and his sureties. If there had been mention of the agreement in the mortgage, it

would not have been admissible to show, by

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parol evidence, its connection *with any antecedent verbal promise. But the mortgage served the double purpose of supplying written evidence of the previous agreement, and of carrying the same into effect. In the light of established principles of equity, it is conceived that only one view can properly be taken of the case, which is, that there was a valid agreement to execute a mortgage which affected the land as an equitable lien instantaneously upon the delivery of the conveyance to Melton, and that the agreement was afterwards consummated by the execution of the instrument contracted for.

It is a general principle, says Chancellor Kent, that "the wife's dower is liable to be defeated by every subsisting claim, in law or equity, existing before the inception of the title, which would have defeated the husband's seizin." Thus "an agreement by a husband to convey before dower attaches will, if enforced in equity, extinguish the claim to dower." 4 Com. 50; 1 Scrib. on Dow. 564. In Allston v. Bank, 2 Hill Eq. 235, a remainderman assigned his contingent interest in land to indemnify his accommodation endorser on a note in bank. Before the happening of the contingency on which the estate was limited, a judgment was entered against the remainderman. After the estate vested, a contest for priority arose between the assignee and the judgment creditor. The court held that the assignment, though inoperative as a conveyance, availed as an agreement specifically enforceable in equity; and, accordingly, that the lien of the judgment attached subject to the equity with which, in the consideration of the court, the estate of the remainderman was burdened at the moment it vested in him. If the question in that case had arisen between the assignee and the widow of the remainderman on a claim of dower, the ground upon which a distinction could have been made in her favor is not apparent. If a prior equity would prevail over the lien of a judgment subsisting at the time the title vested, it seems to me quite clear that the inchoate right of dower, partaking, as it does, of the nature of the husband's estate, would equally be subject to the burden which affected that estate, in the very inception of its origin. In states where the doctrine of the vendor's lien prevails, it has been uniformly held that "when the lien attaches, and so long as it is preserved, it is

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paramount to the dower of *the vendee's wife." 1 Scrib. on Dow. 530, and cases cited in note 3. And yet this lien was considered by Mr. Justice Story "not of so high and stringent a nature as that of a judgment creditor, for the latter binds according to the course of common law, whereas the former is the mere custom of a court of equity, which it moulds and fashions according to its own purposes. It is, in short, a right which has no existence until it is established by the decree of a court in the particular case, and is then made subservient to all the equities of the parties, and enforced in its own peculiar manner and upon its own peculiar principles." Gilman v. Brown, 1 Mason 192 [Fed. Cas. No. 5,441]; 1 Lead. Cas. in Eq. (Am. note) 249. If the dower right is subordinated to a lien of this character, for much stronger reason must it yield to an equity which springs from the express agreement of the parties, and is impressed as a specific lien upon the land by its intrinsic force, and not by virtue of the retroactive operation of a decree which originates it. At the time Melton entered into the agreement with his sureties, their claim to be protected by a punctual performance of the obligation was unquestionably superior to that of his wife to be endowed of the forthcoming estate. Without their assistance he would probably not have been able to complete the purchase. The land came to him impressed with this superior equity, and it is but just that the wife's claim of dower should be subjected to it. Qui sentit commodum sentire debet et onus. She is in privity of estate with him, and what bound the land at the instant of its acquisition necessarily binds her dower, which is but a part and continuation of his estate. She is estopped, as his privy, from denying the efficacy of his solemn admission, under seal, respecting the agreement with his sureties, and is fully committed to the consequences, which, in the regard of equity, resulted from that admission.

The conclusion is that the demandant's inchoate right of dower attached to the land, subject to the encumbrance of the mortgage.

When the wife relinquishes her claim of dower to a mortgage, in the mode prescribed by the statute, the purchaser under a decree for foreclosure and sale would take a title absolutely unencumbered of the dower. Keith v. Trapier, Bail. Eq. 63, 66; Keckley v. Keckley, 2 Hill Eq. 252; Rickard v. Talbird, Rice

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*Eq. 170. The widow is remitted, in such case, to the surplus proceeds of sale; and her claim thereon will be protected, if the fund remain in the custody or within the control of the court, when her right becomes consummate. Keith v. Trapier, Titus v. Nelson, 5 Johns. C. 452.

In Brown v. Duncan, 4 McCord 346, the case was that land had been sold under decree in former suits, for the satisfaction of two mortgages, one of which, having been given for the purchase money, was valid against the claim of dower. The land brought $40,000, and the amount applied to the purchase money mortgage was $8000. Duncan, the purchaser, complied with the terms of sale, and received a conveyance. The proceeds of sale were applied to the mortgage debts, as directed by the decree;

afterwards the husband died, and his widow brought suit against Duncan for her dower. It was testified by the commissioner that the land had been sold subject to the contingent right of dower. This circumstance, however, was considered no impediment to a vigorous contention on behalf of Duncan that the widow was not dowable in an equity of redemption, and hence the conclusiveness of the decree and sale thereunder could have been urged with equal propriety. The court, following the principle of Crafts v. Crafts, 2 McCord 54, held that the dower attached, subject to the mortgage for the purchase money, and that the demandant was entitled to dower in the surplus value of the land at the time of the sale. Her right to an allotment in specie was explicitly recognized, though the return of the commissioner, assessing a sum in lieu of dower, was confirmed. No question was raised as to the effect of the decree and sale upon the inchoate right of dower, nor did any observation on that point fall from the court. The operation and effect of the act of 1791, and the basis of assessment, were the only subjects of discussion. The case, however, is at least a tacit recognition of the widow's right of dower in the surplus value of land, against a purchaser under decree for foreclosure, when her right, although subject to the encumbrance, had not been formally relinquished. In Pledger v. Ellerbe, 6 Rich. 266 [60 Am. Dec. 123], a mortgage for purchase money had been foreclosed in the husband's lifetime, and the defendant held through several mesne conveyances

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under the *purchaser at the sale. It was conceded by the distinguished counsel for the defendants that the demandant was entitled to her dower "in the excess of the value of the land over the mortgage debt."

But it was objected on the part of the defendant that the deed of the husband was inoperative as a mortgage, it having been attested by only one subscribing witness, and hence that her dower extended to the entire premises. It was so ruled on Circuit, and a verdict was rendered for the demandant accordingly. On appeal, the ruling of the Circuit judge was reversed, on the ground that the widow was estopped, by reason of her privity in estate with the husband, from denying the validity of the mortgage, which had been adjudged valid against him in the proceedings for foreclosure. The court say: "A mere transitory seizin of the husband, for the purpose of re-conveying the land, will abridge the title of dower, and the demandant in such a case takes her dower cum onere. If there be any surplus, therefore, after satisfying the mortgage security, she may be endowed of that." A new trial was ordered, and that "the writ do issue to admeasure and ascertain her dower in any surplus which may remain after paying the mortgage encumbrance." Here, again, the widow's right of dower in specie, to the extent of the value of the land in excess of the mortgage debt, was recognized and enforced, without question, against one holding under the purchaser at the foreclosure sale. As the question now under consideration was not distinctly raised, the point cannot be said to have been expressly adjudicated; but certainly these cases cannot with propriety be lightly disregarded, nor even be considered as without the weight of authority, unless upon examination it should be found that there is no just ground of distinction, as it regards the widow's claim upon the surplus, between mortgages upon which her dower had been renounced and such as are binding upon her without relinquishment.

When the act of 1791 (5 Stat. at L. 169) converted what had been known as the equity of redemption into a legal estate, the wife's right of dower necessarily attached as upon a legal and abiding seizin of the husband, although in subjection to the lien of any mortgage which was paramount to

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that right. But the *right is so subject only to the extent of the mortgage debt. A sale for satisfaction of the debt being a necessary incident of the mortgage, where the encumbrance is valid against her claim, she would of course be bound by a decree for foreclosure and sale. She could set up no right as against the mortgagee, or any one claiming under him, unless she comes to redeem before a sale; when, however, a sale yields a surplus over the mortgage debt, it is demonstrated that the land was more than sufficient in value to satisfy the debt. When the sale is in the husband's lifetime, the wife could urge no complaint that more than a sufficiency of land had been sold, since her claim rests in contingency, and her husband's deed conveyed his entire estate for all the purposes of a sale for satisfaction of the debt. To the extent, however, of any excess in value of the land beyond the debt, her right could remain intact; unless, by her voluntary act, she had concluded herself from setting up the claim, such would be the effect of a formal relinquishment in favor of the mortgagee and his assigns. The relinquishment would attend the deed of the husband to the purchaser, as a muniment of title. If, in such case, she retains any right after a sale, it is restricted to the proceeds. The purchaser would have no concern with the disposition of the proceeds. He holds under the parties to the mortgage, namely, the mortgagor, the mortgagee, and the wife herself. But how is the case where the right of dower, though subject to the encumbrance, has not been relinquished in the entire premises? On what grounds could the purchaser oppose her claim of dower in so much of the land as corresponds in value with the surplus proceeds of sale? She has not renounced it; her husband's deed does not affect it; the mortgage debt has been satisfied without it; and the purchaser himself has no pre-

tence of claiming to be protected against it, since he might have regulated his bid with a view to the contingent right.

The surplus proceeds of sale are properly to be regarded as the equivalent of the husband's estate in the land, over and above the mortgage debt. The value of the wife's contingent interest is not included in such proceeds, unless she has relinquished her claim to dower in the entire premises. Where no relinquishment has been made, the

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dower right remains intact in *the land itself, to the extent of its surplus value, the purchaser having bought such right only to the extent of the mortgage debt. The purchaser holds virtually as assignee of the mortgage, though the wife has no right to redeem. If, after deducting the mortgage debt from the value of the premises at the time of alienation, there should be an overplus, she is entitled to her dower in that. Her right is clear, when, as in the present case, the land sold for a sum in excess of the mortgage debt.

These considerations persuade me that Brown v. Duncan and Pledger v. Ellerbe, proceeded upon a conscious recognition of a clear right on the part of a widow to have her dower in the surplus value of land sold for the satisfaction of a mortgage, to which her right was subject, but in respect to which she has made no formal relinquishment.

I own that my impressions at the hearing were decidedly adverse to the conclusions of the Probate Court on this branch of the case. I had always supposed that foreclosure of a mortgage valid, for any reason, against the wife, would bar her claim of dower in the land, absolutely and under all circumstances. The result of a careful examination of the subject is to convince me that the conclusion of the Probate Court on this, as on the other questions raised by the appeal, is correct.

It is adjudged, ordered, and decreed that the decree of the Probate Court be and hereby is affirmed, with costs of the appeal to the demandant. John J. Maher.

From this decree both plaintiff and defendant appealed to this court.

Pending the appeal the demandant died. By order of this court, in November, 1877, J. D. Tibbetts, as administrator of Sarah Melton, was made a party plaintiff without prejudice to any right of the defendants, arising from the death of Sarah Melton.

The case was argued at April Term, 1878, and being ordered for re-argument was again heard at this term.

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*Mr. J. P. Carroll, for plaintiff.

The mortgage had no effect until its delivery in 1834, at which time the demandant's inchoate right of dower had attached. 1 Dall. 415; 1 Scrib. on Dow. 264–266; 11 Rich. 417; 43 Me. 489; 4 B. Mon. 339; 12 B. Mon. 261. Relying upon the recitals of the mortgage, the defendants must fail. 12 Leigh 264. But the recitals cannot prejudice the demandant. 5 S. C. 275; 9 Rich. Eq. 513; 9 Rich. 50; 12 Rich. 363; 1 Greenl. on Ev., §§ 180, 190, 536; 1 Ad. & El. 787; Stark. on Ev. 328; 2 Sm. Lead. Cas. 68, 590; 2 Scrib. on Dow. 204–5; 8 Ohio 412; 4 Kent 51; 8 S. C. 100. This is not a mortgage for the purchase money; even if executed the day of purchase it would not prevent dower. 11 Rich. 417; 1 Story Eq. Jur., §§ 629, 630. The mortgage having never been foreclosed, the dower remains unimpaired. Scrib. on Dow. 533, 558; 5 S. C. 213, 461; 2 Hill Ch. 252; 1 Story Eq., § 776, 779; 7 Ves. 265; 3 Lead. Eq. Cas. 80; 2 Lead. Eq. Cas. 699.

If the widow is not entitled to dower upon the whole, she undoubtedly is upon the surplus. 1 Scrib. on Dow. 476–8; Bail. Eq. 63.

Mrs. Melton having died, her administrator is entitled to rents and profits, or to one-third of the interest upon the value at the time of alienation, to be computed from the accrual of her right of dower. 3 Bro. C. C. 495, 632; 1 Fonb. Eq. 22; Bail. Eq. 69; Dud. Eq. 127; 1 S. C. 124; 4 S. C. 9; 2 Scrib. on Dow. 696; 1 Story Eq. Jur., § 625.

Mr. L. F. Youmans, attorney-general, for defendants.

The demandant in dower is dead, having in her favor a Circuit decree affirming the decree of the Probate judge, which latter decrees the opinion expressed therein, to wit, that she is entitled to dower in the residue of the value of the land after satisfaction of the mortgage debt, and that she have leave to apply for necessary orders to carry that judgment into full effect. Dower not being an estate until assigned, and when assigned in the land or the value of the land, being an estate only for life, and she being dead, the authorities cited in the Circuit decree, (4 Rich. 516; 2 Bail. 103; 4 Kent

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62,) are conclusive that her *administrator can have no estate in the land or its value, nor can he obtain any account of rents and profits, for the principal failing the accessory goes with it. Indeed, the Probate Court has jurisdiction only in allotment of dower. Const., Art. IV., § 20; Code, § 38. And this cannot extend to personal representatives, and no account for rents and profits is attempted to be given thereby. If such right existed even, it could not be prosecuted in this court or in the Court of Probate.

But in support of the exceptions to the jurisdiction of the Probate Court, we rely upon the Const., Art. IV., § 20; Code, §§ 38, 40, 146, 276, subd. 1; 14 Stat. 695; 15 Stat. 652; 5 Rich. Eq. 350; 10 Rich. Eq. 428.

The costs of the former action should have been paid before the institution of this suit, or at least this action should have been stayed until the costs of the former action

were paid. 2 T. R. 512; 2 B. & P. 23; 6 T. R. 740, 233; 8 T. R. 645; 2 Strange 1152; 2 Sellon Pr. 144, 450; 3 Com. Dig., tit. "Costs, A," 8; 4 East 585; Hullock on Costs 452.

The statutes of limitation barred the action. 2 Stat. 584; 3 Stat. 612; 1 Rich. 476; Code, § 96.

The mortgage was for the purchase money. 1 Scrib. on Dow. 261, 262; 11 Allen 407; 4 Kent 50; 1 Ham. 249, 538; 3 Edw. Ch. 47; Lamb. on Dow. 23; 1 Leigh 264; Bail. Eq. 463; 2 Hill Ch. 428; Spears Eq. 460, 417; Bail. Eq. 223; 2 Desaus. 552; 12 Rich. Eq. 345; 12 Leigh 264; 2 Ohio St. 415; 5 S. C. 90.

The wife is bound by the recitals of the mortgage. Co. Litt. 352, b; 6 Rich. 271.

The widow is entitled to dower only out of the surplus money after the mortgage is satisfied. 9 Rich. Eq. 512; 2 Hill Ch. 252; Rice Eq. 170; 1 Scrib. on Dow. 458–461, 476–478, 521, 522, 532; Bail. Eq. 63; 5 Johns. Ch. 452; 10 Paige 49; 4 Edw. Ch. 678.

October 3d, 1879. The opinion of the court was delivered by

HASKELL, A. J. This is a proceeding for the allotment of dower, commenced in the Court of Probate, carried up by appeal to the Circuit Court and thence brought by

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appeal to this court. *The facts are very fully set forth in the decree rendered by the Circuit judge.

Several important questions are presented in the appeal from that decision. This court, however, is impressed by the preliminary question, upon the determination of which the consideration of several of the other questions depends. We will thus state it: The prima facie right of the demandant is established. That is to say, the marriage, the legal seizin of the husband during coverture, his death, and that the wife had not relinquished her right of dower in the land, are facts not disputed. But the defendants by way of defense allege as matters of fact that the husband, within a short time, a few weeks, after the execution and delivery to him of a deed of conveyance of the land, executed a mortgage thereon to secure payment of a part of the purchase money; that this mortgage was executed in pursuance of an agreement entered into before the purchase of the land by the mortgagor and of force at that time; that the mortgage was foreclosed in the lifetime of the mortgagor, the husband, and that they derive through the purchaser at the foreclosure sale. They claim as conclusions of law that such a mortgage for the purchase money is by virtue of the agreement part of the res gestæ, and is a right superior to that of dower; and that foreclosure having been had in the lifetime of the husband the land was sold freed and discharged from all right of dower. The facts as above stated are sustained by the findings of the court below. The chief aim, therefore, of the decree by the Circuit judge is to reach the conclusions of law flowing from such facts. The fact, however, which must underlie the entire defence is the existence of the "agreement" at the time of the sale and as part of the transaction. We are of opinion that there is no proof in the record of the existence of such an agreement as against the widow. The defendants offered in evidence nothing but the recitals made in the mortgage executed nearly a month after the legal estate had vested in the husband. The wife was not a party to the mortgage deed. The question is, whether such recitals made subsequent to the time when the wife's inchoate right of dower has attached to the land are admissible in evidence against her

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demanding her dower. The mortgage *was executed to third persons who were not directly parties to the transaction, and there is not a title of other evidence to prove the agreement or to connect it with the transaction. It cannot, then, as in the case of Dutart v. Chovin, Riley 170, be "receivable under the idea of res gestæ," but must rest solely upon the credit given to statements made by the mortgagor, in which view, as conceded in Dutart v. Chovin, "it must according to the rule be clearly inadmissible."

But the conclusion reached by the Circuit judge rests upon the ground that the wife is "in privity of estate" with her husband, and "is estopped as his privy from denying the efficacy of his solemn admission under seal respecting the agreement with his sureties, and is fully committed to the consequences which in the regard of equity resulted from that admission."

It would be difficult to state the general rules on this subject in language more concise or accurate than that found in Greenleaf on Evidence, as follows: "In regard to recitals in deeds, the general rule is that all parties to a deed are bound by the recitals therein which operate as an estoppel working on the interest in the land, if it be a deed of conveyance, and binding both parties and privies; privies in blood, privies in estate and privies in law." Vol. I., § 23.

"The term privity denotes mutual or successive relationship to the same rights of property. * * * The ground upon which admissions bind those in privity with the party making them is, that they are identified in interest, and of course the rule extends no further than this identity." Id., § 189.

Can the widow claiming dower be said in this sense to be in privity of estate with her husband? If she cannot, the evidence is mere hearsay and inadmissible.

The inchoate right of dower is said by Mr. Scribner (Vol. II., p. 8,) to be "a sub-

stantial right, possessing in contemplation of law the attributes of property, and to be estimated and valued as such." And in Cunningham v. Shannon, 4 Rich. Eq. 135, it is defined to be "a right attaching by implication of law, which although it may never be called into effect, * * * yet from the moment that the fact of marriage and of seizin have concurred, is so fixed on the land

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as to become a title paramount to *that of any other person claiming under the husband by a subsequent act. Park on Dow. 256. The estate to which the right of dower attaches comes through the husband, but the right by which it attaches comes through the law.

Thus the wife is in privity of estate with her husband quoad his derivation of estate; that is to say, until the right of dower attaches; but when the right has attached, her interest is independent of him, and is against him. The privity ceases on the concurrence of marriage and seizin. That her right is adverse to her husband would perhaps be an awkward expression, for it cannot be set up against him, because it does not consummate until his death; but that it is against his interest and affects his estate is manifest, for it is good against his heir or his alienee, and the assertion of the right constitutes a breach of a covenant of warranty for quiet enjoyment. Lewis v. Lewis, 5 Rich. 12. The wife's right attaches to the estate which was in the husband at the concurrence of marriage and seizin, and in questions to determine that estate she is in privity with him as to all transactions antecedent, but not so as to any subsequent, for the husband and wife are no longer indentified in interest. In Gaunt v. Wainman, 3 Bing. N. C. 69, an action for dower, it was argued that the tenant was estopped by the deed under which he claimed title to dispute the nature of the title conferred by that deed. Tindall, C. J., says: "As between the parties to that deed there may be an estoppel, but you set it up against [the wife] a stranger to the deed." In Foster v. Dwinel, 49 Me. 44, in commenting on the above, it is said by Kent, J.: "The ground of this decision seems to be that the wife or widow is not a party or privy to the conveyance. Her claim is by a title paramount and distinct and therefore she is not estopped." And again: "We have seen that a widow cannot be defeated of her dower by any declarations or recitals of her husband." The case of Gayle v. Price, 5 Rich. L. 525, is not in conflict with this principle. The title under which the defendant held, and he did not attempt to set up any other, was the title on which the widow relied, and the estoppel was reciprocal. But in this case the title under which the defendants claim is the equity arising from an agreement which depends for proof upon a

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declaration or recital *subsequent to the deed of conveyance under which the widow sets up her demand. The defendants are not estopped from proving such agreement, but there is no estoppel against the widow, as would be if, for instance, such recitals were in a deed indented, to which her husband was a party, and by which he derived title.

No cases directly in point were cited, and we have found none in our own reports, and but little in the text-books, bearing directly on the point in question, but so far as decisions of other courts have been found, they entirely sustain the view already expressed. It is true that the case of Pledger v. Ellerbe, 6 Rich. 266 [60 Am. Dec. 123], was to some extent relied on, not by the Circuit judge on this point, but by the counsel for the defendants. We do not, however, consider it as at all sustaining the position attributed to it, and will consider it presently in another connection.

In the leading case of Greene v. Greene, 1 Ohio 244, though the rule of evidence is not in question, the law as to the effect of such agreements is thus expressed: "If it be considered as real estate, it was acquired subject to a condition or agreement that qualified the estate of the husband, and the wife when there is an agreement, unless it were executed after her right attached, would be bound thereby, so as to exclude her right of dower." We would remark incidentally that that is really all that is decided in Pledger v. Ellerbe, supra. See, also, on that subject Stoppelbein v. Shulte, 1 Hill 200; State v. Laval, 4 McC. 336, and Wilson v. McConnell, 9 Rich. Eq. 500, showing the effect of the act of 1791, and the change which has occurred since the decision in Bogie v. Rutledge, 1 Bay 312, and Verree v. Verree, 2 Brev. 211, doing away with that idea of instantaneous seizin in the mortgagee which left to the widow only an equitable right, and substituting in its stead the principle that a mortgage for the purchase money, or an agreement to that effect, simultaneous or connected with the purchase, is part of the res gestæ and to that extent qualifies the legal seizin of the husband and subordinates the wife's right to the lien thus fixed upon the land. But to return: The recitals in the mortgage unquestionably are, as against the husband and those claiming under him, evidence of an agreement, but being subsequent to the time when the

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*wife's right attached, she is not thereby bound, for as against her they do not constitute evidence that the agreement was prior to or constituted a part of the transaction of purchase. When the right of dower has consummated it is a right fixed upon the land, but that right relates back to the time when it originally attached; or, as already said, the inchoate right itself "is so

fixed on the land as to become a title paramount to that of any other person claiming under the husband by a subsequent act." Such right is protected by the same rules of evidence as other rights of property. Thus when dower has attached and the right has become independent of the husband "nothing that he could" (thereafter) "say would be evidence against his wife; her claim is not through him, but in her own right, and altogether independent of him." Smith v. Scudder, 11 Sergt. & Rawle 325. That was not a case for dower, but states the rule which we think is applicable.

In Doe v. Webber, 1 Ad. & El. 733, 28 Eng. C. L. 191, where a party had by a voluntary settlement after marriage conveyed away his interest in an estate and afterwards executed a mortgage of the same estate; it was held, that declarations, implied or expressed, of the mortgagor made after he had parted with his interest by the settlement were not admissible evidence on behalf of the mortgagee (after the death of the mortgagor) to show that money had actually been advanced upon the mortgage. The views of the judges were various, but the reason is thus pointedly expressed by Taunton, J.: "I am of opinion that he (the husband) having parted with his interest by the settlement was not competent to cut down that settlement by his declarations afterwards made. It is not for us to decide what would have been the effect of the evidence if admitted."

It is difficult to perceive any difference in principle between that case and one in which by reason of the marriage and seizin the interest has passed out of the husband by operation of law. He is a party to it by virtue of the marriage, and as much affected as if the interest had gone out of him by a settlement.

It would be even more startling if, by the admission of his subsequent declarations as evidence, he could "cut down" so highly favored legal right. In Pinner v. Pinner, Bar-

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bec's L. *475, the question fairly arises. The proceeding was by the widow of Wm. Pinner for dower. The other side produced a deed from the husband dated thirteen years before his intermarriage with the petitioner, and by a subscribing witness proved a delivery of the deed a short time before the husband's death, and his declaration that the deed had been delivered many years before. Held that this declaration was no evidence of any previous delivery as against the petitioner. The court, per Nash, Chief Justice, says: "The only testimony upon which the defendant, Nancy, relied to show that the deed was delivered at the time it bore date was the declaration of William Pinner, which was incompetent on that point. The declarations of Pinner before Lanning as to the acknowledgment of the deed were competent as showing a present delivery, for it was part of the res gestæ then taking place. But it was no evidence of what had taken place at any time before. The plaintiff did not claim under him but under the law, and he was endeavoring to deprive her of her rights. So far, then, the declarations of Pinner were incompetent to give the deed an operation before his then acknowledgment."

In Derush v. Brown, 8 Ohio 412, a proceeding for dower, it was held that admissions in a deed of release executed by the husband after he had become seized of the land, could not be taken in evidence as against the widow. The court says: "A deed of release from Stearns to the Browns, in which he admits that he purchased the lands in trust for the Browns with their property and as their agent, has also been introduced. To the incompetency of this testimony the counsel for complainants objects and insists that such admissions, made either by parol or by deed, cannot operate to defeat a widow of her dower, and of this opinion are the court. It is true that the right of the widow to dower is derived from the husband, and in a certain sense she may be said to claim under him. But in some respects her interests are adverse to his. By the marriage and seizin of the husband she acquires an interest in the land of which he cannot divest her. He cannot do it by deed of conveyance, and it would be strange if he could by parol declarations. Declarations made by the husband

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while contracting for the land or at the *time of purchase may with propriety be proven; but declarations made subsequently must be excluded."

The meaning is that if the trust had been proven the right of dower would never have attached, and that it might have been proven by declarations of the husband, which constituted a part of the original res gestæ, or by other evidence, but not by subsequent declarations of the husband, which, if admissible in evidence, would thus enable him at any time to deprive his wife of dower.

Regarding it, therefore, as settled that the wife, as respects her dower, is not in privity with her husband in any transactions subsequent to the concurrence of marriage and seizin, to which she is not a party, the general rule of evidence must govern, and on that the current of authorities is unbroken. Sims v. Saunders, Harper 374; Newman v. Wilbourne, 1 Hill Eq. 10; Smith v. Asbell, 2 Strob. 141; Ruff v. Thomas, 2 Speers 601; Land v. Lee, 2 Rich. 168; Kittles v. Kittles, 4 Rich. 422; Renwick v. Renwick, 9 Rich. 50; Raiford v. French, 11 Rich. 370; Adams v. Lathan, 14 Rich. Eq. 304. The declarations must be made prior to the res gestæ or be part thereof; and as to what constitutes part of the res gestæ it is said in Haynes v. Rutler, 24 Pick. 242, and approved in Adams v. Lathan, supra: "If a declaration is in itself a fact in the transaction, or is made by a

party while doing an act, and serves to explain it, it is to be received in evidence as a part of the res gestæ. But a recital of past transactions is not admissible, although it may have some relation to the act which the person may be doing at the time when he makes the declaration." Greenl. vol. I., § 110.

That the mortgage deed was admissible in evidence is unquestionable, and it proved that the recital had been made, but not the fact which the recital alleges.

Stress is laid upon the effect of the foreclosure. "Judgments and decrees of courts of competent jurisdiction directly on the point in controversy are admissible in evidence not only between the parties, but all persons standing in the relation of privies in blood, in estate or in law. And I understand by privy one whose interest has been legally represented at the trial." McMullin v. Brown, 2 Hill Eq. 457.

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*The wife was in no sense a party to the proceeding for foreclosure; nor, according to the views already expressed, can it be said that her interest was "legally represented at the trial." The "relationship as to the same rights of property"—between the husband and the widow demanding dower, and the identity of their interest—cease at the moment that the right of dower attaches, for the interest of the wife is thenceforth freed, is independent of that of the husband and is adverse to it. That the foreclosure was had in the Court of Common Pleas in the exercise of its power under the act of 1791, thus becomes an immaterial question; the conclusion would be the same had the proceedings been in the Court of Equity in the exercise of its comprehensive jurisdiction.

The case of Pledger v. Ellerbe—already referred to—does not aid the defendants, for the circumstances are essentially different. The act of the husband which there worked the estoppel was admitted to have been a part of the res gestæ. The instrument called a mortgage was given by the husband to the vendor at the time of the sale to secure the purchase money, and whether or not duly attested, was at least an agreement, and was part of the transaction by which the seizin was acquired. That fact was admitted. Whatever the husband did, in the transaction of purchase, affecting the seizin, was binding on the wife, for her right of dower attached to the seizin thus qualified or encumbered. His agreement could have been specifically enforced in equity, and the wife would have been bound, for the decree would have determined a fact in the res gestæ by which the seizin came to the husband, and to that extent she is in privity with him. None the less is she bound when by the husband's assent to foreclosure he admits what would have compelled specific performance, and thus merely dispenses with unnecessary circuity of action. Such acquiescence on the part of the husband is not an act or declaration, subsequent to the seizin, affecting the right to dower, but is an act on his part solely affecting a proceeding at law or in equity, arising from an act in the res gestæ, on which her right depends, and which right could have been in nowise changed or altered by the difference in the mode of procedure. We, therefore, entirely concur in the con-

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clusion reached in *Pledger v. Ellerbe, and deem it in no sense in conflict with the views entertained in this case.

For the reasons above stated it follows that the widow's right of dower was not affected by the mortgage, and that she is therefore entitled to dower in all the land in question.

As to the other points raised by this appeal we are satisfied with the conclusions reached by the Circuit judge for the reasons which he has given, and we deem it unnecessary to add anything to what he has said.

Since the case has been pending in this court the demandant has died, and, by an order of this court, J. D. Tibbetts, as her administrator, has been made a party, without prejudice to any right of the defendants arising from the death of the demandant. It is now contended that as dower is but a life-estate, and there has been no decree for an account of the rents and profits, and no appeal from the decree on account of such omission, the proceeding is necessarily at an end. We think it is clear, from the decision rendered in Keith v. Trapier, Bail. Eq. 63, and the authorities therein cited, that where the widow has made her demand of dower, but dies before her right has been established, equity will decree an account for rents and profits in favor of her personal representative. But in this case the Circuit judge affirmed the decree of the Court of Probate, which not only established the widow's claim of dower, but gave leave to apply for the necessary orders to carry the decree into effect. Under that decree we see no reason why the widow, or her administrator after her death, might not apply for an account of the rents and profits, which, in this case, will be represented by the interest on the value of the dower assessed in accordance with law. Gen. Stat. 530, § 7.

The important question so thoroughly discussed by the Circuit judge does not, under the view which we have taken, arise in this case, and therefore has not been considered.

The judgment must be modified in accordance with the views herein expressed, and the case is remanded for such further proceedings as may be necessary.

Decree modified.

WILLARD, C. J., and McIVER, A. J., concurred.

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*(Case No. 765.)

A. L. ANNELY et al. v. W. G. DE SAUSSURE, Executor, et al.

(April Term, 1879.)

[1. *Appeal and Error* ⟸1022.]
Findings of fact by a referee in an equity cause, concurred in by the Circuit judge, reversed, as being without evidence to sustain them. McIver, A. J., dissenting.†

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⟸1022.]

[2. *Appeal and Error* ⟸1119.]
Where an executrix, who is also a legatee, sues a mortgagor for the foreclosure of a mortgage given her testatrix, making the other legatees parties defendant, and the mortgage is declared satisfied by the Circuit Court, whose judgment, upon appeal by the executrix alone, is reversed—*Held*, that the reversal cannot benefit the defendant legatees not appealing, and to the extent of their interests in the estate, the executrix cannot recover.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4415; Dec. Dig. ⟸1119.]

[3. *Attorney and Client* ⟸81.]
An attorney has implied authority to obtain and enforce satisfaction of his client's demands, and to bind him as a party litigant in certain matters appertaining to the conduct of his causes, but has no general power to contract independently in relation to such demands nor to transfer them. Per Willard, C. J.

[Ed. Note.—Cited in Wieters v. Gideon, 76 S. C. 463, 57 S. E. 193.

For other cases, see Attorney and Client, Cent. Dig. § 142; Dec. Dig. ⟸81.]

[4. *Mortgages* ⟸148.]
A forfeiture to the state for taxes, but with the right of redemption existing, does not extinguish the lien of a mortgage. Per Willard, C. J.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 299; Dec. Dig. ⟸148.]

[5. *Mortgages* ⟸490.]
The state is not a proper party to an action for the foreclosure of a mortgage upon lands which have been forfeited to the state for nonpayment of taxes. Per Willard, C. J.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1431; Dec. Dig. ⟸490.]

[6. *Mortgages* ⟸426.]
When unpaid taxes constitute a lien upon mortgaged property, a judgment of foreclosure and sale should order such taxes to be paid out of the proceeds of sale. Per Willard, C. J.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. ⟸1277; Dec. Dig. ⟸426.]

[7. *Vendor and Purchaser* ⟸231.]
Mortgagees of land are not bound to give to purchasers from the mortgagor any further notice of their claim than that which the record of the mortgage gives. Per Willard, C. J.

[Ed. Note.—Cited in Van Diviere v. Mitchell, 45 S. C. 132, 22 S. E. 759.

For other cases, see Mortgages, Cent. Dig. § 393; Vendor and Purchaser, ⟸231.]

[8. *Mortgages* ⟸148.]
When tenants in common make sale of land, and set apart the interest of one co-tenant in the purchase money to be applied to the credit of a bond secured by a mortgage upon such co-tenant's interest in the land, the mortgagees are not bound by such sale, nor will the court require them to acquiesce, upon proof that it was an advantageous sale, or because of the rights and interests of the other parties. Per Willard, C. J.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. 299; Dec. Dig. ⟸148.]

[9. *Mortgages* ⟸137.]
A mortgagee has no title to the mortgaged land, but he holds the legal title to the lien created by the mortgage. Per Willard, C. J.

[Ed. Note.—Cited in Heath v. Haile, 45 S. C. 647, 24 S. E. 300.

For other cases, see Mortgages, Cent. Dig. § 273; Dec. Dig. ⟸137.]

[10. *Mortgages* ⟸274.]
Where the executor of a mortgagor advised a purchaser that a clear, unencumbered title was being conveyed, and the purchaser believing such statement, completed his purchase and erected improvements, *held* that the improvements were not excepted from the lien of the mortgage. Per Willard, C. J.

[Ed. Note.—Cited in Folk v. Brooks, 91 S. C. 12, 74 S. E. 46.

For other cases, see Mortgages, Cent. Dig. § 722; Dec. Dig. ⟸274.]

[This case is also cited in Gibbes v. Greenville & C. R. Co., 14 S. C. 385, and distinguished therefrom.]

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*Before Reed, J., Charleston, May, 1877.

This was an action for a foreclosure of a mortgage, instituted by Amelia L. Annely and Julia A. Blake, as devisee and as executrix of Anna Maria Annely, against Wilmot G. De Saussure, executor of John W. Lewis, F. P. Lewis, J. W. A. Lewis, the Commercial Wharf and Cotton Press Company, and the heirs of John W. Lewis.

The case is fully stated in the report of Hon. B. G. Pressley, which, upon the matters considered by this court, is as follows:

To the Honorable Jacob P. Reed, Judge of the said Court:

By your order of March 16th, 1876, the issues of law and fact in this case were referred to me to report thereon to the court, with leave to report any special matter.

I respectfully report, that in connection with the solicitors of the plaintiffs and defendants, I have taken the testimony filed with this report, and find thereon the following facts, to wit:

On January 5th, 1859, John W. Lewis, Sr., was indebted to Amelia and Anna Maria Annely on two bonds, each in the sum of $5813, with legal interest, payable semi-annually until the whole amount be paid. These bonds were secured by mortgage of his one-fourth share of the commercial wharves in Charleston, and the whole principal and interest to be computed with semi-annual rests, from January 5th, 1865, are now due and unpaid.

In October, 1865, Anna M. Annely died, leaving in full force her will, whereby she bequeathed the bond held by her to Amelia J. Lewis, Francis P. Lewis and John W. Lew-

† See note at the end of this volume.

is, Jr., of whom the first named, before the death of Miss Annely, had intermarried with Julius A. Blake. She was appointed and qualified as executrix of said will, and in that character is one of the plaintiffs in this case. On July 14th, 1872, Miss Amelia Annely and Mrs. Blake, executrix, placed their said bonds and mortgage in the hands of W. G. De Saussure for friendly foreclosure. He was survivor of H. A. De Saussure & Son, who, before that time, had been the legal advisers of the mortgagor and also of Miss Annely. Her letter, accompanying the delivery of the bonds and mortgage to Mr. De Saus-

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sure, simply *directs him "to take charge of her interest in regard to the foreclosure of the bond in her possession, all parties consenting." The other bond held by Mrs. Blake, executrix, was delivered to same solicitor under same instructions.

Previous to that time the said wharves had been placed for sale in the hands of L. D. De Saussure, broker. His authority was from the mortgagor and the trustees of John Fraser & Co., who then held an undivided one-half of said property. The price limited by them for the whole was $40,000, but no offer was made for it at that price. When Mr. W. G. De Saussure, as attorney of the mortgagees, applied to the mortgagor for his consent to a decree of foreclosure, he refused to give it, unless the mortgagees would first agree to release him from personal responsibility on his bonds, and look for payment only to the mortgaged property. To that all the mortgagees, except John W. Lewis, Jr., assented, and his refusal stopped the foreclosure at that time. Mrs. Blake, being daughter of the mortgagor, would not press the foreclosure against his consent, and if that were to be done, Mr. De Saussure also informed the mortgagees that they must employ some other attorney for that purpose. They did not employ any other, but stopped the suit, and left the bonds and mortgage in the hands of Mr. De Saussure, giving him no notice or indication that they did not expect him to act as their attorney, and so to represent their interests in that behalf at a future time. I therefore hold that his authority so to represent them still continued.

After this the said wharves remained for sale in the hands of L. D. De Saussure, broker, until June, 1873, at which time the share of John W. Lewis was sold and forfeited to the state for large arrears of state taxes. This suspended, for some time, the attempt to sell the wharves as a whole, and the trustees of John Fraser & Co. advertised their moiety at public sale. That was stopped by order of the United States court, which then had charge of the said trust, and which soon thereafter transferred the authority of the trustees to S. Lord, Jr., referee.

In September, 1873, John W. Lewis, Sr., died insolvent, leaving very little personal property, and mortgages on all his real estate, greatly exceeding its market value. All

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the said *mortgages except that involved in this case, contained power to the mortgagees to sell the mortgaged property. The will of Mr. Lewis gave a like power to his executors, of whom only W. G. De Saussure qualified. In his answer he states that the other executors refused to qualify because of the manifest insolvency of the estate, and that he qualified only for the purpose of enabling him to redeem from the state the forfeiture of the Lewis interest in said wharves and sell it under the power conferred in the will, for the benefit of the mortgagees. After so qualifying, he continued the authority of the said broker to sell the said property, and Samuel Lord, Jr., referee, also employed him for that purpose, at the same time directing him to obtain authority from the other owners, and to sell the wharves as a whole. They were then very much out of repair and produced no income, or not more than paid their current expenses. That appears by the testimony of Mr. Taft, who says that the Lelands did not receive any income on their share, and paid the taxes thereon from other sources. In this condition of the property an undivided interest in it could not have been sold for its proportionate value in the whole. For that reason, S. Lord, Jr., referee, instructed the broker to obtain authority from the other owners and sell the whole property, and in that form it was offered for sale. In so offering it the broker had no express authority from the mortgagees, except such as could be conferred by W. G. De Saussure, executor of John W. Lewis, who was also their attorney. He believed that in his character as executor he was bound to pay the state taxes as first lien on the said property, and could lawfully sell the same for that purpose, even without the consent of the mortgagees. But he also regarded himself as representing them in the said matter, using his best judgment for their interest, with their knowledge and acquiescence. The price then fixed by him and the other owners for the whole property was $40,000.

Afterwards, the gale of 1874 carried away the wharf pierheads and otherwise so injured the said property and the docks as to make it impossible to use them, except for small vessels. Two or more parties then, or about that time, were in treaty to purchase the said property—none of them made a definite offer for it, except R. Q. Pinckney, president of

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the Palmetto Cotton *Press Company, who offered for the whole $35,000, which, after some delay and consultation, was accepted on January 4th, 1875. On the same day the written contract was executed by the said purchaser, and by L. D. De Saussure, as broker for the vendors, who immediately there-

after ratified it by their signatures, W. G. De Saussure signing it as executor for the Lewis interest. By this contract the vendors agree to sell their respective shares of the said wharves, but the vendee only contracts for the whole; and so to pay the purchase money, which, by the contract, "is to be divided among the vendors according to their respective interests, when definitely ascertained." The payment was to be "one-fourth cash on delivery of the property, to be held by L. D. De Saussure, as a stakeholder, and the balance when satisfactory and legal titles are executed, by bonds bearing seven per cent. interest, payable in three annual installments, secured by mortgage of the property." The testimony before me proves, to my satisfaction, that the price provided in the contract was a very full price for the said property, and the mortgagees have not produced any counter testimony on that point.

On January 7th, 1875, L. D. De Saussure, as a stakeholder, received the cash portion of the purchase money, and the purchaser immediately went into possession of the wharves. He had employed W. G. De Saussure as his attorney to examine the title. He advised that it was good, and that during the delay required for obtaining conveyances from the vendors, the purchaser might safely take possession and proceed with his proposed improvements. In reliance on that opinion, the said purchaser paid the cash portion of the purchase money, took possession and made the improvements hereinafter stated.

There is some confusion in the testimony as to the time when the mortgagees of Lewis were first informed that the sale had been effected. W. G. De Saussure testifies that it was before he signed the contract; John W. Lewis, Jr., testified that it was in the month of March, thereafter; and Mr. Blake's memory fixes it after the sale, some time in January, and a few days prior to a notice of said sale in the News and Courier. That notice was on the 11th of January, 1875, and on the 26th of the same month is the date of Miss

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Annely's receipt to Mr. De Saussure *for the said bond and mortgage, of which she then resumed possession. I therefore find, on the testimony of Mr. Blake and on the date of said notice, that the mortgagees were first informed of the sale between January 4th and 11th, 1875, and that they were then "disappointed in the sale."

It is not proved that before that time they expressly authorized their said attorney to sell their interest in the said wharves or to appoint a broker for that purpose. But they had directed a foreclosure of their mortgage in the lifetime of the mortgagor, and only his refusal to consent to it prevented the foreclosure at that time. That obstacle was removed by his death in September, 1873; and from that time until this sale more than fifteen months had passed. During all this delay the mortgagees received no interest on their bonds nor income from the mortgaged property. It was well known to be a very insufficient security for the mortgage, and was continually becoming more so by dilapidation of the buildings, increase of mud and debris in the docks, and by yearly addition of taxes and of interest on the debt. The loss to the mortgagees by this decay of the mortgaged property was not expected by them to be made good from the estate of the mortgagor. He left no other estate, except such as was fully covered by mortgage. Knowing all this, the mortgagees did not, themselves, commence or direct any suit to foreclose their mortgage. Without such suit they could sell the property only through the executor of Lewis, under the power conferred on him by the will. If they had directed their attorney to foreclose by suit at law, it would have been his manifest duty to advise them that a sale in that manner of an undivided share in property so dilapidated would be ruinous to their interests, and that a sale by him, as executor, in concert with the other tenants in common, was the easiest, best, least expensive, and far more advantageous method of foreclosing their mortgage. That method he adopted, and all the circumstances satisfy me that the mortgagees knew of his plan and acquiesced in it. They knew, also, that said property was for sale by the said broker; that is proved by Mr. Blake, who says that some months before this sale he was consulted by the broker about selling it to Mr. Pelzer. They also knew that it was not the equity of

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redemption, *but the interest of the mortgagees, which was being sold. How else could they have expected to receive the proceeds, and why "disappointed in the price when they heard of the sale?" I am, therefore, forced to find that the mortgagees relied on the judgment of their said attorney to foreclose the mortgage as he might deem best for their interest; that they knew of the plan adopted by him for that purpose, and of his appointment of the said broker to execute it; and that they acquiesced before the sale in the said plan and appointment.

After the sale none of the mortgagees, when informed thereof, gave any notice of their dissatisfaction or dissent, and two of them, F. P. Lewis and John W. Lewis, Jr., who each have an interest of one-sixth of the money secured by said mortgage, signified their concurrence in the sale, and desired to have the matter closed speedily. Whilst the completion of the title was delayed, by reason that the forfeiture to the state must be redeemed before a valid title could be made, the purchasers, relying on the opinion of their said attorney, and having no notice to the contrary, commenced the necessary improve-

ments and repairs, the extent and nature of which had been published in the notice of the News and Courier of January 11th, 1875. That was read by Mr. Blake and John W. Lewis, Jr.; whether also by Mrs. Blake and Miss Annely, is not proved; but Mr. Blake testifies that Miss Annely then lived with him, and that and other circumstances proved by him and by John W. Lewis, Jr., satisfy me that both Miss Annely and Mrs. Blake knew of the proposed improvements and of their progress. During the progress of the work of said improvements, Mr. Blake, being then the personal friend of Mr. Pinckney, considered it his duty to inform him of anticipated difficulty concerning the title to the said property. To this end he asked Mr. Pinckney if he knew of the condition of the bonds and mortgages held by Miss Annely and Mrs. Blake; told him that Miss Annely was peculiar; had great objection to signing legal papers; knew that she would not sign unless they were to get something from the sale; knew, also, that Mrs. Blake would not sign in that case. This notice was not given to Mr. Pinckney as coming from any of the mortgagees or by their authority; on the

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contrary, Mr. Blake requested *Mr. Pinckney not to mention it. He did not wish the mortgagees to hear or know that he had meddled in the matter; but though he gave this information without their authority, yet it was sufficient to require the purchasers to stop their improvements and await the perfection of their title, if it had been in time. Whatever be its date, whether in the spring, as Mr. Blake thinks, or in June, according to Mr. Pinckney, at either date, it was after that conveyances had been accepted by said purchaser from the other tenants in common, and after the improvements had been contracted for; the foundations of the range of offices had been commenced, part of them laid, and the digging going on for the other part; old buildings had been pulled down and the bricks were being cleaned for the new; and the appropriation of $13,000 to pay the contractor, had been raised to $26,000. If, in that condition of the work, the purchasers had stopped its progress, some further compensation must have been made to the contractor, and the property costing $35,000, and that cost much increased by improvements already made, would have remained in the hands of said purchasers as owners of an undivided interest, not able to derive any income from it so long as the improvements should remain in that condition. The notice of Mr. Blake was, therefore, too late as a precaution of any value to the said purchasers.

The plaintiffs claim that in addition to the record of their mortgage, the purchasers had also special notice thereof, by "a communication" to them. This claim is not proved by any testimony offered before me, but is based on the ground that it is alleged in the complaint and not denied in either answer. I find that Article IX. of the complaint does allege such "communication," but by whom, or when made, or whether it was before or after the "communication" by Mr. Blake to Mr. Pinckney, or whether that was the communication intended, does not appear by the allegation. As Mr. Pinckney testifies that the first notice he had of the mortgage was from Mr. Blake, and as Mr. Blake gave that notice, in the belief that his friend Mr. Pinckney ought to be put on his guard concerning the said mortgage, I find that the "communication" alleged in the complaint, was either that which Mr. Blake made to

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Mr. Pinckney, or was subsequent *to it. But the attorney employed by the defendants, the purchasers, to examine the title for them, I regard as having, at the time of the contract of sale, express notice of the mortgage, it being then in his hands as attorney for the mortgagees.

Before this conversation Mr. Blake had not conferred with the attorney of the mortgagees concerning the said sale, but John W. Lewis, Jr., had done so several times. His impression now is that said conferences were only casual, or "just so," as he expresses it. I differ from him in that respect, because in other parts of his testimony he says that, after hearing of the sale, "he was very glad to have the whole thing closed, being 'advised' that it was the best that could be done." That he "was at first surprised at the price, but after consulting with General De Saussure, thought it the best that could be done." It is clear, therefore, that he then regarded Mr. De Saussure as his adviser in the said matter, and that his conferences were with him in that capacity. Mr. Lewis also states that, in said conferences, he spoke only for himself, not for Miss Annely or Mrs. Blake. I do not find that he was ever authorized to speak for the latter, but there is no doubt whatever that he was the channel of communication between the former and her solicitor. He wrote and delivered the first letter which Miss Annely sent, "at his request," asking General De Saussure to take charge of her interest in the matter of foreclosing the said mortgage; and he and Mr. Blake both testify that, in their final interview with General De Saussure, they respectively represented Mrs. Blake and Miss Annely. That final interview was in July, 1875. Mr. Blake and Mr. Lewis had previously talked several times about going to see General De Saussure, but had been delayed. Miss Annely and Mrs. Blake had been asked to have the mortgage satisfied, but had heard "a rumor that the taxes would eat up the whole of the Lewis share," and "they would not satisfy the mortgage

without knowing what they were to receive." Accordingly Mr. De Saussure was asked, at this interview, to explain his plans and give a statement of the taxes and expenses.

His plan was that the mortgagees should satisfy their mortgage, so that he, as executor of Lewis, might make good title to the purchaser and receive the purchase money.

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That the cash *portion and some of the bonds for the credit portion be used to pay the state and city taxes and other charges and expenses, and the balance go to the mortgagees, who were also to petition the legislature to have the penalties, charged for the non-payment of the taxes, in time refunded to them.

This plan was objected to by Mr. Blake, partly because he thought that said penalties, if once paid, would never be refunded, and partly because there was too little (only $3000), left to the mortgagees after deducting taxes, penalties, costs and charges. They, however, took from Mr. De Saussure a full statement of the whole matter and submitted it to Mrs. Blake and Miss Annely, and they, after some consultation, resolved to consult an attorney before making a final decision of the matter.

Accordingly, on July 19th, 1875, Mr. Blake wrote to Mr. De Saussure, informing him that Messrs. Campbell and Whaley had been employed by the mortgagees as their attorneys in said matter. Said attorneys failed to adjust it amicably, and soon after filed the complaint in this case.

Before the date of the said letter the purchasers had been incorporated by the name of the Commercial Wharf and Cotton Press Company, and without notice of the refusal by the said mortgagees, had accepted conveyances from all the other vendors of their respective shares, except for the one-twentieth share of the estate of Mrs. Fitzsimmons. They had also nearly completed repairs and improvements on said wharves, costing $56,500.

These repairs and improvements, or nearly all of them, were necessary to restoring the property to its condition before the war, and without them, or nearly all of them, the said property would not have produced an income. They were made judiciously, and at the lowest cash price. The present market value of the property, so improved, is not more than $80,000. The very full contract price, $35,000, at which it was sold before the improvements, being deducted from the improved market value of the wharves, leaves $45,000, which I find as the actual value added to said property by the improvements, and if said property, as improved, could be sold for more than $80,000, the surplus, over $35,000 to the amount of $56,500, could be attributable only to the value so added.

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*I have therefore reported to your Honor that the sum of $1907.53 is due to the state for taxes on the mortgaged property, and by order of the court I was authorized to pay the same and redeem the forfeiture of the property. Of the amount so reported, $213.15 is due and payable by the defendants, if their contract of purchase be confirmed.

The city of Charleston claims the sum of $3813.30 for taxes due to it on the same property for eight years, beginning with 1867 and ending with 1874, inclusive. Whether that claim be a valid lien on said property, will depend on the matters of law, as set forth in the legal issues of this report.

Issues of Law.—On the issues of law involved in this case, I respectfully report:

First. That the executor of John W. Lewis, Sr., could not, under the power conferred on him by the will of Lewis, sell the said property discharged of the mortgage, unless the mortgagees assented to that manner of foreclosure. It had been forfeited to the state, and that discharged the lien of the mortgage, but such discharge was, at any time, capable of being set aside by the redemption of the property, either by the mortgagor or his personal representative, or, if he failed to redeem, then by the mortgagees. No other person, as the law then stood, could so purchase the property as to acquire the right to redeem it, other than in the name of the mortgagor. But if redeemed in his name, the effect of that would be to restore not only the former title, but also the former liens, according to their respective priorities. The tax was a first lien, but an executor is under no obligation to pay taxes on real estate, unless there are personal assets in his hands to be appropriated for that purpose; but his obligation to pay taxes as a first lien out of the personal assets, does not carry with it the power to marshal the liens on the real estate which is under mortgage. The mortgagor could not sell real estate, encumbered by a first and a second mortgage, in order to pay the first, nor could he sell real estate discharged of the first mortgage, in order to pay taxes or any other prior lien. Having, therefore, no such power himself, he could not, by his will, confer it upon his executor.

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*Secondly. I find that the said executor, in his character as attorney of the mortgagees, could not, without their consent, express or implied, foreclose their mortgage by a private sale of the mortgaged property; nor could he, without such consent, authorize a broker to make a contract of sale which would bind them. But I have heretofore found, as an issue of fact, that the said mortgagees, in the matter of the proper method of foreclosing their mortgage, relied upon the judgment of W. G. De Saussure, as their attorney; that they knew

of his plan for that purpose, and acquiesced in it before the sale; that after the sale two of them ratified it and that the other two did not, in reasonable time, repudiate it. It follows, therefore, that under these circumstances they should be held bound by the said contract of sale, and should be decreed to complete it. Their previous acquiescence in the plan adopted by their attorney was an equivalent to an agreement by them to satisfy their mortgage if a sale should be made by their attorney, and the co-operation of the other tenants in common in effecting a sale of the whole property, in a manner most advantageous to the mortgagees and all interested, was a sufficient valuable consideration to support the joint agreement to sell in that manner.

Thirdly. As to two of the mortgagees, F. P. Lewis and John W. Lewis, Jr., I find that the former has filed no answer in this case, and that nothing appears before me herein showing that he has any desire to be relieved from his express ratification of the said sale after it was made. The latter seems to claim that he ought not to be held to his ratification, because, he says, that his assent was upon the advice and supposition that the completion of the said sale was the best that could be done. But he has not attempted to prove any mistake in that advice, nor has he produced before me any testimony to the effect that a better sale of the said property could have been made in January, 1875, or could now be made, the property being in the same condition as at that time. I therefore perceive no equity for releasing him from his said ratification, and find that both he and F. P. Lewis are expressly bound, to the extent of their interest in the said mortgage, by the said contract of sale.

As to Miss Annely and Mrs. Blake, I find

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that apart from *their acquiescence in the plan of their attorney before the sale, their long silence afterwards, during which the purchasers, without notice from them, accepted conveyances of undivided interest in the said property from other tenants in common, and made costly improvements on the property, created new equities in favor of the said purchasers, which not only strengthen the implied agreement of the said mortgagees prior to the sale, but also constitute of themselves an equitable foundation for a decree of specific performance. Before the other tenants in common conveyed their undivided interests to the purchasers they had an acknowledged right to compel a sale of the whole for partition. Pell v. Ball, 1 Rich. Eq. 361. But they did not exercise that right, because of their belief, at that time, that all parties in interest had agreed to a private sale, and to that end had united in a contract of sale, which purported to give the purchaser a good title to the whole property. That contract so made was manifestly advantageous to all the vendors, including the mortgagees, and if the latter had in time given notice of their refusal to complete the sale, and the other tenants in common had made them parties to a suit against the purchaser for a specific performance, upon the proof offered before me in this case, they would then have been compelled to perfect the title of the purchasers. In such case the court would have regarded the true interests of all the parties before it, and would not have permitted one co-tenant, or the mortgagees of a co-tenant, to defeat a sale so manifestly proved to be advantageous to all who had any interest in the property, unless some proof had been offered that it was possible to make a better sale. In such a case as between the tenants in common and against the consent of one or more of them, it would even have the right to assign the property to one of the co-tenants at an appraised value, and if such would be the power of the court as against a tenant in common, who holds the legal title, its power is certainly no less, but rather greater, against his mortgagee who holds only an equitable title. In foreclosing that, the court may make such decree as shall best protect the rights and equities of all parties to the suit; to that end it may sell the mortgaged property at public or private sale, and on such terms and in such manner as may seem best to the

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court. In *Stoney v. Schultz, 1 Hill Eq. 465 [27 Am. Dec. 429] the mortgaged property was ordered to be sold on credit, though the whole of the mortgage debt was then due, and in order to protect the rights of purchasers of portions of the mortgaged property, it was decreed to be sold in lots and in such order as the equities and priorities of the said purchasers required. I cannot doubt that a similar power over the mortgage would have been exercised by the court in this case, and upon the abundant and uncontradicted proof that this contract of sale secured a very full price, the court would not have subjected the other tenants in common to the loss of the advantages of this contract; on the contrary, it would have compelled the mortgagees to perfect the title and the purchasers to complete their purchase. What the court would have done in favor of the equities of the other tenants in common, in case they had been compelled to apply to it for a decree of sale in partition, it will now do in favor of an innocent purchaser, who had contracted for the whole property, and who, believing that he was finally to get a good title for the whole, accepted the conveyances of the other tenants in common, and, without any notice that his title was not to be perfected, made improvements on the common property, which considerably exceed, in cost and val-

ue, the price at which it could have been sold before it was improved.

Fourthly. If my findings be correct on either of the above issues of law, it will be unnecessary to consider whether the purchaser will be entitled to a charge on the property for the value which his improvements have added to it. On the issues of fact I have found that the said property was in ruinous condition when the purchasers took possession thereof, and that all, or nearly all, the improvements they have made were necessary to restore it to its former condition. It is, therefore, claimed that it is a case of repairs, and that one tenant in common, in possession, may repair and charge the cost thereof to the common property. That might be so if, on proceedings in partition, the property could be divided without sale, and the improved portion could be set off to the tenant who made the improvements. But when this cannot be done, then the right of one tenant in common to have the cost of repairs refunded to

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him is limited to *the necessary repairs of a house or mill, and even in that case he must show that he requested his co-tenant to join in making such repairs, and that he refused to do it. 4 Kent 370. But I do not regard the work done on the property involved in this case as repairs. That relates only to buildings or structures still standing, though dilapidated, and yet capable of being made useful by repair without being pulled down and rebuilt. To erect a new building in such case, even with the old material, is not to repair, but to rebuild, and that is improvement, not repairs. If one or more tenants in common unite to purchase a house, a mill, or a factory, an agreement between them to keep it in repair would probably be presumed in law, but no such agreement would be presumed in case of the total destruction of such house, mill, or factory. I therefore find that the new wharf, new offices and new sheds, which were built upon the old sites of former buildings by the purchasers in this case, were improvements, and that the value thereof would not be a charge on the property if made by owners of undivided interests, unless they then supposed that they were to obtain good title to the other interests. On this point the decisions of the courts of this state are very clear. The cases of Hancock v. Day, McM. Eq. 69 [36 Am. Dec. 293]; Thompson v. Bostick, Id. 75; Dellett v. Whitner, Chev. Eq. 213; Thurston v. Dickinson, 2 Rich. Eq. 317 [46 Am. Dec. 56], and Corbett v. Laurens, 5 Rich. Eq. 301, all agree and settle that one tenant in common may not, without the consent of the other tenant, improve the common property, as a charge thereon, for the cost of said improvements.

But the purchaser claims to be refunded the value of his improvements under the betterment act of this state. Rev. Stat. 559. The constitutionality of this act is questioned by the plaintiffs' attorneys, who cite on that point Green v. Biddle, 8 Wheat. 100 [5 L. Ed. 547]. They also claim that this is a case of purchase from the mortgagor of property encumbered by mortgage which was duly recorded, in which case the purchaser as against the mortgagee, in proceedings to foreclose the mortgage, will not be allowed the value of his improvements out of the mortgaged property. Hughes v. Edwards, 5 Cond. Rep. 657. This doctrine would certainly be applicable to this case,

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if it were a pur*chase from the mortgagor, without the supposed concurrence of the mortgagee; but in my finding on the facts I have concluded that though the mortgage was on record, and though the purchasers' attorney had express notice of it, yet they supposed at the time of the purchase that all parties having any interest united in the said sale, and that the improvements were made by the purchasers in that belief and without notice to the contrary. Their case, is therefore, clearly that of purchasers for valuable consideration, improving the property with the knowledge of the mortgagees, and without any notice from them of their intention not to perfect the title. After silence on their part, until the improvements were almost completed, they come into a court of equity to foreclose their mortgage, and claim not only the mortgaged property according to its value at the time these innocent purchasers took possession, but also, in addition thereto, the improvements they placed upon it. To such case the betterment act would apply, if the suit were on the law side of the court; its intent is to afford the defendants in suits at law the same relief which, before the act, a court of equity had power to give, according to the doctrine that "he who comes into that court seeking equity must do equity." This doctrine I regard as plainly set forth and elucidated in the following cases, to wit: Green v. Biddle, supra; Southall v. McKean, 1 Wash. 336; Coulter's case, 5 Co. 30; Putnam v. Ritchie, 6 Paige 391; Bright v. Boyd, 1 Story 478; 2 Id. 615; Lowndes and Ton v. Chisolm, 2 McC. Eq. 455 [16 Am. Dec. 667].

On the authority of the above cases I hold that if it were possible in this case to conclude, as matter of fact, that the mortgagees of Lewis never assented to or acquiesced in the sale made in this case by W. G. De Saussure, their attorney, and that without their consent it was sold by him, as executor, solely under the power conferred on him by the will of Lewis, yet even in that case, as he believed when he made the sale that the said authority conferred on him was sufficient to enable him to convey to the purchasers a valid, unencumbered title, and so advised

the purchasers, and as they looked to him as their legal adviser in that behalf, if he was mistaken in law, and by that mistake caused the purchasers to make improvements

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on the property, *believing that their title to it was good, they will be compensated for their improvements out of the lands to the extent added thereby to its value.

This doctrine of relief against a mistake in law was subsequently fully discussed and maintained in Lawrence v. Beaubein, 2 Bail. 647 [23 Am. Dec. 155], and Gist v. Gist, Bail. Eq. 343, which settled conclusively, as the law of the state, that a mistake of law is ground for relief as clearly and as fully as a mistake of fact. See, too, Dellet v. Whitner, Chev. Eq. 213.

From the above-cited cases it is manifest that Judge Story was mistaken in supposing that he was the first to extend the equitable doctrine of compensation for improvements to the case of a claimant by land by legal title—our judges had preceded him in that matter by many years, and are quite as decided and as clear upon the point as he was.

In this case plaintiffs claim the land, not by legal title, but by the lien of a mortgage, which, under our law, is only an equitable title. As against such title, under all the decisions, even as restricted by the case of Green v. Biddle, and the subsequent case decided by Chancellor Walworth, the defendants are entitled, out of the mortgaged property, to the amount of the value added by their improvements; and, under the cases in this state, I would hold the same, under the circumstances of this case, even if the plaintiffs held the legal title. If this view be correct, there will be no necessity to order a re-sale of the property, because, according to the facts found by me, whatever it could be sold for above the contract price in this case would be due to the value of the improvements, and could not amount to their actual cost. The defendants should, therefore, not be subjected to the inconvenience and expense of a re-sale, which could not possibly benefit the plaintiffs.

The plaintiffs excepted to the findings of fact by the referee upon the questions of authority of W. G. De Saussure to act for them, and acquiescence and ratification by them, and also as to betterments, rents and profits, and actual notice by the purchasers of the wharf. Upon the referee's conclusions of law, the plaintiff's exceptions were as follows:

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*1. Because the referee erred in finding that the plaintiff, Julia A. Blake, the executrix of Maria A. Annely, could not recover the whole debt of her testatrix, because of the acts of the legatees, John W. Lewis, Jr., and F. P. Lewis.

2. Because the referee erred in finding, that even in the absence of authority from, or acquiescence in, or ratification by the plaintiffs, they should be required to complete a contract of sale to which they were no party.

3. Because the referee erred in finding that the mortgagor, who was a tenant in common, could, together with the other tenants in common, make a partition among themselves which could affect the rights of the mortgagee without his consent.

4. Because the referee erred in finding that the Commercial Wharf Company was a bona fide purchaser.

5. Because the referee erred in finding that a contract at private sale between tenants in common, should be enforced against the mortgagee, simply because he concludes it to be their interest, from the testimony of witnesses called by the purchaser from the mortgagor.

6. Because the referee erred in finding that the plaintiffs were bound by the acts of Col. Blake, John W. Lewis, Jr., and F. P. Lewis.

7. Because the referee erred in applying the doctrine of mistake of law, and in finding that the wharf company was entitled to relief, when the plaintiffs sought to enforce no contract against them, and only required them to account for rents and profits from the time of filing this complaint for foreclosure.

8. Because the referee erred in extending the doctrine of allowance of improvements to a case in which the occupants of the land had knowledge of the true state of the title, as well as of the encumbrance thereon.

9. Because the referee erred in applying the law, that allows the mortgagee in possession for his improvements, as against the mortgagor, to the case of a mortgagee out of possession against an occupant under the mortgagor.

The decree of the Circuit judge confirmed the report of the referee, and concluded as follows:

It is further ordered that the said Com-

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mercial Wharf and *Cotton Press Company do pay to the referee the sum of $8750, with interest thereon from January 4th, 1875, less the amount paid through said referee for taxes due to the state on said property, in accordance with his report; and that upon receiving said sum the referee do enter satisfaction as of record upon the mortgage held by the plaintiffs.

It is further ordered that the referee, after paying the costs of the plaintiffs, do pay over the remainder of the sum so received by him to the plaintiffs in this case, and that they have leave to enter up their decree for the amount remaining unpaid on their bonds against the estate of Lewis; to be paid in due course of administration of said estate.

From this decree the plaintiffs appealed

upon the several grounds taken as exceptions to the referee's report.

The defendant, W. G. De Saussure, appealed upon the ground that his Honor should have ordered that out of the proceeds of sale, after the payment of costs, there should be paid to the defendant a commission of five per cent. for effecting the sale, either as executor of John W. Lewis, under the power of sale contained in his will, or as agent or attorney of the plaintiffs, as reported by the referee.

[For subsequent opinions, see 17 S. C. 389; 26 S. C. 497, 2 S. E. 490, 4 Am. St. Rep. 725; Ex parte Blake, 18 S. C. 603.]

Messrs. B. J. Whaley and J. B. Campbell, for plaintiffs.

Messrs. De Saussure & Son, for the executor of J. W. Lewis.

Messrs. Simonton & Barker, for wharf company.

October 30th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The action is for the foreclosure of a mortgage. The complaint alleges that J. W. Lewis gave a mortgage to the plaintiff, Amelia L. and to Anna Maria Annely, to secure two several bonds, one to the said Amelia and one to Anna M., covering the undivided one-fourth part of certain wharf property in the city of Charleston, known as the commercial wharves. That Anna M. has died, leaving a will, of which the plaintiff, Julia A. Blake, is executrix;

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that J. W. Lewis, the *mortgagor, has died also, and that the defendant, W. G. De Saussure, is his executor. The proper parties appear to be before the court.

The executor of the mortgagor, J. W. Lewis, and the Commercial Wharf Company, answered, setting up a contract of purchase, under which the Commercial Wharf Company claim to have become the owners of the wharf property, made by the executor of J. W. Lewis, under a testamentary power of sale, and by the other parties owning the remaining three-fourths of the property, and claim to have made valuable improvements on the property, greatly enhancing its value, rendered necessary by injuries arising from various causes to the structures on the wharf property. It does not appear by the answer that the mortgage has ever been satisfied, or the mortgaged land released by the mortgagees, but certain matters are set forth which are claimed to have extinguished the right of the mortgagees under this mortgage, and to have subjected them to certain equities set forth by the defendants, as arising out of their contract of purchase. The nature of these claims will be stated in connection with the discussion of the question raised upon them.

The case was heard before a referee, and a decision rendered sustaining the claims of the defendants.

The report was confirmed by the Circuit Court, and the plaintiffs now appeal, alleging exceptions to various points of decision made by the report of the referee.

The referee holds that the plaintiffs are bound by the contract made by the executor of the mortgagor, on the ground of acquiescence. He says: "I am, therefore, forced to find that the mortgagees relied on the judgment of their said attorney to foreclose the mortgage, as he might deem best for their interests; that they knew of the plan adopted by him for that purpose, and of his appointment of the said broker to execute it; and that they acquiesced before the sale in the said plan and appointment."

The foregoing implies that W. G. De Saussure, executor of the mortgagor, was also the attorney of the mortgagees, and that whatever he thought advisable to do in this double character, bound them, as the act of their attorney, to such extent, at least, that, unless they expressly objected to his action, they

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were *bound, by the principle of acquiescence, to the extent of destroying the lien of their mortgage. Although his conclusion is stated by the referee as a conclusion of fact, it is evidently a mixed conclusion of law and fact.

It is doubtful, on the face of the answer of Mr. De Saussure and the testimony, whether either the plaintiffs or Mr. De Saussure himself considered that the relation of attorney and client existed between them at any time subsequent to the death of J. W. Lewis, the mortgagor. Mr. De Saussure says, in his answer, that in the summer of 1872 the plaintiffs "placed the said bonds and mortgages in the hands of this defendant, professionally, to foreclose said mortgages, and the papers, by way of summons and complaint, were prepared for the purpose, but in consequence of an objection made by the said John W. Lewis, the said plaintiffs instructed this defendant not to proceed further in the matter. The said bonds and mortgages remained in the hands of this defendant until January 26th, 1875, when they were delivered up to the plaintiff, Amelia L." This is the only statement of the relations of the parties in question that we can find in the answer of Mr. De Saussure, and it falls far short of claiming that the relation of attorney and client existed between himself and the plaintiffs after the decease of Mr. Lewis. We find no evidence in the testimony of the existence of such relation after Mr. De Saussure became the executor of Mr. Lewis. The continuance of that relation cannot be presumed, for the obvious reason that when Mr. De Saussure became the executor of the mortgagor he assumed responsibilities inconsistent with his acting as the professional adviser and representative of the plaintiffs.

Finally, it is clear that Mr. De Saussure did not regard himself as acting in the interest of the plaintiffs, for it appears by his own testimony, as well as that of another witness, that when in consultation as to the possible effect upon the treaty with the Commercial Wharf Company of the refusal of the plaintiffs to assent to such contract, he assumed the ground that if their consent was withheld the title might be made through the forfeiture of the land for non-payment of taxes. If Mr. De Saussure had supposed that he was under an obligation to pursue the interests of the plaintiffs, he could not

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and would not, as we are *bound to say, have devised any mode of carrying out the plans of the other parties in disregard of their interests. In this respect it is apparent that the referee has done Mr. De Saussure unintentional injustice.

But if Mr. De Saussure had been the attorney and counselor of the plaintiffs it would not follow that without special authority he could make a contract that would so far bind his clients that they could only discharge such obligation by express notice repudiating his authority.

The relation of attorney and client implies authority to enforce the demands of his client, of obtaining either voluntary or coercive satisfaction of such demands, and to bind the client as a party litigant in certain matters appertaining to the conduct of causes; but it does not confer a general power of attorney to contract independently in relation to such demands, nor to transfer such demands to a third party. The proper duty of a counselor is to advise his clients; if he becomes a negotiator, a business manager, it is through some other form of authorization than that implied in being selected as a legal adviser merely.

The evidence shows no authority in Mr. De Saussure to bind the plaintiffs by any contract whatever.

The first proposition of law by the referee, adverting to the fact that the property had become forfeited in the state for non-payment of taxes, says: "It had been forfeited to the state, and that discharged the lien of the mortgage, but such discharge was at any time capable of being set aside by the redemption of the property, either by the mortgagor or his personal representative, or, if he failed to redeem them, by the mortgagees." If this be taken as a correct statement of the rights of the parties as against the state, then the forfeiture to the state was not absolute, but leaving outstanding a right of redemption: whether legal or equitable, the state would be regarded as holding title as security for a debt, and its rights would be in the nature of a mortgage prior to that of the plaintiffs. How the existence of such a prior mortgage could extinguish the lien of a subsequent mortgage, when there was a clear right of redemption for the latter to act upon, is inconceivable.

It may be as well in the present connection

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to notice the *general question as to how far the consequences of the forfeiture of the land to the state by the failure to pay taxes can be brought into the case, thus anticipating the fifth proposition of law.

Only the right existing between the plaintiffs and defendants can properly be considered in the present case. Can a mortgagor, in a suit for foreclosure, set up title in a third person, not a party to the suit, and in which he has no interest? Clearly he cannot. If so, then in case the mortgagee was let into possession, on condition broken, and the mortgagor put to his bill to redeem, the mortgagee could plead as against such right of redemption title outstanding in a third person, with which he was disconnected.

The action is based upon the rights existing between mortgagor and mortgagee. The mortgage being established, as between the mortgagor and the mortgagee, and a breach shown, the only right of the mortgagor that can be considered is that of the right of redemption.

If the mortgage binds nothing by reason of title outstanding in a third person, then the equity of redemption is valueless, and the mortgagor has no interest to defend.

Nor could the title of such third person be examined unless he is made a party. The state is not a party in the present case, neither is any person a party claiming to have derived title or to hold under the state.

When a mortgagor remains in possession of the mortgaged premises, as was the case here, he is entitled to the rents and profits of the mortgaged lands without liability to account. He should accordingly pay annual taxes, as he has the fund out of which they should be paid, namely, current income. If there happen to be no income, that does not change the legal relations of the parties. The mortgagor is not bound to hold possession, and may throw the entire burden of protecting the mortgaged lands upon the mortgagee by surrendering possession. If he does not choose to do so he can gain no advantage by suffering taxes to accumulate or allowing the land to become forfeited or sold for taxes. Certainly, in a court of equity, he would stand in a bad light, alleging that through his failure to keep down taxes the mortgagee had lost the lien of his mort-

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gage, and thus *claim to be left, or that his assignees may be left, in undisturbed enjoyment of the mortgaged premises as against the mortgage.

Whether the land mortgaged has been forfeited for non-payment of taxes, or whether there is or is not a right to redeem them by law in the parties to the suit, or whether the lands are in the position of being chargeable

with state or city taxes, are circumstances altogether immaterial to the present question. If the taxes claimed to be due to the state and city are to be regarded as still operative as a lien on the lands in the hands of the proper legal owners, then, as was held in Smith v. Gatewood, 3 S. C. 333, they are to be regarded as liens prior to that of the mortgage, and title made under a decree for the plaintiffs must be subject to such liens, unless provision is made for the payment of such taxes out of the proceeds of the sale of the mortgaged lands. To accomplish this it is not necessary or proper that either the state or the city should be made parties to such action. The state and city have a right to choose their own methods, as allowed by law, of enforcing their taxes, and should not be subjected to the expense of becoming parties to all suits incidentally involving questions of taxation, as was said in Smith v. Gatewood. Under proper administrative orders the officer authorized to sell for foreclosure may apply the proceeds of sale to the payment of taxes. If there is a question as to the legality of the taxes imposed, the course to be pursued can be fixed in suitable administrative orders.

It, therefore, follows that all that is decided by the referee in regard to an outstanding title in the state for taxes, and as to the proper mode and effect of redemption, and as to the effect of unpaid state and city taxes, the right of the parties, is foreign to the issues in the present case.

The conclusion of the referee, that forfeiture to the state discharged the mortgage, was erroneous.

The conclusions as to the powers of the executor of the mortgagor to pay taxes, are quite immaterial to the present case. They may tend to show that the mortgagor had not, by any intentional default, suffered the lands to become forfeited by non-payment of taxes, but as no such charge is made by the plaintiffs the inquiry is immaterial. The fact

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that the executor *of the mortgagor has had no means of keeping down the taxes, cannot benefit the assignee of the mortgagor or prejudicially affect the rights of the plaintiffs, as mortgagees, in any way.

The second conclusion of law is based upon the finding of fact in reference to acquiescence on the part of the plaintiffs in the action of Mr. De Saussure, and is already disposed of by the conclusion of fact above stated, that no authority in Mr. De Saussure is shown sufficient for a foundation for the application of the principle of acquiescence.

The third proposition advanced by the referee holds that F. P. Lewis and J. W. Lewis, Jr., co-devisees with the plaintiff, Julia A., under the will of Anna M. Annely, deceased, and made defendants to the complaint, are bound to the other defendants, on the ground of acquiescence.

F. P. Lewis and J. W. Lewis, Jr., are not before us as appellants from the decree, and, therefore, it must stand as against them. It cannot, however, bind the plaintiff, Julia A. Blake, in either of the characters in which she sues, viz., as devisee of A. M. Annely or as executrix of the latter. As devisee, it leaves her share of the estate of her testator unaffected. As executrix, it excludes her from claiming in the right of F. P. Lewis and J. W. Lewis, Jr., co-devisees, as equity will look through her title, as executrix, to the substantial rights it covers, and finding that F. P. Lewis and J. W. Lewis, Jr., have bound their interests in the manner determined by the decree of the Circuit Court, it will not permit the executrix to set up in their right, what they themselves could not demand as against their co-defendants. But, for all that appears before us there may be other interests, as that of creditors of the testator, entitled to such protection, who would not be affected by any act of such devisees, and who are not parties to the action; as to such possible rights there must be an inquiry in the Circuit Court, under proper orders, to be made conformable to the judgment of this court, and the rights of such third parties, if any there be, placed on the same footing with those of the executrix and devisee, Julia A.

The referee also holds that the plaintiffs, Miss Annely and Mr. Blake, are bound to

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the defendants also, on the principle of *acquiescence, independently of the authority conferred upon their alleged attorney, constituting "an equitable foundation for a decree of specific performance."

This conclusion states, as its grounds, two facts. First, their silence while the defendants were purchasing, without notice from them, from other tenants in common. Second, the additional fact of such silence, while the purchasers were making valuable improvements on the premises. This proposition is not correct, unless a general rule can be stated to this effect, that a mortgagee of an undivided interest in lands, under a recorded mortgage, is bound to give express notice of a refusal to be bound by a sale made by his co-tenants, holding in common with the mortgagor, when such co-tenants are known to be dealing with the land in contravention of such mortgagee's rights. This is an extraordinary conclusion which, if sound, will tend to impair materially the value of mortgage securities of that class.

One who purchases lands bound by a recorded mortgage, buys with notice. It is equally so whether the mortgage effects an undivided interest in the land or the entire interest. The statute determines what the notice shall be and nothing more can be exacted either at law or in equity. The purchaser purchases at his peril, having the right to demand access to the instruments

that constitute the title he is purchasing, and all legal encumbrances upon it.

It is said that the purchase was made in the belief that the executor of the mortgagor had authority from the mortgagee to release the mortgage; then it was the obvious right and duty of the purchaser to demand proof of such authority. It was not to be assumed that the mortgagee would place in the hands of the executor of the mortgagor unlimited power of negotiation, and of canceling or discharging the mortgage. It does not appear that Mr. De Saussure ever asserted that he had such authority; on the contrary, it appears that he looked to the right of the state in virtue of forfeiture of the lands for non-payment of taxes as the means of making title in the purchaser in case the plaintiffs would not concur in his plans. There is no evidence to show that any conduct on the part of the plaintiffs, or either of them, contributed to impress the minds of

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the purchasers *with the idea that Mr. De Saussure possessed the authority they now allege that they thought he possessed. There is no foundation in the evidence, or the reasonable presumptions therefrom, for applying to these plaintiffs any limitation of the rule of conduct affecting all other mortgagees of undivided interests in lands.

The referee, in discussing this question, refers to the right of partition that existed among the tenants in common, and says: "But they did not exercise that right because of their belief at that time that all parties in interest had agreed to a private sale, and to that end had united in a contract of sale, which purported to give the purchaser a good title to the whole property."

The fact that they did not exercise the right of partition is of importance, but the reason why they did not is altogether unimportant, unless that reason involves something tending to affect the equities or legal rights of the plaintiffs. The statement here is simply as to the belief of the purchaser founded on the contract of purchase itself. That contract was in writing, and did not purport to contain the signature of the plaintiffs, or of any one assuming to sign in their behalf. They could have drawn no such inference from the contract.

The referee, further discussing the same question, goes on to state that the contract was advantageous to the parties, and if the plaintiffs "had, in time, given notice of their refusal to complete the sale, and the other tenants in common had made them parties to a suit against the purchasers for a specific performance, upon the proof offered before me in this case, they would have been compelled to perfect title in the purchaser." If the referee here means to say that the court would have specifically enforced the contract on general equitable considerations, independently of proof of authority in Mr. De Saussure to bind the plaintiffs, it is not easy to see what ground there is for the conclusion. Of course, it will not be contended that one tenant in common can compel another by suit for specific performance, or in any other manner, to consent to and be bound by the contract of the former to sell the land held in common, upon the ground that the contract is advantageous to the latter.

It may be that the referee contemplated

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partition proceedings *in his remark. If so, his conclusion is equally erroneous, for in partition the court would not have adopted a private sale by one tenant in common as the basis of a decree enforcing such contract of a sale as against one refusing to be bound by it, however advantageous it might seem. Individuals make contracts for themselves; not the courts for them. The courts merely enforce that which is accomplished in the right and by the mind of the parties.

The result of a partition would have been the sale of the land at public sale, if it could not be actually partitioned with reasonable convenience. Perhaps, in such a case, the land might have brought less than the purchaser was willing to pay for it. That is a matter for the consideration of the parties, who are not wards of the court or dependent on its assistance.

The referee is equally in error in holding that in such a writ "the court would have regarded the true interests of all the parties before it, and would not have permitted one co-tenant or the mortgagees of a co-tenant to defeat a sale so manifestly proved to be advantageous to all who had any interest in the property, unless some proof had been offered that it was possible to make a better sale." The courts do not undertake to enforce the interests of parties sui juris, but to enforce their rights. They may not allow their views of interest to prevail against rules of law and equity, but will not supplement their errors and fallibilities nor coerce their stubbornness from a more enlightened view of their interests than they themselves are willing and able to take. These principles are fundamental to enlightened jurisprudence. Nor would the court look to the interests of the tenants in common as a class as distinct from their individual interest, for there is no other bond, legal or equitable, between them than that their several rights meet in the same subject of property. There is nothing in the nature of an obligation arising from a contract, express or implied, existing between them that equity can lay hold of to give shape to their common rights and conduct. They are neither a legal corporeity nor related by any fiduciary tie nor obligation to pursue a common object. Both law and equity can, under certain circumstances, apply as between them certain modifica-

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tions of the ordinary rules relating *to own-

ership in severalty. So equity may intervene to disasseverate their possession by dividing or selling the property for division of the proceeds, but that is accomplished not to carry out any equity implied in the relation, but to sever it on equitable principles.

The referee further says: "In such a case as between tenants in common and against the consent of one or more of them, it would even have the right to assign the property to one of the co-tenants at an appraised value." It is not necessary to inquire whether as between tenants in common, like the present, deriving their title from distinct and independent sources, and not distributees or devisees from a common ancestor, the court could exercise the right here indicated; it is enough to know that no such authority has been exercised.

The essential feature of this proposition is the idea that one tenant in common may sell the entire lands held in common as if they were his own in severalty, and if called into a court of equity may validate his action, if he can show that under a proceeding in such court for purchase he might have by some means been enabled to reach the same practical result.

The purchasers do not ask a decree in the nature of partition based upon the rights of the parties as they stood at the time of suit brought. But what they ask is a decree of the character that would have been made had partition been obtained at the time they became purchasers of the property. They do not want the value of the property, as it stands, the basis of partition, but its value at the time of purchase. The proposition of the referee is, then, that the act of the co-tenants as affecting the plaintiffs, considered as representing the interests, subject to mortgage, was equivalent to a decree and sale in partition, subject to the right of the court to say that it was not well grounded in equity. Thus the co-tenants are the court of original jurisdiction, and the Circuit Court a revisory body to record its decrees, if not found wanting equity.

The court of equity often applies the principle of approving, when done without its authority, that which it could have authorized, and which it clearly appears it would have authorized. It will not be pretended

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that the court could authorize *one tenant in common to exercise the power of partition as against his co-tenant or one claiming in his right, nor will it sanction that which it could not authorize. The act of the co-tenants, under whom the purchasers claim, was an assertion of dominion merely; what is essential to separate tenancies in common is judicial authority; the court cannot make the one the equivalent of or the substitute for the other.

The referee adds: "If such would be the power of the court as against a tenant in common who holds the legal title, its power is certainly no less, but rather greater, against the mortgagee who holds only an equitable title." It is true that he does not hold the title to the land while the mortgagor remains in possession, but he holds the lien or security on the land by a legal title. Simons v. Bryce, 10 S. C. 354.

It is erroneous to suppose that a mortgagee holds only an equitable title to his security. The statute (Gen. Stat. 536) only takes away possessory action by the mortgagee while the mortgagor is in possession, but by so doing recognizes that the mortgagee has a legal title to the security. The equitable doctrine that a mortgage is a mere security for debt, on which the statute was founded, does not affect the character and nature of the title passed by the mortgage, for that existed independent of equity, but limits the use of that title against the mortgagor. A right created at law is none the less a legal right in its nature, because equity holds it affected by equitable considerations.

The statement of the referee, that in foreclosing "the court may make such decree as shall best protect the rights and equities of all parties to the suit," is correct, but may be misunderstood. The object of foreclosure is clear and definite. It is to sell the land by judicial sale, bar the equity of redemption, and give a personal decree, when demandable, for any deficiency of the proceeds of sale to pay the mortgage debt. The rights of mortgagors and mortgagees may become affected by and complicated with many circumstances giving rise to legal or equitable consequences that can be observed by the court. This does not, however, authorize the court to leave the beaten track of a familiar proceeding to devise more perfect methods of subserving the real or supposed interests of the parties.

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*The referee further adds that the court "may sell the mortgaged property at public or private sale, and in such terms as may seem best to the court." We know of no authority to sell at private sale under a decree of foreclosure in invitum. To a certain extent the court may fix the terms of sale, but an order for that purpose is made for the mutual benefit of all concerned, based solely on the ground of placing the property in the best marketable condition; it cannot be construed into a right to change the relative rights of the parties as they stand under the mortgage.

He finally concludes, on this point: "What the court would have done in favor of the equities of the other tenants in common, in case they had been compelled to apply to it for a decree of sale in partition, it will now do in favor of an innocent purchaser, who has contracted for the whole property, and who, believing that he was finally to get a good title for the whole, accepted the conveyances of the other tenants in common, and, without

any notice that his title was not to be forfeited, made improvements on the common property which considerably exceed in cost and value the price at which it could have been sold before it was improved." The basis of this proposition we have considered and denied, namely, that upon partition the co-tenants, other than those represented by the plaintiffs, could have compelled the plaintiffs to accede to their contract of sale, because it was advantageous. If, then, the purchasers have equities against the plaintiffs, it must be upon other grounds than that these expectations are disappointed. Equity does not deny the fundamental principles of law. It does not assume to equalize among men the consequences of errors of judgment or misfortune. It is not a chimerical expediency, but a resolute system, looking to rights according to their proper equitable interpretation. It sometimes exercises providential care in the right of those incapable of representing themselves or protecting their own interest, but independently of this peculiar jurisdiction, inapplicable to the present case, it is contented to see that the dealings of men are just and equal, without attempting to insure that the practical and material results of those

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dealings shall be *distributed with theoretical equality. To do this would transcend the offices of Divine Providence.

If there are any equities in favor of the views presented by the referee, they must arise from the proposition that it is inequitable and unconscionable for the plaintiffs to avail themselves of the benefits conferred on the mortgaged property by the improvements put upon it by the purchaser, and of the enhanced value of the property resulting from such improvements. This is not equivalent to asking whether, in the forum of private conscience, the plaintiffs could justify the acceptance of these benefits procured by the means and effects of others. Equity does not administer the dictates of private conscience, but certain rules that have been justly called the conscience of the court. If, therefore, the claims of the plaintiffs are inequitable and unconscionable, it is because they contravene fixed rules and principles of equity. Do they?

It is clearly inequitable for a party to demand the fruit of fraud, misrepresentation or dissimulation. The plaintiffs are free from any such charges. It is not inequitable for a mortgagee to claim the benefits of all improvements put on the mortgaged premises. The mortgage is a security for a fixed sum, that cannot be decreased by injury to or destruction of the property, or increased by adding value to it. In the present case, the value of the mortgaged premises was impaired by the casualties of war and tempest. Had the mortgagor himself rebuilt, there would not have been a question but that in legal and equitable consideration, the right of the mortgagee to go upon the improvements for the satisfaction of his mortgage, would have been perfect. How can the plaintiff's rights be less, so far as restoration has been accomplished by the assignee of the mortgagor. If a mortgaged house is consumed by fire and rebuilt by the mortgagor or his assignee, has there ever been a question whether it was equitable for the mortgagee to assert his mortgage, as it regards such improvements? So far as it regards the question of improvements made jointly by the assignee of a tenant, subject to mortgage, and his co-tenants, not affected by such mortgage, or as in the present case, by a party uniting both these characters, no inquiry has been made and findings

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of fact presented, enabling *this court to determine whether the improvements are of a nature, and the property so circumstanced, as to call for the recognition of equitable severalty in them, as regards the undivided interest derived under different titles. Williman v. Holmes, 4 Rich. Eq. 475. For the want of a proper basis of fact, that question cannot be considered in the present stage of the case; but there should be an inquiry into such facts and proper action thereon.

But should it appear that the improvements must enure to the benefit of the plaintiffs, it is not inconsistent with any rule of equity that they should insist on such demand. On the other hand it would be entirely inconsistent with equitable rules to deny to the plaintiffs relief to which they are entitled, simply because it imposes hardship on the purchaser.

We cannot say that the purchaser, if compelled to suffer hardships, is free from fault in the matter. It was the plainest dictate of prudence to perfect their title before expending upon the improvement of the property. If the purchaser felt secure on account of the forfeiture to the state, that expectation rested on a speculation that contemplated the entire loss to the plaintiffs of their mortgage security through taxation, and its failure entails upon the plaintiffs no duty to submit to the destruction by the arm of equity of that which has escaped the hardships of taxation.

Nor is there any reason to say that the plaintiffs have received benefit from the improvements by the purchaser, and, therefore, an equity rises against them. The object of the defence is not to obtain compensation for benefits conferred, but to deprive the plaintiffs of the right themselves. But the conclusive answer to the proposition under consideration is, that improvements put upon mortgaged lands, are not, in equity, regarded as benefits conferred on the mortgagee, nor can this conclusion be changed by the circumstances of the particular case, as it regards the sufficiency of the security without the improvements.

The application made to the case by the referee of the betterment law, and the equitable principles analogous to those to which that law relates, rests upon two grounds. The first has already been disposed of, inasmuch as it involves the supposed acquiescence of the plaintiffs; the other will be considered.

Referring to Lowndes v. Chisolm, 2 McC.

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Eq. 455 [16 Am. Dec. 667], the ref*eree says: "On the authority of the above case, I hold that if it were possible in this case to conclude, as matter of fact, that the mortgagees of Lewis never assented to, and acquiesced in, the sale made in this case by Mr. De Saussure, their attorney, and that, without their consent, it was sold by him as executor, solely under the power conferred on him by the will of Lewis, yet even in that case, as he believed when he made the sale, that the said authority conferred on him was sufficient to enable him to convey to the purchaser a valid, unencumbered title, and so advised the purchaser, and, as they looked to him as their legal adviser in that behalf, if he was mistaken in law, and by that mistake caused the purchaser to make improvements on the property, believing that the title to it was good, they will be compensated for their improvements out of the lands to the extent added thereby to their value."

In other words, if the mortgagor, being the legal adviser of a third party, says he has authority to make good title as against a recorded mortgage, and such third person takes title under such assurance, he shall be so far released from the mortgage as to be protected as to all improvements made on the premises, whether such representation was correct or incorrect. If correct, he holds through its truthfulness; if incorrect, in virtue of its being a mistake.

The attention of the referee evidently was not called to McDow v. Brown, 2 S. C. 95, where the equitable relief afforded by equity in cases of mistake, was considered very fully upon the authorities. It will not be necessary again to develop that subject. It is enough for the present case to quote the language of Chancellor Dargan in Murrel v. Murrel, 2 Strob. Eq. 148 [49 Am. Dec. 664], who says: "A party fully competent to protect himself, under no disability, advised as to all circumstances by which he may be saved his rights, or in a situation where he might, by due diligence, be so advised, not overreached by fraud, concealment or misrepresentation, nor the victim of mistake, against which prudence might have guarded, has no right to call the courts of justice to protect him." This is sufficient to deprive the purchaser of the equitable relief demanded, as we have already seen.

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*It is held in McDow v. Brown, as to mistakes of fact, that "when a mistake has arisen without the fault of either of the justices * * * relief is granted only when the mistake is mutual." In the case, as presented by the purchaser, the mistake, if any was made, was one of fact as to whether the executor had been authorized to act for the plaintiffs in the manner contended for. That question has been considered in this case as one of fact alone, for it is not pretended that the executor had any implied or presumable authority whatever, or any other authority, except such as might be conferred by some act of the plaintiffs susceptible of proof as matter of fact. It was not a mistake as to the relationship or rights of the parties, nor as to the construction of a power in a will, deed or contract, nor in any other sense a mistake of law. Had there been a mistake of law on the part of the legal adviser of the purchaser, it is not clear how the consequences of that mistake could have been visited on the plaintiffs, especially when, by prudence, it might have been avoided, but the case presents no such question.

In McDow v. Brown, the case of Lowndes v. Chisolm is considered, and it is said that it "did not necessarily depend on the power of equity to grant affirmative relief on a bill alleging mistake, but upon the principle that when parties are before the Court of Equity seeking equity, the court will look into transactions collateral to and dependent upon the principal subject of inquiry, in order that full justice may be done."

Lowndes v. Chisolm stands upon the equities between a surety on a bond, additionally secured by mortgage, and the obligee of the bond subsequently becoming purchaser of the mortgaged property. The question of relief in equity for mistake of law is there discussed, but not with the view to lay down any final rule on the subject. But with that doctrine we have no concern at present.

The question of taxation raised by the fifth proposition of the referee, has already been disposed of. The conclusions of the referee as to interest, being based upon views from which this court dissents, are erroneous.

The decree of the Circuit Court and the report of the referee, so far as inconsistent herewith, should be set aside, and the cause

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*remanded for proceedings conformable to what is here determined. As has already been said, there should be an inquiry under proper orders to ascertain whether there are parties other than the devisee, Julia A. Blake, and the co-devisees, entitled to participate in the assets of the estate of Anna M. Annely, who, on the foregoing principles, ought to be considered. An inquiry should also be made into the situation and circumstances of the mortgaged property, with a view to determine whether actual partition can be made, and a decree made for the sale of the undivided one-fourth part of the prop-

erty, in case such actual partition cannot be had, with liberty to the defendants, if they desire, to have the whole property and improvements sold, as for partition among them, to have it decreed accordingly, application of the proceeds of such sale to the payment of the amount found due on the mortgage to be made, as to their extent upon the principles of this decision, and in accordance with the determination of this matter reserved for further consideration by the Circuit Court.

HASKELL, A. J. I concur in the opinion that the judgment should be reversed, upon the ground that there is a total lack of evidence to support the conclusion that the executor of Lewis, either in that character or personally, had authority to act for the mortgagees, or that the mortgagees ratified his action as to them by acquiescence or otherwise. I concur further in the opinion that such parties in interest as have not taken an appeal are bound by the Circuit decree. The mortgage, therefore, to the extent not thus affected, remains a lien on the interest held by Lewis. What that interest is, has not been considered by the Circuit judge, for the whole case turned upon the point which is error, and the right to foreclose being thus denied, the question of partition was never reached.

I concur, therefore, in the opinion that the case should be remanded for such further proceedings in the court below as may be necessary, in conformity with the views expressed by the Chief Justice on the points above indicated.

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*McIVER, A. J., dissenting. This was an action to foreclose a mortgage executed by the testator, John W. Lewis, to secure the payment of two bonds held by the plaintiffs respectively. The mortgage covered an undivided fourth part of the commercial wharves, a property situate in the city of Charleston.

The issues of law and fact were referred to a referee whose report contains such a full and clear statement of the facts as to render a repetition of them here wholly unnecessary.

To this report various exceptions were filed by the plaintiffs, all of which were overruled by the Circuit judge, and from his judgment this appeal is taken upon the same grounds as are set forth in the exceptions to the referee's report.

It is very manifest that if the conclusions of fact reached by the referee and confirmed by the Circuit judge can be sustained, there is no ground for this appeal.

The rule that the findings of fact by a referee, concurred in by the Circuit judge, will not be set aside unless they are without any evidence to sustain them, or are manifestly against the weight of evidence, is so well settled and has been so frequently announced by this court that it is not necessary to cite the cases establishing it. Without entering upon a detailed examination of the testimony in this case, with a view to justify the conclusions of the referee, which is as unusual as it would be unnecessary in this case, it is enough to say that, in my judgment, after a careful examination of the testimony, there is no sufficient ground for disturbing the findings of fact by the referee, concurred in, as they are, by the Circuit judge.

It certainly cannot be said that the conclusions of fact reached by the referee are without any evidence to maintain them, and I do not think that they are manifestly against the weight of the evidence. On the contrary, it appears to me that there is very strong support for the main finding of fact that Mr. De Saussure, in making the sale, acted with the knowledge and assent of the mortgagees, in the undisputed fact that they were disappointed in the results of the sale.

This shows two things: First, that they knew of the terms of the sale, as otherwise there would be no reason in their expressing dissatisfaction; and, second, that they

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then understood that *the entire fee was sold and not merely the equity of redemption. For, if it was merely the equity of redemption which was sold, then there was no conceivable reason why they should express disappointment at the sale, as their rights could not possibly be prejudiced thereby, but they would, on the contrary, be actually benefited. The testimony leaves no doubt, not only of the fact that the property was sold for its full fee simple value, but that by selling the whole property together, rather than the one undivided fourth separately, upon which alone the plaintiffs had a lien, that fourth brought more than it would have done if sold as an undivided share. It is impossible, therefore, to believe that a mortgagee would express dissatisfaction at a sale of the equity of redemption in the property covered by his mortgage for a price equal to its full fee simple value, as by that means his chances for realizing the whole of his debt would be legally increased, especially in a case like the present, where the property mortgaged constituted the sole security, (the mortgagor being insolvent,) and was encumbered by a large arrearage of taxes which would have to be first paid out of the proceeds of a sale ordered to foreclose the mortgage. Act of March 19th, 1874, § 126, 15 Stat. 774. In addition to this it may be remarked that the testimony tends to show that the disappointment of the mortgagees arose, not from the fact that the sale was an absolute sale of the entire interest nor from the price obtained, but from the apprehension that the proceeds of the sale of the share upon which their lien rested would be wholly, or to a large extent, consumed in the payment of taxes and other charges, leaving but little, if anything, to be applied to the mortgage.

Another circumstance which tends to strengthen the conclusion of the referee is that neither of the plaintiffs has ever yet denied the authority of the executor to make the sale, or their full knowledge of an acquiescence in his proceedings up to the time of the sale, neither of them having been examined as witnesses in the case. Numerous references were held, continuing from day to day, and although it was manifest from the course of the testimony that the defendants relied upon the fact that the executor in making the sale acted with the knowledge and assent of the mortgagees, as evidenced by

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the testimony in regard *to conversations between Blake and Lewis, who were alleged to be the agents of the plaintiffs, and the executor, and the message sent to them by the executor before concluding the contract of sale, yet neither of the plaintiffs were put upon the witness stand to disavow the authority of the executor to sell, or to deny any knowledge of, or assent to, his proceedings.

Another circumstance in support of the view taken by the referee is to be found in the condition of things existing at the time, which rendered it highly probable that the mortgagees would have done just what the referee has found they did do for the protection of their own interests. Here were mortgagees holding a mortgage as the sole security for their debt which was rapidly increasing in amount, no payment having been made in about ten years upon property on which large arrearages of taxes had accumulated, which the mortgagor had no means of paying, and which the mortgagees do not appear to have taken any steps to provide for, though the property covered by the mortgage had been forfeited for non-payment of taxes, and the time allowed for redemption was rapidly drawing to a close, in which event the security would be wholly lost. Under these circumstances the most ordinary prudence would seem to prompt the mortgagees not only to assent to, but gladly adopt any scheme by which the property could be sold to the best advantage and at the least cost possible, whereby a portion at least of their debt might be saved. This is exactly what was done. The testimony places it beyond dispute that the mortgaged property was sold to the best possible advantage, without cost to the mortgagees, and after relieving the tax encumbrance, a balance is left to be applied to the mortgage debt. Thus, the result has proved the wisdom of the course adopted by the executor, with the knowledge and assent of the mortgagees, as the referee finds, and as I must believe from all the circumstances of the case.

The apparent inconsistency of Mr. De Saussure's acting both as executor of the mortgagor and as attorney or agent for the mortgagees is more apparent than real. He states in his answer what all the circumstances of the case confirm, that he qualified as executor only for the purpose of enabling him to benefit the mortgagees. The estate of the

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mortgagor was confessedly in*solvent, and the only source from which the debt of the plaintiff could be paid was the mortgaged property, which, under the power of sale contained in the will, could be sold by the executor without delay and expense incident to an action for foreclosure. He was, at the time he qualified, the attorney of the mortgagees, entrusted with the bonds and mortgage for the very purpose of effecting a sale of the mortgaged premises, "all parties consenting," which possession continued until after the sale was made without any change in his instructions; and as the course which he adopted, in the condition of things then existing, was, as we have seen, undoubtedly the best for the interest of the mortgagees, as well as for the estate of the mortgagor, I am unable to perceive any real inconsistency in his conduct.

Nor do I think any weight should be attached to the remark attributed to Mr. De Saussure—that if the mortgagees refused to recognize his action they could be forced to do so by reason of the fact that the property had been forfeited for taxes—because, it will be remembered, that this remark was not made until after the sale, and after he had discovered that the mortgagees were disposed to repudiate his action in making the sale. It cannot, therefore, be fairly argued that this plan of perfecting the title in the purchaser was present to or influenced his mind at the time he made the sale.

A more reasonable inference would be that it was the offspring of a natural irritation at finding that the mortgagees were disposed to repudiate his action, taken, as he supposed, and as he had good reason to suppose, with their assent and for their benefit.

The point raised by the appeal on the part of the executor of John W. Lewis does not appear to have been taken before the referee or in the court below, and is not properly before us for consideration.

I am satisfied, therefore, that the judgment of the Circuit Court should be affirmed.

Decree reversed.

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*(Case No. 766.)

THE STATE v. LEMUEL DAVIS.

THE STATE, ex rel. BALL, v. L. DAVIS et al.

(April Term, 1879.)

[1. *Bail* ⟸74.]

A soldier of the United States army, indicted in the state court for murder, and convicted of manslaughter, was granted a new trial and then admitted to bail. Thereupon he filed his petition in the Circuit Court of the United States, praying a removal of his case to that court, and setting forth that the homicide

was committed by the accidental discharge of his gun while he was one of a detail to assist a revenue officer of the United States government in arresting the deceased; a writ of habeas corpus cum causa was issued by the United States Circuit judge, and under that process the person of the defendant was taken out of the custody of the state authorities, and turned over to his commanding officer in another state. *Held*, that the sureties on his recognizance were liable for his failure to appear for trial at the succeeding term of the state court.†

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 291; Dec. Dig. ⟸74.]

[2. *Criminal Law* ⟸98.]

The jurisdiction of the state court over a prisoner charged with a crime against the laws of the state, is not affected by the removal of the prisoner from the custody of the court by virtue of a writ of habeas corpus, issued by a United States Circuit judge under Section 643 of the Revised Statutes of the United States.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 192; Dec. Dig. ⟸98.]

[3. *Habeas Corpus* ⟸45.]

The writ of habeas corpus under this section is not an original, remediable writ, but merely an auxiliary process to bring the person of the petitioner within the jurisdiction of the United States Circuit Court.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⟸45; Removal of Causes, Cent. Dig. § 210.]

[4. *Constitutional Law* ⟸27.]

Every grant to the government of the United States by the constitution is limited to the powers expressed in the terms of such grant, or arising therefrom by necessary implication.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 31; Dec. Dig. ⟸27.]

[5. *Courts* ⟸258.]

Congress cannot confer upon the courts of the United States any jurisdiction or powers not granted by Article III. of the constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 793; Dec. Dig. ⟸258.]

[6. *Courts* ⟸258.]

Congress cannot confer upon the United States courts original jurisdiction of a case involving an offense against the laws of a state, because that the defence interposed depends for its force and effect upon the constitution and laws of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 793; Dec. Dig. ⟸258.]

[7. *Courts* ⟸256.]

Meaning of the word "case," as used in Article III., Section 2, of the constitution of the United States, with regard to the appellate and original jurisdiction of the courts of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. ⟸256.]

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[8. *Courts* ⟸260.]

*The United States courts can have original jurisdiction of cases only where there is a demand of affirmative relief by plaintiff or defendant, based upon the constitution, laws or treaties of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. ⟸260.]

[9. *Courts* ⟸417; *Removal of Causes* ⟸11.]

The Circuit Courts of the United States have no appellate jurisdiction over cases properly instituted in the state courts; and cases are removable to the former courts from the latter under the acts of congress, only where they could have been brought, in the first instance, in the courts of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1118; Dec. Dig. ⟸417; Criminal Law, Cent. Dig. § 198; Removal of Causes, Dec. Dig. ⟸11.]

10. Martin v. Hunter, 1 Wheat. 304 [1 L. Ed. 97], and Cohens v. Virginia, 6 Wheat. 264 [5 L. Ed. 257] considered.

Before Mackey, J., at Spartanburg, October, 1877.

The case is fully stated in the opinion of the court.

Mr. L. C. Northrop, U. S. district attorney, for appellants.

Mr. B. W. Ball, solicitor, contra.

November 15th, 1879. The opinion of the court was delivered by

WILLARD, C. J. Lemuel Davis was indicted in the Court of General Sessions of Spartanburg for willful murder, and convicted of manslaughter. Subsequently a new trial was granted. Thereupon he filed his petition in the Circuit Court of the United States for the district in which the indictment was pending, alleging, in substance, that he was a soldier in the military service of the United States, and was detailed as one of a guard of United States soldiers to aid a deputy marshal of the United States in making the arrest of Brandy Hall, under a warrant issued by a United States commissioner, for violation of the internal revenue laws as a distiller. The petition then states that while guarding the house in which the deputy marshal was attempting to make the arrest, Hall escaped suddenly from the house, frightening the petitioner's horse, and causing an accidental discharge of his piece, by means of which Hall was mortally wounded and died.

The petition demanded the removal of the cause for trial into the Circuit Court of the United States.

It appears that thereupon a writ of habeas corpus cum causa was issued by the United

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States Circuit Court, and Davis was *taken out of the custody of the sheriff of Spartanburg and brought before the Circuit Court. It also appears that Davis was discharged from custody under said writ, and removed from the state and placed under the orders of his commanding officer in the State of Pennsylvania.

The Court of General Sessions assumed

† The defense in this case was not the same as that in State of Tennessee v. Davis, a decision of the Supreme Court of the United States, rendered after the opinion in this case was filed, and not yet published. It is believed, however, that the decision upon the main point here is not in accord with the conclusions of the majority of the court in the Tennessee case. REPORTER.

subsequently to proceed with the cause, and, Davis not appearing, made an order for the forfeiture of a recognizance taken in the Court of General Sessions for his appearance. From this order the sureties on this recognizance have appealed to this court.

The question presented is, whether the Court of General Sessions lost jurisdiction of the case in virtue of the proceeding in the Circuit Court of the United States that resulted in that court obtaining custody of the body of the prisoner under indictment.

It is manifest that a full decision of this question of conflicting jurisdiction here presented will render necessary an inquiry into the constitutional limits of the authority vested in congress touching the matters contained in Section 643 of the Revised Statutes of the United States, under which section the authority under which the removal of the cause was attempted is claimed. It is understood that this question is now before the Supreme Court of the United States in its general aspects, but there is no reason to assume that the decision of that court will reach some of the important features of the present case that to some extent render it independent of any solution that may be given to the question of the constitutional powers of congress.

Without adverting at the present time to the special features of the present case, it is enough to say that the uncertainty that the judgment of the Supreme Court of the United States will dispose of all the matters in controversy, the gravity of the question, involving, as it does, the integrity of the power of administering criminal justice in the courts of the state, and the importance of an early presentation of the questions involved to the court of last resort in all matters that have their origin and force from the constitution and laws of the United States, should the parties so desire, leads us to dispose of the questions at issue without delay.

The first question to be considered is,

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whether we can look *into the grounds on which the jurisdiction claimed for the United States Circuit Court in this case rests, for the purpose of determining whether that court had constitutional power to proceed in such manner as to divest the Court of General Sessions of its undoubted jurisdiction. If we find ourselves bound to conclude that the effect claimed to be produced upon the jurisdiction of the Court of General Sessions, namely, the destruction or suspension of its jurisdiction, could only be so produced in a case where the Circuit Court of the United States could take jurisdiction, then we would be compelled to look into the constitutional jurisdiction of the Circuit Court in order to make that the measure of the authority of the Court of General Sessions over the case. But if the loss of jurisdiction by the General Sessions is not necessarily dependent on its acquisition by the Circuit Court, then ground may exist for an argument tending to exclude us from looking into the grounds on which the Circuit Court claims jurisdiction. That argument is based on the fact that under Section 643 the petition presenting the grounds for the removal of the cause is required to be presented to the United States Circuit Court, and no means are afforded for bringing such matters to the attention of the state court. Until the passage of the enactments contained in Section 643, the mode of removing causes was by a petition filed in the State Court, and the removal of the cause took place, in form at least, as a voluntary cession of jurisdiction by the state court after looking into the sufficiency of the grounds stated therefor—a mode of procedure that was dictated by a spirit of comity that always accompanies a just understanding of what appertains to the administration of justice. It may be argued that the change in this respect implies an intention on the part of congress of excluding the state courts from judicial knowledge of the ground of the removal, and thus disabling them from discharging the important judicial duty of maintaining jurisdiction in its full exercise. It is fortunate that we are not compelled to examine the considerations arising from the constitution, the comity between judicial bodies, and the practice of well-ordered governments that would be material to the discussion whether such an implication could arise from the language of the act.

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It is through *the force of a proposition that seems adequate to dispose of the present case that we are relieved from considering that construction of the section in question. This proposition is as follows:

That if the courts of the United States could by no possible means obtain original jurisdiction of the present case, then we are justified in concluding that the authority of the General Sessions remained intact.

As this proposition assumes that the loss of jurisdiction by the General Sessions depends on its acquisition by the United States Circuit Court, it is necessary to inquire whether such is the case. It probably will not be seriously disputed that, ordinarily, this would be the rule, arising from the important principle that no lapse should occur in the administration of justice, and, therefore, the duty of receding from jurisdiction should be commensurate with the right of claiming and exercising it. It may be contended, however, that Section 643 creates an exception to this rule by force of the provisions that enable the United States Circuit Court to take the person of the prisoner in confinement under the process of the state court into its custody by the writ of habeas corpus cum causa; that, having done so, the Court of General Sessions having lost control of the prisoner would lose, as incidental thereto, jurisdiction to proceed, and this with-

out regard to the question whether the Circuit Court could or could not take jurisdiction in the case. The correctness of this proposition need not be considered, for it is clearly inapplicable.

If the act had provided that the writ of habeas corpus should issue as an original and independent remedy, questions of difficulty might arise as to the constitutional limits of that jurisdiction and as to the effect of custody of persons subjected to such jurisdiction in the proceedings in state courts affecting the person, such as criminal proceedings requiring the presence of the prisoner. Even if the habeas corpus under which the petitioner was taken into the custody of the Circuit Court had been such an original remedial writ, yet in the present case no question of the effect of custody held under such writ could become material, for it appears that the prisoner was permitted to pass out of that custody, and, as we are compelled to assume, out of all judicial custody of the courts of

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the United States into that *of his military commander, acting under military authority alone. In addition to this, the proceedings of the General Sessions brought here by appeal were of such a nature that the presence of the petitioner was not essential to their validity, namely, the forfeiture of his recognizance.

But we are forced to conclude that Section 643 did not intend to authorize the issuing of the writ of habeas corpus as an original remedial writ, but merely as process to bring the person in question within the jurisdiction assumed to be competent to take cognizance of the case and the person of the defendant. That this writ was intended as auxiliary to the judicial jurisdiction in aid of which it issued is apparent from the use to which it was put, and by the fact that it was issuable as matter of course by the clerk. Any other construction would open the act to the criticism of attempting to stretch the judicial power of the United States beyond the jurisdiction of its courts, so that it might be able to destroy the jurisdiction of the state courts without being able to replace it by that of the United States courts; "for unless it was intended that the interference of the judicial power of the United States should go to a case beyond the constitutional powers of its courts, there could be no possible motive for giving effect to the writ beyond what might be necessary to subserve the jurisdiction of the court in aid of which it was given. This leads us to conclude that the writ as auxiliary process was limited in its effect by the nature of the constitutional jurisdiction of the Circuit Court."

If, then, congress could not confer jurisdiction on the United States courts to take cognizance of the present case, and the Court of General Sessions could not lose its jurisdiction except where the Circuit Court had authority to take it, it was not material, to enable the General Sessions to discover the state of its control over the case, to know the grounds on which its removal to the United States court was sought, but, on the contrary, it was the duty of that court to proceed with the case.

The question of the constitutional power of the United States Circuit Court to take original jurisdiction, by removal from a state court of a criminal case seeking alone to im-

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pose penalties *for the infraction of the laws of a state, is, then, fairly presented, and we are forced to its consideration.

It will not be disputed that the general rule of the constitution of the United States, that all powers not granted expressly or by necessary implication are expressly reserved, is as applicable to grants of judicial powers and jurisdiction as those of any other class. It will be remarked that this reservation is made in express terms, (Amendment, Art. X.,) and is not left to result as an implication or a mere consequence from the nature and extent of that which is expressly granted. And this is in harmony with the conclusion that the reasonableness of an implication is not sufficient ground to apply it to the language of the constitution, but that it must have the character of a necessary implication, reached by Justice Story in Martin v. Hunter, 1 Wheat. 304 [4 L. Ed. 97]. This distinction is important in a case where the convenience to the government of certain powers is strenuously urged as ground for enlarging the sense of the constitution on the principles of implication. In order to engraft on express terms of the constitution granting powers of government in their nature capable of being exercised by the states previous to the adoption of the constitution, an enlarged sense due to necessary implication, it is requisite to show that the denial of such implication would work a substantial destruction of the powers granted. This cannot be shown by demonstrating merely that such powers can be made more full and satisfactory under the operation of such an implication, for that would be enlarging the sense on the ground of the mere reasonableness and not the necessity of the implication. With this key to the construction of the constitution, derived from the doctrines advanced by the decisions of the Supreme Court of the United States, we will endeavor to arrive at the intention of that instrument as it regards the original jurisdiction of the courts of the United States other than the Supreme Court.

Section 1, Article III., of the constitution, commences with the following language: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the congress may, from time to time, ordain and establish." The second section then proceeds to define

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the limits of that *"judicial power," which, so far as it is applicable to the present case, is accomplished by these words: "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be made under their authority." It will not be disputed that in order to find authority for congress to confer power on the courts of the United States to take original cognizance of a criminal case instituted in a state court under the laws of a state, and solely to enforce penalties for the infraction of such laws, a grant of such legislative power must be made out from the language just quoted, either as inherent in its express terms or arising by necessary implication therefrom.

It is clear that Article III. was intended to limit as well as vest the judicial power of the United States. In the first place, limitation is implied in the words "extend to." In the next place, the object of the constitution was to apportion certain governmental powers between the general and local governments, and such an apportionment is, in its nature, limitative. In the last place, under the operation of the tenth article of amendment, the constitution must receive that construction. That article is as follows: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." This cannot, with any propriety, be read as a new grant to the states or the people of such power as had not been delegated or prohibited by the constitution, for that would assume the existence of a considerable period of time when these powers were either in abeyance or vested somewhere else, which is an assumption inadmissible as inconsistent with the nature of governmental powers. It must be concluded that article X. was intended as declaratory of a pre-existing intent of the constitution, and that would lead us to construe the constitution precisely as if the tenth article of amendment had been incorporated in it at its first adoption. Reading, then, the constitution with this reservation, it is necessary that the terms of every grant should be construed as the express limitation of such grant where that is reasonably possible. In the present case we have no difficulty in so doing, as the terms employed import limitation.

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*The next consideration is, that the limitation of the judicial power of the United States affects not only the powers of the courts of the United States, but the power of congress to vest and give exercise to such judicial powers. Judicial power is not identical with jurisdiction. It may lie within the power of the legislature, ungranted wholly or in part, and in the latter case the measure of such jurisdiction as may have been lodged would not be the measure of the judicial power that created it. It may safely be affirmed, however, that when the legislature is restricted in the creation of judicial jurisdiction within certain limits, such limits are the measure of the extent of its judicial power. The effect of this limitation on the legislative power would present a question of great importance if it had appeared in this case that congress had attempted to destroy the jurisdiction of a state court in a case where it could not open the doors of the United States courts to entertain such case, but, as we have seen, no such intent can be inferred from Section 643. The only deduction sought to be made for the purposes of the present case from the proposition just considered, is too plain to need discussion, and is this: that congress cannot, by any measure, enlarge the jurisdiction of the courts of the United States beyond the measure of Article III. of the constitution, or grant them powers that are not warranted by such grant of jurisdiction.

It being clear, then, that the grant of judicial power in the constitution to extend to certain prescribed cases, is equivalent to its denial in all other cases, it becomes necessary to define this limit with sufficient exactness to ascertain whether the present case is within or without the scope of that grant. The first limitation is perceived by comparing the first and second sections of Article III. In the first section the judicial power of the United States is described by a limitation that has its force from the mode in which that power shall be vested, namely, in the Supreme and inferior courts of the United States. The second section gives it a further definition as to the subjects that may be brought within it, among which are cases arising under the constitution, laws and treaties of the United States. As congress can only establish the jurisdictions of courts, ordain their functions and delegate their powers, in virtue of the grant of judi-

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cial *power, and that grant is required to be exhausted upon the United States courts, it follows that congress cannot mould the jurisdiction, remedial system or process of the state courts, and, therefore, cannot directly cut off that jurisdiction or accomplish that result in any other way than indirectly by means of constitutional jurisdiction conferred on the United States courts. The conclusion just drawn is of importance in fixing the sense of the terms "cases arising under the constitution," &c.

It must be conceded on the ground of indisputable authority, that for the purpose of determining the scope of the appellate power of the Supreme Court of the United States over the final judgments of the highest courts of the states, cases arising under the constitution, laws and treaties, must be understood as embracing all cases in which any question depending on the construction of the constitution, laws and trea-

ties of the United States arises material to the judgment. The further limitation imposed by the original judiciary act, confining that jurisdiction to cases where there has been a denial of some right asserted under the constitution, laws and treaties of the United States, is not contained in the constitution, and may be left out of view.

A superficial view of the question might lead to the conclusion that the same interpretation put upon the words in question for the purpose of defining the appellate powers of the Supreme Court, ought to prevail, when the question of original jurisdiction comes to be considered. It must be admitted that, as a general rule, words capable of being applied to different classes of subjects should receive the same definition in their application to each class. Allowing the utmost force due to this consideration, it is a rule of uniformity merely, and must not stand in the way of reaching a conclusion, rendered necessary by the nature of the subjects involved.

With a view to an exact understanding of the nature of the present question, a classification of the cases concerned will be serviceable. Three classes are recognized: First, where the cause of action is some claim or demand that claims its origin or force from the constitution, laws or treaties of the United States. As to this class there is no dispute, congress having the undoubted power to extend the original jurisdiction of the

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United States *courts to embrace all such cases. The second class is where there is some subject of controversy to which both plaintiff and defendant make title or claim, the plaintiff claiming under the laws of a state, and the defendant under the constitution, laws or treaties of the United States, and wherein the defendant may have affirmative relief. The remaining class consists of cases in which the defendant makes no affirmative claim, but stands upon purely defensive ground. The question presented by the present case belongs to the third class, from the nature of the proceeding, namely, a criminal prosecution under the laws of a state. Strictly speaking, we have at present nothing to do with cases of the second class, but it will be impossible to bring the principles applicable to the third class into full discussion without involving considerations bearing directly on the second class.

The distinction shown between cases of the second and third classes is very clearly pointed out by Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264 [5 L. Ed. 257], although there applied to distinguish classes of cases capable of being brought up by writ of error. He there denies that a writ of error brought by a defendant occupying a purely defensive situation, as in a criminal case, could be regarded as the substance of a suit prosecuted against a state. The distinction thus pointed out is identical with that here presented, though employed for a different purpose.

The exact question, then, is, whether a defence interposed to an indictment under the laws of the state, depending for its force and effect upon the constitution and laws of the United States, is a case arising under the constitution and laws of the United States in the sense of the constitution. This question is not stated upon the facts disclosed in the petition to the Circuit Court, because that petition was not by law required to be presented to the general sessions, and it may be contended that that court could not properly base its decision as to its jurisdiction on the terms of that petition—a proposition that need not be considered under the view of the case we take. It will be observed that the nature of the defence, as disclosed by the petition, is materially different from that contemplated by Section 643. That section, so far as it affects the present case, provides for the case of a defence by an officer appointed under or acting

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by the *authority of any revenue law of the United States, or of any person acting under the authority of such officer, whereas the petitioner claims to have been acting for the protection of a United States deputy marshal, under his authority, while in the execution of process of the United States courts. It certainly cannot be claimed that the United States marshal or his deputy is such an officer, or that the authority he exercises under the process of a court can be properly said to be the authority of any revenue law of the United States. Although the revenue law defined the crime, it did not constitute the authority under which the marshal acted. Again, Section 643 covers the case of an "act done under color of his office, or of any such law, or on account of any right, title or authority claimed by any such officer or other person under such law," whereas the defence disclosed by the petition is that of accidental shooting. The present question, in order to avoid all disputable minor points, is put on the broad ground that congress cannot confer on the Circuit Court of the United States original jurisdiction in any such case.

We come now to consider what original jurisdiction the courts of the United States can properly take under that clause of the constitution that extends the judicial power of the United States to, and limits it at, cases arising under the constitution, laws and treaties. If we arrive at the conclusion that such original jurisdiction does not embrace the present case, then it will remain to show that the Circuit Court could only get possession of the case as part of its original jurisdiction; in other words, that the removal of the cause could not be justified as an exercise of the appellate jurisdiction of the Unit-

ed States courts over cases pending in a state court.

The object of the language under construction was to establish and limit judicial jurisdiction by defining the "cases" to which it should extend. Cases are the natural boundary of jurisdiction in one of its directions. In the other direction the character of parties is the boundary. That sense of the word "case" should then be taken as its intended sense that enables it to serve as the boundary of original jurisdiction where that jurisdiction is described by it. The constitution, with a nicety of expression due to the merited influence of the distinguished law-

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yers who assisted *in its preparation that leaves no doubt as to its intention to use the word case in its technical sense, employs that term when defining the limits of jurisdiction by the nature of its subject matter, and applies the term controversies where jurisdiction is intended to depend on the character of parties. The instance of "cases affecting ambassadors," &c., is not a departure from the order of expression; on the contrary, the form of the expression opens the inference that it was intended to give this jurisdiction a scope beyond the instances where the ambassador or other public minister is a party in a legal sense, as consisting with the use of the word cases instead of controversies. More exact and significant language could not have been employed. There is not the slightest doubt that it was intended that the word case should receive its definition and sense by means of legal exposition, and not according to any idea popularly attached to the term. Its direct and primary sense is that technical sense in which the law understands it, and if that sense best satisfies the manifest object of the use of the expression it must prevail.

The term case is, according to familiar legal usage, applicable either to a suit or other remedial proceeding in a court of justice, or to matters brought into an appellate court by means of a writ of error and assignment of errors, or other similar proceeding. When used to designate a suit or proceeding in a court of original jurisdiction it embraces the idea of parties and a subject matter in controversy between them, its character and description for jurisdictional purposes being determined by the nature of the demand of the party seeking the court for relief. When applied to a writ of error and assignment of errors, it covers the idea of certain alleged errors in a legal judgment consisting in failure to apply the proper law of the case to its adjudication. Every error assigned is a case in substance and effect, as it would separately and independently support a writ of error as such. It would follow that, in order to determine, for the purpose of appeal, whether a case is one arising under the constitution, laws and treaties of the United States, inquiry would be directed to ascertain whether any of the alleged errors concern propositions of law deriving their force from that constitution or the laws or treaties made under it. If such er-

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rors are found, a *case for the appellate jurisdiction of the United States courts appears.

It is otherwise when the question concerns the original jurisdiction. Propositions of law are not in themselves the proper elements of such a case. The leading features of a case for original cognizance are the subject matter and law under which the party coming for relief demands judgment. If that party proves himself entitled to a judgment it is on the strength of the proper law of the case, and this is the law under which his demand had its origin. All other matters are incidental and tend merely to deny that the matter in controversy is subject to the law propounded as the ground of relief. It would follow that a case can be said to arise under the constitution, laws and treaties of the United Sattes only when the law propounded as the ground of demanding judgment has its force under that source of authority. If a defendant cannot claim affirmative relief his position is purely defensive, and the matter of his defence is always regarded as incidental to the main question, and, as such, does not enter into the legal description of the nature of the case. When such a defendant asserts title or claim in himself to defeat that set up by the plaintiff, the whole force of his defence is to negative the grounds on which the plaintiff demands judgment, each defensive ground not amounting to the introduction of a new and countercause of action. Where the defendant is entitled to affirmative relief, his matter of defence assumes the form of a cause of action. In that case considerations of a different character would present themselves which cannot properly be discussed in the present case, as it does not possess that feature.

In view of these obvious distinctions, it ought to be concluded that when the constitution used the terms in question, that it was intended that when the words "cases arising," &c., were resorted to for the purpose of fixing original jurisdiction, they should be taken in the sense appropriate to that purpose; and when as the test of appellate jurisdiction, they should be read in a manner agreeable to the idea of such jurisdiction. To assume the contrary is to imply that the framers of the constitution did not understand the differences between the various

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subjects to which *their language might be applied and their proper application according to the nature of such subject. We must then look for that sense which is agreeable to the nature of original jurisdiction.

It is of the nature of original jurisdiction

to attach to a case or to refuse to attach, according to the statement made by the party who is actor in the court, by whatever name he may be called. It is he who moves the court for relief who has a right to demand that the powers of the court shall be exercised in his behalf, if the nature of the case as disclosed by his pleadings warrant it. If it cannot attach at that stage of the proceeding, it can never attach, and, as a general rule, if it then attaches it cannot be lost by any means. There are cases where a general jurisdiction may be ousted in favor of an exclusive special jurisdiction, and there are many cases in which a special and limited jurisdiction may be ousted in favor of one that is general; but these are exceptional cases and leave the general proposition untouched that, for the purpose of determining what is a case for the exercise of original jurisdiction, the statements and allegations of the actor in the case must be looked to as the proper means of determining the existence of jurisdiction. That the framers of the constitution should have intended that the practice in exceptional cases, and not the great general rules established by the experience of mankind, should become the principle of its construction and form the basis for distributing the immense jurisdiction cognizable in the courts of the United States and the various states between those courts is incredible. We must conclude that they intended that the customary rules should be observed in applying their words giving jurisdiction to the various subjects to which they are properly applicable.

The question, then, comes to this: The constitution assumes to assign certain cases to certain juridictions. It assumes that what is meant by a case is well understood and attempts no new definition of the term. It signifies no intention to change any of the features of the great remedial system of the common law and equity, and yet an effect is claimed for its words that subvert fundamental principles of those systems. Nothing is better understood than that the actor should

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choose his forum, when *there are courts of concurrent jurisdiction, resting as it does on the rational ground that the actor being compelled to build his case, the defendant being concerned only to pull it down, he should have that compensating advantage. It is proposed to take that right from the plaintiff and give it to any defendant who is willing to allege, whether true or false, a defence having its force under the constitution and laws of the United States. To accomplish this end it is necessary to affirm that it was the intention of the constitution that, contrary to the spirit of our judicial system, neither the fact of jurisdiction rightfully acquired nor the nature of the issues as a whole should be decisive of the question of the right to retain that jurisdiction, but that any question of a certain class incidentally arising should control the jurisdiction and accomplish the novelty of stripping a court of general jurisdiction of authority once rightfully acquired. As long as the question of transfer concerned only the cases where jurisdiction depended on the character of the parties, such an anomaly did not arise, because that effect of personal privilege in divesting jurisdiction otherwise rightfully acquired was not unknown to the common law. In a word, a new and hitherto unknown jurisdiction, to which the designation of shifting would not be inappropriate, is to be regarded as of so much importance as to turn the sense of the constitution aside from the natural significance of its language. To repose the administration of justice on the shifting sands of such an unsubstantial system is to wreck it, and to render possible the recurrence of the spectacle afforded by this case; the judiciary of the United States, stretching out its arms and taking from the criminal courts of a state in times of peace, one of its soldiers indicted for murder, and returning him to the ranks of the army without a trial. It would be a blow inflicted on the principles of permanent order that could not be justified by any temporary necessity, however urgent.

It must be concluded, then, that what the constitution meant by a case for the purpose of determining a question of original jurisdiction is the statement of the claim or demand made by a party prosecuting another in a court. This would apply to the case made by an indictment. It is easy, then, to apply the

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mode *of distinguishing such cases adopted by the constitution, namely, the fact of their origin under the constitution, laws or treaties of the United States.

It will be found that the foregoing construction is in full harmony with the established doctrines as to the extent of the appellate jurisdiction of the Supreme Court of the United States in case of appeals from the final judgments of the highest courts of the states.

It becomes necessary, at this point, to examine the actual determinations and the doctrines advanced in the decisions of the Supreme Court of the United States affecting the present question, and in the course of such examination the additional question will come up for consideration, whether, when the Circuit Court of the United States takes jurisdiction through the removal of causes before final judgment, such jurisdiction appertains to that conferred upon them as original or to that given as appellate jurisdiction.

Martin v. Hunter, 1 Wheat. 304 [4 L. Ed. 97]. In that case an appeal had been taken from the Court of Appeals of Virginia to the United States Supreme Court, and judgment therein rendered and a mandate issued accordingly to the Court of Appeals. The court refused to obey such mandate, on the

ground that the United States Supreme Court had not jurisdiction of appeals from a state court, and gave judgment contrary to such mandate. That judgment was appealed to the Supreme Court, and reversed. The question of the right of the Supreme Court to exercise the jurisdiction conferred by Section 25 of the old judiciary act was the only one actually decided, but the opinion of the eminent jurist who rendered the judgment of the court discusses many questions that have an argumentative relation to the question before the court, and are of great interest in view of the distinguished source from which they come and the occasion that called them forth. The basis of the argument in behalf of the jurisdiction claimed by the Supreme Court was the fundamental proposition that congress was bound, under the constitution, to vest the whole judicial power of the United States either as original or appellate jurisdiction. He held that that jurisdiction properly extended in some form to all

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cases in which questions *arose under the constitution, laws and treaties of the United States, either directly or indirectly. The existence of an exclusive jurisdiction in the state courts of cases that might involve questions arising under the constitution, laws and treaties of the United States is recognized, and the argument is that as such questions could only be reached through the appellate power, that power must be deemed to be granted as constituting part of the judicial power of the United States.

The argument just stated contains the proposition that within the class of cases described by the constitution as arising under the constitution, laws and treaties of the United States there are two subordinate classes, namely, cases within the original jurisdiction and cases without that jurisdiction, that can only be reached by the appellate jurisdiction. Elsewhere the opinion points out a still further classification of causes within the original jurisdiction of the United States courts, namely, cases for the exclusive cognizance of those courts, and those of which the United States courts and the state courts may have concurrent jurisdiction.

The opinion places the criminal jurisdiction of the United States and the admiralty and maritime jurisdiction in the class exclusive in the United States courts, and finally says: "It can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority that they can now constitutionally exercise a concurrent jurisdiction."

To arrive at the means of harmonizing these various propositions it is necessary to bear in mind that the constitution places in one class three subjects of jurisdiction as to which jurisdiction is conferred by the same words. The primary inference would be that if one is the subject of exclusive jurisdiction, all of that class would be so subject. These classes are, first, "cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" second, "cases affecting ambassadors, other public ministers and consuls;" and, third, "cases of admiralty and maritime jurisdiction." We have the authority of the distinguished jurist whose opinion

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we are considering, that the grant, *as it regards cases in the admiralty and maritime jurisdiction, is of exclusive cognizance in the United States courts. We have also his authority to the same effect as it regards one of the class of cases arising under the constitution, laws and treaties of the United States, namely, criminal prosecutions under the laws of the United States. This last statement requires certification. The conclusion that jurisdiction in criminal cases, under the laws of the United States, cannot be conferred on the state courts, must depend on the principle that cases originating within the "judicial power" of the United States cannot be placed beyond that judicial power for adjudication, as that power is exclusively vested in the United States courts. The constitution draws no distinction between civil and criminal causes as it regards the matter of jurisdiction, so that it must be controlled by provisions common to both civil and criminal cases. It follows that the criminal jurisdiction of the United States is created and vested under the clause that relates to cases arising under the constitution and laws. We have here authority for the proposition that some of the cases that are described as arising under the constitution and laws of the United States become, under the grant relating to such cases, the subject of exclusive jurisdiction in the United States courts. We have also the same authority for the proposition that others of the same class may be the subject of concurrent jurisdiction in the courts of the United States and the states. The last class is described as including those cases "where, previous to the constitution, state tribunals possessed jurisdiction independently of national authority." The learned judge is here adverting to a distinction between cases arising under the constitution, &c., the effect of the application of which is to consign part to the exclusive jurisdiction of the United States courts and part to the concurrent jurisdiction of the United States and the state courts. Here, then, is a distinct instance where words conveying jurisdiction over a class of subjects must yield different senses when the nature of the different subjects demand it. I shall endeavor to show the ground of this distinction.

Every action capable of being prosecuted must be constituted as such by some law.

The law may be the law of a state or of
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*the United States. In the latter case the action may be said to have its origin under the laws of the United States, and, whatever may be its nature, it has the same character, as far as jurisdiction is concerned, as a criminal cause under the laws of the United States. It is very clear that the class of cases described as arising under the constitution and laws of the United States has a much more extended range than that just indicated. A right of action may exist in virtue of our law, and the subject-matter of the action may arise out of an entirely distinct law. An action upon a contract made subject to the law of a foreign state illustrates the distinction. An action in a state court for the recovery of land claimed under title arising out of the laws of the United States is another instance. The right by which one clothed with the title to land seeks to be put in possession may exist under a state law and yet the title depend on the force and effect of the laws of the United States. When the right of action arises out of the laws of the United States, as we have seen, the jurisdiction of the United States courts is exclusive. This depends on the principle that congress is required to vest the entire judicial power of the United States in its own courts; it cannot delegate that judicial power to the state courts, nor can the latter exercise it without delegation. It follows that a right of action, having its origin as such, under the laws of the United States, appertains to its judicial power and cannot be separated from it. The class of cases recognized by the opinion under consideration as those in which the courts of the United States and those of the states have concurrent jurisdiction must, then, be of those in which the right of action has arisen under the laws of a state, yet the claim or demand presented by means of such action has arisen under the constitution and laws of the United States. It is clear that it was not intended to be held that every case cognizable by a state before the adoption of the constitution of the United States is the subject of concurrent jurisdiction, for that would include the admiralty and maritime jurisdiction, which is held to be exclusive. The distinction must then be found in the nature of the cases described as arising under the constitution, &c., and that pointed out is the only one that appears to meet this case.

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*When it is remembered that the learned judge is here discussing the question of original jurisdiction, it will become manifest that he construed the words of the constitution in extending the original jurisdiction of the United States courts only to cases where the title, claim or demand sued upon has arisen under the constitution, laws and treaties of the United States. This is obvious, both from the nature of the conclusion and from the necessary meaning of other expressions in the opinion that will be hereafter considered.

It must be conceded that wherever concurrent original jurisdiction exists between the courts of the states and of the United States, congress may make that jurisdiction exclusive in the United States courts. At all events that proposition is fundamental to the appellant's case, for the whole power of removal, as between courts of concurrent jurisdiction, rests upon that principle. If, then, the original jurisdiction of the United States may extend to any case in which a federal question arises incidentally or collaterally, the exclusive jurisdiction of the United States courts may be extended thus far, so that the moment that a federal question is presented in a state court it would lose its jurisdiction, without regard to whether provision was or was not made to remove such cause to the United States courts. If such a doctrine should be established, the state judicial systems are practically at an end; or if they continue to exist for any useful purpose and with any dignity and authority, it is not because they are secure under the constitution, but because congress sees fit to spare them. Such a consequence cannot have been within the intention, or even within the contemplation, of the eminent jurist whose views we are considering. He was too near to the times and too much under the influence of the opinions that embodied in the constitution the great principle of placing the local governments and the general government as mutual checks upon each other, to make this instrument the means of destroying the efficiency of that balance.

This view of the authority quoted prepares us to understand what is stated in another part of the opinion in these words: "It must, therefore, be concluded that the constitution not only contemplated but meant to provide for cases within the scope of the
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*federal powers of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction state courts would incidentally take cognizance of cases arising under the constitution, the laws and the treaties of the United States. Yet, to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that has already rightfully and exclusively attached in the state courts, which, as has been already shown, may occur; it must, therefore, extend by appellate jurisdiction or not at all."

Here it is distinctly conceded that an extent may be given to the appellate powers of the United States courts that cannot be given to the original jurisdiction of those courts—a

conclusion that necessarily involves the proposition that the words "arising under the constitution," &c., are to receive a somewhat different construction when applied to define original jurisdiction than when applicable to appellate jurisdiction. The instance cited as at least one of the causes giving rise to the conclusion of the opinion in this respect, is the circumstance of a state court obtaining possession of a federal question "incidentally," showing that it was in the mind of the learned judge that original jurisdiction could not extend to such cases. The argument is based on the constitutional inability of the original jurisdiction to reach all cases within the judicial power, for it is the intention of the constitution that is made the argument in behalf of the appellate power. Comparing the citation last made with those previously made, the reference is irresistible that the class of cases to which the original jurisdiction cannot extend, is that class where the federal question comes in "incidentally." Coming in incidentally means beyond doubt, coming in otherwise than as the foundation of the right put in suit by the action. This is not only the usual sense of the term, but is necessary to complete the view of the opinion. It first traces the lines of the original jurisdiction, both exclusive and concurrent, in order to find a class that falls outside of such line, and on that class bases the argument for the extended appellate power of the United States Courts.

We come now to a question that appears at first sight to be put in doubt by the views of

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this eminent authority. That doubt *will, however, disappear on a close examination of the opinion. The language of the opinion involves the proposition that the right of appeal from the state courts stands upon the same ground of constitutional authority with the right to remove causes from the state to the federal courts. He says: "This power of removal is not to be found in express terms in any part of the constitution. If it be given, it is only by implication as a power necessary to carry into effect some express power." He compares this right of removal with that existing in the courts of common law, and regards the two as identical in nature. He says that this right of removal "is always deemed, in both cases, an exercise of appellate jurisdiction and not of original jurisdiction." He concludes that the right of removal is embraced in the grant of appellate power, and is one of the modes in which it may be exercised, all modes being open under the grant of judicial power. He holds that, as appertaining to the appellate power, it may be exercised before as well as after judgment, on the ground that congress may authorize appeals from interlocutory judgments.

It must be conceded that if the right of removing causes from a state to a federal court is derived from the right to establish appellate jurisdiction, then that power is commensurate with the appellate power of the Supreme Court over causes pending in a state court. That that power has been conclusively shown by the decisions of the Supreme Court, and is established by law under the constitution, cannot be disputed. As such it embraces all cases in which any question arising under the constitution, laws and treaties of the United States arises incidentally and is material to the judgment. It is at present limited to cases where a decision has been made in effect denying some right claimed under the federal law, but that limitation is imposed by congress and not by the constitution, and may be removed by the same authority that gave it existence. Such a conclusion would involve the practical absorption and destruction of the judicial systems of the states. When it is considered that it is within the constitutional power of congress to affect the great mass of, if not all, transactions and contracts by some right, having its origin under the laws of the United States, especially

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*under its power to regulate commerce between the states, to levy duties, imposts and excises, to coin money and regulate the value thereof, and fix the standards of weights and measures, it is obvious that such a construction of the constitution aims a blow at the balance of power, local and general, that distinguishes this republic from other western republics, and was thought to promise to preserve it from that fate which the lessons of history seem to mark out for unbalanced republics. It cannot for a moment be supposed that this sound lawyer and able statesman contemplated any such possibility, living, as he did, in the midst of the men and institutions that created the constitution. It is true that expanding a system of government through implications drawn from the text of a written constitution, is the work of lawyers and not necessarily of statesmen, but we know that the eminent lawyers of that day were grounded in the sound principles of government, not from the teachings of schools of philosophy, but from the sober experiences of events that put in peril all social and political rights.

It should be remembered that the idea of employing the power of congress to remove from the state to the federal courts causes there pending, on the ground of their involving incidentally federal questions, had not, at that time, been entertained in any legislation by congress. That Judge Story did not conceive the possibility of its application to any such purpose, is apparent from the nature of the argument by which he sustained the appellate jurisdiction of the court on argument that rested on the incapacity of drawing within the original jurisdiction of

the United States courts cases where state jurisdiction had "rightfully and exclusively" attached. That he had in mind a much more limited idea of removal than that which would justify a court of the United States in taking a case out of a state court prior to any judgment or even interlocutory order therein, and proceed to hear and determine and render an original judgment therein is evident from language that has already been referred to. He instances the right of removal before judgment as dependent on the ground that appellate power may extend to the revision of an interlocutory as a final judgment. This shows that he had in mind that removal

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of a cause which is, in sub*stance and effect, an appeal, and presupposes a judgment or order as the subject of revision under that appeal. Again, he compares that mode of removal to certain modes prevailing at common law. The writ of certiorari is doubtless the remedy at common law that he had chiefly in view as a type of a class. That writ is undoubtedly a means of a limited character of revision. At common law that writ did not open the case for an original judgment in the court to which it was returned. There is a statute certiorari sometimes allowed to remove causes from an inferior court of appeal or limited jurisdiction that admits of an original hearing and judgment in the court to which it is returned; but there the writ is merely process incidental to an appeal, and, as such, is unknown to the common law, and only issues after a judgment below. It is easy to conclude that what was in view was something totally different from the removal of causes under Section 643, but it is not clear what was the precise idea here attached to the right of removal.

To say that it is the same in substance to take a cause before verdict or judgment and remove it into a court other than that in which it orginated, and there try and hear the issue involved and render an original judgment and to take it by way of appeal after judgment, even though in the latter case the court may try the case de novo, is the obliteration of simple and clear legal distinctions. Such an intention ought not to be imputed to that distinguished jurist, except upon the strongest grounds of proof, and no such proofs are afforded by the opinion in question.

Aside from the importance that is given to the question by the obscure reference to it made by Judge Story, it is too plain and obvious to admit of discussion. The object of removal to the Circuit Court, under the judiciary act and its amendments, is to prevent the state court from trying or hearing the cause if a party having the right to remove so desires, and not for any purpose of revision. This is evident from the fact that the removal, if made at all, must be made before trial or hearing. If the object in view was the exercise of appellate power, the fact of a trial or hearing would constitute the strongest claim for the exercise of such appellate power. It must be concluded that the removal of causes to the Circuit Court is in-

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tended as a means of *obtaining original jurisdiction, and may take place in certain cases where the state court is excluded from such jurisdiction by the exclusive character of the jurisdiction of the United States courts, or where such courts have concurrent jurisdiction at the election of certain parties after suit brought to transfer the cause to the United States courts. If this is the true view, then the question in regard to the right to remove any particular case is whether it could have been brought in the first instance in the United States courts, and that would exclude at least criminal cases prosecuted under the laws of a state.

Cohens v. Virginia, 6 Wheat. 264 [5 L. Ed. 257]. The argument of Chief Justice Marshall in that case is in substantial accordance with that in Martin v. Hunter. The broad definition that is given to the grant of jurisdiction in cases arising under the constitution, laws and treaties of the United States, is expressive of all that may be brought into the jurisdiction of the United States courts by means of their combined original and appellate jurisdiction. That the latter has the largest scope is conceded in this case as it was in Martin v. Hunter. The question of the appellate power was the only one before the court, and, therefore, the largest possible definition of the jurisdiction granted was pertinent to the case. What has been already said is applicable to Cohens v. Virginia and need not be repeated.

It admits of no doubt, on comparing the provisions of the original judiciary act with the reasonings on which the limits of the appellate jurisdiction of the Supreme Court, was settled, that the prevailing idea was that when questions arising under federal laws were presented incidentally in causes properly brought originally in the state courts, the final adjudication of such questions in the United States courts should be accomplished through the exercise of the appellate power of the Supreme Court, and not by the removal of such causes for original adjudication in the United States courts. To this idea the administration of justice was brought contemporaneously almost with the constitution itself and was maintained for nearly a century. It is an instance of contemporaneous exposition reinforced by a settled system of administration lasting near-

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ly a century. It is now proposed to *put new readings on the constitution to meet emergencies arising from public debt incurred in a great war. We may well pause to in-

quire whether the emergency is of sufficient magnitude, and sufficiently likely to occur in the future to warrant a readjustment of the federal powers of the government based on more critical views of the meaning of the constitution than those who framed it were enabled to take, although they inaugurated the government under circumstances in many respects similar to the present, at the close of an exhausting war and in the presence of public debt and the necessity for extraordinary revenues. The infant government struggled into a state of organization and self-support without disturbing the balance between the general and local administrations, and we may well inquire whether their ideas of government may not be adequate to any present or prospective emergency. These considerations have no place here as suggesting a question of policy, with which the courts have nothing to do, but as the means of estimating the degree of force that should be accredited to the practical exposition of the constitution embodied in the statutes of that time and the practice of the courts thereunder. If there is a disputable sense involved in the language of the constitution, that sense that has been thus practically embodied should be preferred.

The constitution confers upon the Supreme Court, under its appellate jurisdiction, power to determine upon appeal matters both of fact and law. Why this power has not been fully put in exercise it is unimportant to inquire. The grant stands on the face of the constitution, and, under it, it is not possible, in a legal sense, that a state court may abuse its judicial power without a corrective being applied through this appellate power. It is not necessary to trace all the consequences of this provision. Its insertion in the constitution is best accounted for on the idea that that appellate power should be the means of preventing any maladministration on the part of the state judiciary, by means that leave untouched the integrity of the system of state administration. Then the argument from necessity falls to the ground, and that from reason, authority and the practice of the government remains unimpeached.

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*It follows that no authority existed for the removal of the cause to the United States Circuit Court; therefore the jurisdiction of the General Sessions remains intact and its proceedings must be sustained.

An order affirming the judgment has been already entered.

Judgment affirmed.

McIVER and HASKELL, A. J.'s, concurred.

[Reversed, Davis v. South Carolina, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574.]

12 S. C. 555

(Case No. 767.†)

A. J. KIBLER v. J. D. McILWAIN.

(November Term, 1879.)

[*Appeal and Error* ⟸425.]

Appeal dismissed on motion, for want of service of notice of appeal upon the clerk of the Circuit Court, within the time required by statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2155; Dec. Dig. ⟸425.]

[This case is also cited in Crane, Boylston & Co. v. Moses, 13 S. C. 43, and distinguished therefrom.]

Motion to dismiss appeal, notice of appeal not having been served upon the clerk of the Circuit Court for the proper county, within the time required by statute. The appeal in this case was taken before the act of December 19th, 1878, took effect. 16 Stat. 698.

November 28th, 1879. The opinion was delivered

PER CURIAM. The appeal must be dismissed for want of service in due time of notice of appeal upon the clerk. The power of allowing the rectification of any proceedings in taking an appeal where defective is regulated by the code and confined in terms to proceedings other than the notice of appeal as required. This excludes any general authority that might otherwise have been exercised.

Motion granted.

† This is the first decided case of those heard during the term of the present Reporter, which commenced September 27th, 1879.

12 S. C. *556

*(Case No. 772.)

L. D. POOLE et al. v. W. P. BROWN et al.

(April Term, 1879.)

[1. *Appeal and Error* ⟸20.]

This court, on an appeal, can exercise jurisdiction of only such matters as were within the original jurisdiction of the court in which the action was instituted.

[Ed. Note.—Cited in Caldwell v. Little, 15 S. C. 241.

For other cases, see Appeal and Error, Cent. Dig. § 81; Dec. Dig. ⟸20.]

[2. *Appeal and Error* ⟸185.]

This court, on appeal, will, of its own motion, take notice of the want of jurisdiction in the Court of Probate of a suit commenced in that court, where the allowance of the appeal would require further action in the case by the Court of Probate.

[Ed. Note.—Cited in Reeder v. Workman, 37 S. C. 415, 16 S. E. 187.

For other cases, see Appeal and Error, Cent. Dig. § 1174; Dec. Dig. ⟸185.]

[3. *Trusts* ⟸298.]

The Court of Probate has no jurisdiction of a petition in the nature of a bill in equity by a cestui que trust against his trustee for an

accounting, when it does not involve any matters testamentary. Const. Art. IV., § 20.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 417; Dec. Dig. ⟸298.]

Before Kershaw, J., at Spartanburg, March, 1878.

John Brown died in 1857, leaving a will, of which W. P. Brown and E. P. Brown qualified as executors. One of the devisees of testator was his daughter, Polly Poole, whose share was to be retained by W. P. Brown and E. P. Brown, as trustees for her to be managed and controlled by them and kept at interest for her benefit, the interest to be paid annually to his daughter during life, and after her death the corpus to be divided equally amongst her children.

Upon a settlement made by the executors before the Ordinary in 1860, the share of Polly Poole was ascertained to be $2020.93, which, by decree of the Ordinary, was ordered to be retained by E. P. Brown and W. P. Brown, executors of John Brown, deceased, they accounting for interest thereon. This interest was annually paid to Polly Poole until 1868. In 1871, Polly Poole and her husband, with an informal power of attorney from her children authorizing a full settlement with the trustees and a receipt of the amount, demanded an account and payment. The matter was referred to arbitration, and an award made, the amount whereof was paid to Polly and her husband upon their receipt. Polly Poole died in 1873, leaving L. D. Poole and W. D. Poole her only surviving children who afterwards filed their

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*petition in the Court of Probate for Spartanburg county, praying an accounting and settlement by W. P. Brown and E. P. Brown of the share of Polly Poole, retained by the said trustees. The judge of probate sustained the settlement made by the arbitrators and adopted their award as the decree of the court. On appeal to the Circuit Court, this decree was affirmed; and the plaintiffs then appealed to this court.

No question was made in the Court of Probate, in the Circuit Court or in the arguments of counsel in this court, as to the jurisdiction of the Court of Probate.

Messrs. Evins, Bomar & Simpson and Duncan & Cleveland, for appellants.

Messrs. Bobo & Carlisle, for respondents.

December 4th, 1879. The opinion of the court was delivered by

WILLARD, C. J. This suit was commenced in the Probate Court by cestuis que trust under a testamentary trust for an account against the plaintiffs as trustees, and is virtually based on an alleged breach of trust. The breach of trust alleged is that the trustees paid part of the trust estate to certain persons claiming to be the attorneys and agents of the plaintiffs, who had no such authority, and had assumed, in conjunction with such persons claiming to represent the plaintiffs, to submit to arbitration the question of the amount of the trust estate, and under the award of the arbitrators they had refused to pay the balance of the trust estate.

The Probate Court refused the petition of the plaintiffs, not upon the ground of want of jurisdiction, but on the ground that full payment had been made by the defendants. We are asked to reverse the decree of the Circuit Court affirming that of the Probate Court. The effect of the decree for which the appellants contend would be to sanction the jurisdiction assumed by the Probate Court, as this court, upon an appeal from a Circuit Court decree, based upon a decree of the Probate Court, can only exercise the jurisdiction proper to the Probate Court as the

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*court of original jurisdiction. No exception has been brought before us based on the want of jurisdiction in the Probate Court, and, therefore, it is not the right of the parties to insist upon any such defect of jurisdiction in that court. A question of jurisdiction is not necessarily incapable of being considered by this court, merely because not raised by the record, as has often been held. Where the appeal is such that if allowed the court will be compelled to put in exercise powers, as pertaining to the court of original jurisdiction, that are beyond the competency of that court, a case is made for the consideration of such question of jurisdiction, even though no exception is before it for that purpose.

The question then arises, whether the Probate Court had jurisdiction of a petition in the nature of a bill in equity by a cestui que trust against his trustee, alleging a breach of trust.

The constitution (Article IV., Section 20,) fixes the jurisdiction of the Probate Court in these words: "A Court of Probate shall be established in each county, with jurisdiction in all matters testamentary and of administration, in business appertaining to minors and the allotment of dower, in cases of idiocy and lunacy, and persons non compotes mentis." Unless the matter of the present suit can be regarded as a "matter testamentary," it cannot be brought within the terms of the grant of jurisdiction.

A trust, even though testamentary, is not necessarily a "matter testamentary" in the sense of the constitution. An action to enforce the trust is primarily based upon the liability of a trustee and not on that of an executor, and matters testamentary are such as grow out of the liability of an executor. It may be that where one is made both executor and trustee by a will, and the insolvency of the trustee or other sufficient reason makes it necessary for the cestui que trust to pur-

sue the assets of the testamentary estate specifically, that a right of action might exist that could properly be regarded as a matter testamentary. The existence of such a right in that case could not be presumed, for when the executor is required to pay to himself as trustee, the law presumes such payment made, and the liability subsequently

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*arising must be presumed to be that due to the character of trustee.

It would be specially objectionable to make a contrary presumption for the mere purpose of bringing the case within the jurisdiction of a court of special jurisdiction. Such being the case, it was necessary that the record should show facts and circumstances repelling this presumption in order to confer upon the Probate Court jurisdiction of the case as a matter testamentary. It nowhere appears that the plaintiffs are seeking to subject the defendants to liability on any other ground than that of a breach of trust committed by them as trustees. This is the aspect of the case presented by the Circuit decree. It appears in the case, in confirmation of this view, that there had been a final accounting before the Ordinary and a decree that the trust estate in executors' hands be retained by them as trustees, and the petition does not seek to get rid of that order or modify it in any way. This is conclusive of the proposition that the matter in dispute was the accounting of a trustee, and not any matter testamentary.

The appeal must be dismissed, and the Circuit decree is affirmed.

Appeal dismissed.

McIVER and HASKELL,† A. J.'s, concurred.

† This is the last appearance of Judge Haskell's name as associate justice, he having resigned his office December 5th, 1879.

12 S. C. 559

(Case No. 775.)

W. A. ROGERS v. E. W. NASH, Administrator.

(November Term, 1879.)

[1. *Exceptions, Bill of* ⟸39.]

When the appellant fails to furnish the presiding judge with a copy of his exceptions within ten days after the rising of the court at which the judgment was rendered, the appeal will be dismissed on motion. 16 Stat. 698.

[Ed. Note.—Cited in Sullivan v. Speights, 12 S. C. 561, 562.

For other cases, see Exceptions, Bill of, Cent. Dig. § 54; Dec. Dig. ⟸39.]

[2. *Appeal and Error* ⟸633.]

When appellant fails to serve his case and exceptions within thirty days after giving his notice of appeal, the appeal will be dismissed on motion.

[Ed. Note.—Cited in Scurry v. Coleman, 14 S. C. 166, 168; Gibbes v. G. & C. R. Co., Id., 385, 391; McElwee v. McElwee, Id. 623; Stribling v. Johns, 16 S. C. 116.

For other cases, see Appeal and Error, Cent. Dig. § 2773; Dec. Dig. ⟸633.]

[3. *Exceptions, Bill of* ⟸39.]

[Cited in Godbold v. Vance, 14 S. C. 470, to the point that the act of 1878 (16 Stat. 698) does not profess to be an amendment of the Code.]

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54–56, 60; Dec. Dig. ⟸39.]

[This case is also cited in Hyatt v. McBurney, 17 S. C. 151, without specific application.]

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*Motion to dismiss appeal from decree of Aldrich, J., Greenville, July, 1879.

This was an equity cause, heard on exceptions to the master's report, and decree rendered in open court, July 17th, 1879, during the term. It does not appear when the term was adjourned. Notice of appeal was given to respondent July 22d, judgment was entered August 9th, and the case, with exceptions, was served August 30th. The exceptions raised legal questions only.

Mr. W. L. Wait, for the motion.

Mr. D. R. Speer, contra.

December 10th, 1879. The opinion was delivered

PER CURIAM. The respondent moves to dismiss the appeal and shows that the appellant did not furnish the presiding judge with a copy of the exceptions within ten days after the rising of the court. The statute (16 Stat. 698), imperatively requires that such service shall be made within ten days after the rising of the court, and declares that if not so done the appeal shall be deemed to be waived. This statute does not profess to be an amendment to the code, so that the provisions of the code in relation to enlarging time and curing defects and irregularities, may have an application to it, but excludes that right, in this instance, by providing for its exercise in one of the instances provided for in the statute, but not in the case of a failure to take exceptions within ten days after the rising of the court. It follows that the appeal must be deemed waived, although it is competent for the respondent to ask the dismissal of the appeal.

It also appears that the appellant failed to serve the respondent with a copy of the case and exceptions within thirty days after serving his notice of appeal. This is also required by the statute, to which reference has already been made. The statute allows the enlargement of the time for serving the case and exceptions, but that must be accomplished in the manner pointed out in the act. As there has been no enlargement of the time,

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*according to the provisions of the act, the appeal must be deemed waived under the provisions of the act, and the appeal must be dismissed on the last-named ground as well as upon that previously considered.

The motion must be granted and the appeal dismissed.

Motion granted.

12 S. C. 561

(Case No. 776.)

HEWLETT SULLIVAN v. A. M. SPEIGHTS et al.

(November Term, 1879.)

[1. *Exceptions, Bill of* ⟸39.]

A failure to furnish the presiding judge with a copy of exceptions within ten days after the rising of the court at which judgment was rendered, operates as a waiver of the appeal. Rogers v. Nash, ante p. 559, approved.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 54; Dec. Dig. ⟸39.]

[2. *Exceptions, Bill of* ⟸41.]

The time within which the exceptions must be furnished to the presiding judge is not enlarged in cases where they are sent by mail.

[Ed. Note.—Cited in Walters v. Laurens Cotton Mills, 53 S. C. 159, 31 S. E. 1; Craig v. United States Health & Accident Ins. Co., 80 S. C. 155, 61 S. E. 423, 18 L. R. A. (N. S.) 106, 128 Am. St. Rep. 877.

For other cases, see Exceptions, Bill of, Cent. Dig. § 65; Dec. Dig. ⟸41.]

[3. *Exceptions, Bill of* ⟸39.]

The provision of Section 427 of the code is intended for the benefit of the party upon whom the service is made.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54–56, 60; Dec. Dig. ⟸39.]

Motion to dismiss the appeal.

This was an action upon a bond, tried before Fraser, J., and a jury, at Greenville, April, 1879. Thirteen days after the rising of the court, the appellants mailed to the address of the presiding judge a copy of their exceptions.

[For subsequent opinion, see 14 S. C. 358.]

Mr. C. G. Wells, for motion.

Messrs. Stokes & Featherston, contra.

December 11th, 1879. The opinion was delivered

PER CURIAM. This is a motion to dismiss the appeal upon the ground that the exceptions were not furnished to the presiding judge within the time prescribed by law.

It appears from the motion papers, and the fact does not seem to be controverted, that no exceptions were furnished to the pre-

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*siding judge until after the expiration of ten days from the rising of the court at which the case was tried; and the only question is as to the proper construction of the act entitled "An act to alter and amend the law in relation to appeals from the Circuit Court to the Supreme Court," approved December 19th, 1878. 16 Stat. 698.

This question has been disposed of by the decision rendered in the case of Rogers v. Nash, in which it was held that a failure to furnish the presiding judge with a copy of the exceptions within ten days after the rising of the court at which the case was tried, operated as a waiver of the appeal.

It was argued, however, that the service of the exceptions in this case was made by mail, and that by Section 427 of the code, when that mode of service is adopted, the time is enlarged to double the time required in cases of personal service. A sufficient answer to this is, that the act of December 19th, 1878, does not purport to be an amendment of the code, and, therefore, that provision of the code cannot be regarded as affecting the provisions of the act now under consideration. In addition to this, however, we may say that the provision of the code by which the time is doubled in case of service by mail, is intended for the benefit of the party upon whom the service is made, and not for the benefit of the party making the service. For while there is good reason for extending the time within which any act is to be done by a party who has been served by mail after such service, there is no reason for such extension in favor of one who adopts that mode of serving another, inasmuch as the service is complete from the time the paper to be served is deposited in the post-office, addressed to the person upon whom it is to be served, at the place of his residence, with the postage paid. Code, § 426.

The motion to dismiss the appeal is granted.

Motion granted.

12 S. C. *563

*(Case No. 777.)

M. P. LAKE v. J. P. MOORE et al.

(November Term, 1879.)

[1. *Appeal and Error* ⟸348.]

The time for giving notice of appeal from a judgment filed in vacation begins to run from the receipt of written notice of the judgment, notwithstanding actual notice, as by reading the original decree, previously had.

[Ed. Note.—Cited in Maner v. Wilson, 16 S. C. 475; Bowers v. Watts, 40 S. C. 548, 18 S. E. 888; Greenwood Loan & Guarantee Ass'n v. Childs, 67 S. C. 252, 45 S. E. 167.

For other cases, see Appeal and Error, Cent. Dig. § 1902; Dec. Dig. ⟸348.]

[2. *Appeal and Error* ⟸937.]

The burden of proving that irregularities were committed in preparing an appeal, is upon the party alleging them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3788; Dec. Dig. ⟸937.]

[This case is also cited in McElwee v. McElwee, 14 S. C. 623, and distinguished therefrom.]

Motion to dismiss appeal.

The decision of Fraser, J., was filed in the clerk's office May 23d, 1879, which was during vacation. Defendants' attorney read it same day and directed notice of it to be served on attorney for plaintiff, which was done. Subsequently defendants' attorney obtained a copy of the decision from the deputy clerk of the court. Afterwards, on July 26th, defendants gave notice of appeal. This was a motion by plaintiff to dismiss the appeal.

Messrs. Earle, Wells & Westmoreland, for motion.

Mr. A. Blythe, contra.

December 11th, 1879. The opinion was delivered

PER CURIAM. The respondent asks the dismissal of the appeal on the ground that the notice of appeal was not given in due time. It appears that the judgment appealed from was filed in vacation, and that no notice, in writing, was given to the appellant of its entry. It is contended, however, that the appellant had actual knowledge of the judgment, having seen and read it in the office of the clerk. This was not ground sufficient to put the statute laws for appealing in currency in the case of a judgment entered in vacation. The object of the notice is to apprise the appellant that the respondent intends to insist on an appeal within the time

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fixed by law, and unless such notice is *given the appellant is unrestricted as it regards the time within which an appeal may be taken.

The respondent alleges that the case was not served within thirty days after notice of appeal was given. The motion papers contain no proof of this fact, and as the burden of proof is on the party moving upon the ground of irregularity, the matter charged must be regarded as unproved.

The motion must be dismissed.

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12 S. C. 564

(Case No. 779.)

W. T. CRIBB et al. v. MARY ROGERS et al.

(April Term, 1879.)

[1. *Deeds* ⟸120.]

A deed of land to A in consideration of "love, good-will and natural affection," reserving to grantor "the use of said lands during my natural life only," habendum to A, her heirs and assigns forever, conveys the fee to A in præsenti, charged with a life-estate in favor of the grantor. Cases cited, and Dinkins v. Samuel, 10 Rich. 66, limited.

[Ed. Note.—Cited in Sumner v. Harrison, 54 S. C. 362, 32 S. E. 572.

For other cases, see Deeds, Cent. Dig. § 454; Dec. Dig. ⟸120.]

[2. *Deeds* ⟸142.]

A fee may be granted with a reservation of the usufruct to grantor for life.

[Ed. Note.—Cited in Ellen v. Ellen, 16 S. C. 142; Jacobs v. Mutual Ins. Co. of Greenville, 52 S. C. 118, 29 S. E. 533; Cook v. Cooper, 59 S. C. 564, 38 S. E. 218; Steele v. Smith, 84 S. C. 468, 66 S. E. 200; Rembert v. Veote, 89 S. C. 216, 71 S. E. 959.

For other cases, see Deeds, Cent. Dig. § 464; Dec. Dig. ⟸142.]

Before Wallace, J., Marion, April, 1879.

Action for recovery of a tract of land. At the trial the Circuit judge permitted defendants to introduce testimony to show a valuable consideration. Margaret Lewis, mentioned in the deed, and one of the defendants herein, was a step-daughter of grantor, and Mary Rogers was her tenant. Verdict for defendants.

The character of the claim and the terms of the deed under which defendants held are fully stated in the opinion of the court.

Messrs. Harllee & Montgomery, for appellants, cited 10 Rich. 66; 4 McC. 14; 4 Kent. 5; 2 Black. Com. 104; Wms. on Real Prop. 55, 155–6; Gen. Stat. 427, § 8.

Mr. J. G. Blue, for respondent, cited 1 Mills 148; 10 Rich. 66; 2 Strob. Eq. 376; 3 Strob. 21.

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*December 17th, 1879. The opinion of the court was delivered by

WILLARD, C. J. The plaintiffs claim as heirs-at-law of D. Cribb, and the defendants under the following deed of lands: "I, Dempsey Cribb, of the county and state aforesaid, for and in consideration of the love, goodwill and natural affection which I have and bear to Margaret Lewis, have given, granted and conveyed, and by these presents do give, grant, release, convey and deliver to the said Margaret Lewis, a certain tract, piece or parcel of land, containing four hundred and sixty-seven acres, more or less, reserving for myself the use of said lands during my natural life only, said lands being situated," &c. Then follows the description of the lands conveyed "to the said Margaret Lewis, her heirs and assigns forever." The deed concludes with a general covenant of warranty, and was duly executed and attested.

The only question affecting the validity and operation of the deed, as sufficient to pass a fee in the lands conveyed, arises out of the words, "reserving for myself the use of said lands during my natural life only." The fact that the usufruct is separated from the fee is not inconsistent with the vesting of the fee. The grantor may convey the fee to one and the usufruct to another; hence the reservation of the usufruct to himself violates no rule governing the vesting of the fee. The grantee takes the fee, burdened with a use in favor of the grantor for his natural life.

It has been argued that under the operation of the statute of uses the fee was, at the moment of its creation, thrown upon the grantor by the execution of its uses, and thus

the deed rendered ineffectual. The statute of uses could not operate until there was such a title in the grantee, as the deed was intended to vest, and this was a fee. The only effect of the statute would, assuming its operation, be to cast upon the grantor an estate commensurate with the uses created by the deed, and that would be a life-estate, leaving a remainder in fee vested in the grantee, which would owe its existence as such, not to the deed, but to the operation of the statute. The rules of the common law, as it regards the support required for a remainder, are, therefore, inapplicable, for the deed does

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not create a remainder as such. *The statute cannot operate to defeat the deed, for it was not intended to have such effect, but only to effectuate its purposes by raising estates competent to give the fullest support to its uses.

Jenkins v. Jenkins, 1 Mills C. R. 48. That case fully sustains the conclusions just stated. The same conclusions were reached in Sunday v. Boon (MS.), cited in Jaggers v. Estes, 2 Strob. Eq. 376 [49 Am. Dec. 674].

Singleton v. Bremar, 4 McC. 15 [17 Am. Dec. 699]. The present interest was conveyed by the deed in that case, as it was to take effect only upon the death of the grantor. It is contrary to the nature of a deed that it should commence to operate as such at a time subsequent to its delivery; on the contrary, it must take effect, if at all, from the moment of delivery to operate as a deed, though in certain cases it may be upheld as a covenant to stand seized to the use of the grantee.

Dinkins v. Samuel, 10 Rich. 66. The principal question actually passed upon by the court was, whether such a relationship subsisted between the parties to the deed as could support the deed as a covenant to stand seized upon the consideration of natural love and affection. The conclusion that the deed in that case could not operate as a conveyance of a present interest probably arose from the terms of the habendum clause, and appears to have been reached without any particular consideration of the terms of the deed. As no reference is made to Jenkins v. Jenkins, it is fair to conclude that the view presented by this case was not pressed upon the court. Certainly no intention to overrule that case can be assumed, as it is not expressed, and it may reasonably be assumed that some attempt would have been made to distinguish that case from Jenkins v. Jenkins if the question in all its bearings was in the mind of the court. Judge Withers should then be understood, when, speaking of the absence of a substantial valuable consideration, he says: "It is, therefore, not a deed of bargain and sale; it is not a conveyance by lease and release, nor a deed of feoffment. The only question is, whether it can operate by way of covenant to stand seized to uses," as intending only that there was no such valuable consideration as would be competent to raise a use that would support the deed

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*as a covenant to stand seized, where it was, for other reasons, confessedly inoperative as a deed. It is enough to show the correctness of this interpretation that the deed in that case did express a nominal pecuniary consideration, in addition to natural love and affection, showing that he was solely considering the operation of the deed as a covenant to stand seized.

It appears, then, that a present interest passed under the deed, and it becomes unnecessary to consider the other questions discussed, as they relate to the proofs to which resort may be had to support the deed as a covenant to stand seized. Misdirections as to such immaterial issue could not have affected the verdict of the jury who sustained the defendant's title.

The appeal should be dismissed and the judgment affirmed.

Appeal dismissed.

McIVER, A. J., concurred.

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12 S. C. 567

(Case No. 785.)

THE STATE v. BELTON SAMPSON et al.

(November Term, 1879.)

[1. *Burglary* ⇐4.]

A mill-house, in which no one sleeps, distant seventy-five yards from its owner's dwelling-house, but separated by a public highway therefrom, and not proved to be appurtenant, is not the subject of burglary at common law.

[Ed. Note.—Cited in State v. Evans, 18 S. C. 139; State v. Anderson, 24 S. C. 116; State v. Johnson, 45 S. C. 489, 23 S. E. 619.

For other cases, see Burglary, Cent. Dig. §§ 14–18; Dec. Dig. ⇐4.]

[2. *Burglary* ⇐4.]

In the absence of evidence showing the character and relation of such a mill-house, it cannot be deemed a parcel of the dwelling-house, or of its appurtenances, under the terms of Chapter CXXIX., § 32, of the general statutes.

[Ed. Note.—Cited in State v. Puckett, 95 S. C. 117, 78 S. E. 737, 46 L. R. A. (N. S.) 999.

For other cases, see Burglary, Cent. Dig. § 14; Dec. Dig. ⇐4.]

Before Aldrich, J., Abbeville, June, 1879.

Indictment against Belton Sampson and Ben Seawright for burglary. The facts are all stated in the opinion of the court.

Mr. E. G. Graydon, for appellants, cited 1 Bouv. L. Dict., tit. "Appurtenance;" 1 Bl. Com. 88; and State v. Ginns, 1 N. & McC. 583. As to the fine, Gen. Stat., ch. CXXIX., § 7.

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*Mr. Solicitor Cothran, contra, contended that State v. Ginns was decided by a divided court, and had never been acceptable to the profession. As to the fine not invalidating

the sentence, he cited 1 Archb. Cr. Pr. & Pl. 676–7, but admitted that there could be no fine.

January 7th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an indictment for burglary in breaking and entering, in the night-time, into a mill-house and stealing therefrom flour and corn. The mill-house was situated about seventy-five yards from the dwelling-house of the prosecutor, on the opposite side of a public road, and was not inclosed. No one slept in it. The Circuit judge charged the jury "that the mill was the subject of burglary, and instructed them that if they believed that the defendants broke into it in the night-time and carried away the flour and corn, as alleged in the indictment, they must find them guilty." To this charge and instruction exception was duly taken, upon the ground that the mill-house was not the subject of burglary. The defendants having been found guilty, were sentenced "to be imprisoned at hard labor in the state penitentiary for three years, and to pay a fine of one dollar." Exception was also taken to so much of the sentence as imposed a fine.

At common law, the offence of burglary consisted in breaking and entering the dwelling-house of another with intent to commit a felony therein; and the term "dwelling-house" was held to include all outhouses contiguous to the dwelling and parcel thereof, if within the curtilage. 4 Bl. Com. 224; 2 Russ. on Crimes 14; 2 Bish. on Crim. L., § 104. These authorities show that to bring an outhouse within the curtilage of a dwelling-house, it must be parcel of or appurtenant thereto, and be connected therewith by being under the same roof or within the same inclosure. For, as is said by Blackstone, "if the barn, stable or warehouse be parcel of the mansion-house and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein, for the capital house protects and privileges all its branches or appurtenants, if within the curtilage or homestall." So

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in Russell, it is said "any out*house within the curtilage or same common fence as the mansion itself, was considered to be parcel of the mansion." And in Bishop's work: "The term 'dwelling-house' also includes the entire cluster of buildings not separated by a public way, which are used for purposes connected with the habitation." And in 1 Bouv. L. Dict. 391, the term "curtilage" is defined to be "the open space situated within a common enclosure, belonging to a dwelling-house." It is very manifest, therefore, that this conviction could not be sustained at common law, for the mill-house was not within the common enclosure of the dwelling-house, but was separated therefrom by a public highway, and there is no evidence that it was parcel of or appurtenant to the dwelling-house. For all that appears in the case submitted here, it might have been as distinct from and independent of the dwelling-house as if it had belonged to another person. Indeed the case, as originally submitted, did not even show that the mill-house belonged to the owner of the dwelling-house, though, on the argument here, it was agreed that the case should be amended by inserting that fact. But that fact alone is not sufficient to bring the mill-house within the class of houses which were the subjects of burglary at common law.

The next question is, whether the mill-house in question can be brought within the class of houses which, by the act of 1866. (Gen. Stat., ch. CXXIX., § 32,) have been declared to be subjects of burglary. The language of that statute is as follows: "With respect to the crimes of burglary and arson, and to all criminal offenses which are constituted or aggravated by being committed in a dwelling-house, any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer, or person who lodges there, with a view to the protection of property, shall be deemed a dwelling-house: and of such a dwelling-house, or of any other dwelling-house, all houses, outhouses, buildings, sheds and erections, which are within two hundred yards of it, and are appurtenant to it, or to the same establishment of which it is an appurtenance, shall be deemed parcels."

Now, in order to bring this mill-house within the terms of this statute, it is not sufficient

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to show that it is situated within *two hundred yards of the dwelling-house, but it must also appear that it is an appurtenance of the dwelling-house, or of the establishment of which the dwelling-house is itself an appurtenance. Of this there is no evidence whatever. It does not appear that the dwelling-house of the prosecutor was the appurtenance of a farm or plantation of which the mill was a part and parcel, nor does it appear what the character of the mill was, whether a merchant-mill or an ordinary mill attached to and forming a parcel of a farm or plantation.

The question raised by the second exception cannot arise under this view of the case, inasmuch as the judgment below must be set aside, and, of course, the sentence based upon such judgment must go with it.

The judgment of the Circuit Court is set aside and a new trial ordered.

New trial granted.

WILLARD, C. J., concurred.

12 S. C. 570

(Case No. 787.†)

R. H. GLENN, Sheriff, v. E. M. SHANNON.

(November Term, 1879.)

[1. *Appeal and Error* ⟸993.]

A finding of fact by a Circuit judge in an equity cause tried before him is conclusive, unless without evidence to sustain it, or manifestly against the overbearing weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3900; Dec. Dig. ⟸993.]

[2. *Payment* ⟸85.]

Money paid under a mistake of fact to a person who has no claim in conscience to it, may be recovered by the party paying it.

[Ed. Note.—Cited in Bragg v. Thompson, 19 S. C. 578; Ford & Co. v. People's Bank of Orangeburg, 74 S. C. 182, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986; Atlantic Coast Line R. Co. v. Schrimer, 87 S. C. 309, 69 S. E. 439.

For other cases, see Payment, Cent. Dig. § 272; Dec. Dig. ⟸85.]

[3. *Justices of the Peace* ⟸183.]

Errors and irregularities in proceedings in a trial-justice's court, may be objected to only by the party to the cause who was affected by them.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 713; Dec. Dig. ⟸183.]

Before Pressley, J., Chester, March, 1879.

This was an action by R. H. Glenn, sheriff of Chester county, to recover from the defendant a sum of money paid to him under a mistake of fact. Both plaintiff and de-

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fendant consider it a *case in chancery because that mistake was the ground upon which relief was demanded.

The goods of one Barber were attached by a constable under two trial-justice's warrants of attachment on December 17th, 1874. The plaintiff, as sheriff, levied an attachment on the next day upon the same goods, under a warrant of attachment from the Court of Common Pleas in favor of Shannon. Under an order from the Circuit judge the property was sold, and the sheriff, after paying expenses, paid the balance to Shannon. In this action he sought to recover from Shannon so much of the money, so paid to him, as the two trial-justice's attachments called for.

The affidavits made before the trial-justice, and the complaints or warrants issued by him, alleged that Barber was absent from the state, or so concealed himself that the due process of law could not be served upon him. There was no service upon Barber. Judgments were entered against him but no executions were proved to have been issued. It was ruled on Circuit in this case that Barber was made a party in the trial-justice's court by the attachment of his goods, and that he only could object to errors and irregularities there committed.

The only witness examined was Glenn. He testified that he went with Shannon to make the levy upon Barber's goods, under Shannon's attachment, and found the constable in charge of the goods. The constable told witness of his levy, but exhibited no inventory. Witness then said to Shannon that the trial-justice's attachments would have to be first paid. Witness then took possession of the goods. Some time having elapsed after the sale, and no papers being received from the trial-justice, witness supposed that those cases were settled, and paid balance in his hands to Shannon.

The presiding judge held that the payment was under a mistake as to the facts, and ordered judgment for the plaintiff. Defendant appealed.

Mr. J. F. Hart, for appellant.

Mr. W. B. Wilson, for respondent.

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*January 7th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover certain money which the plaintiff alleged that he, as sheriff, had erroneously paid to the defendant under a mistake of fact. The case came on for trial by the court, a jury having been dispensed with, and the court, having found that the money was paid under a mistake of fact, rendered judgment for the plaintiff. This finding of fact is conclusive here unless it were shown, as it has not been, that it was without any evidence to sustain it or was manifestly against the overbearing weight of the evidence. There can be no doubt of the correctness of the legal proposition that, where money is paid under a mistake of fact, to a person who has no ground in conscience to claim it, the person paying it may recover it back. Farmer v. Arundel, 2 W. Bl. 824; Bize v. Dickason, 1 T. R. 286; recognized in Lawrence v. Beaubien, 2 Bail. 652 [23 Am. Dec. 155]. The same doctrine is recognized in Ash v. Ash, 1 Bay 304; Supervisors of Onondaga v. Briggs, 2 Denio 26; Ege v. Koontz, 3 Penna. St. 109; Haven v. Foster, 9 Pick. 112.

Exception was also taken to the ruling of the court below that the defendant could not object to or take advantage of any of the several errors or irregularities alleged against the proceedings by attachment in the trial-justice's court, but that such objection could only be made by the debtor himself. This ruling was unquestionably correct and is fully sustained by the authorities cited. Foster v. Jones, 1 McC. 116; Kincaid v.

†Case No. 786 will appear in the next succeeding volume [State v. Corley, 13 S. C. 1].—Reporter.

Neall, 3 McC. 201; Camberford v. Hall, 3 McC. 345.

The judgment of the Circuit Court is affirmed.

Appeal dismissed.

WILLARD, C. J., concurred.

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12 S. C. *573

*(Case No. 788.)

B. E. FEEMSTER v. M. L. GOOD et al.

(November Term, 1879.)

[1. *Executors and Administrators* ⟸81.]

An executor deliberately departing from the instructions of the will, no matter what his motives, cannot impose resulting loss upon innocent devisees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 334; Dec. Dig. ⟸81.]

[2. *Executors and Administrators* ⟸81.]

So where the will directed all debts to be paid and the balance to be given to the widow "to dispose of as she may think best for her and our children," and the executor, in kindness and for the interests of the estate, as he thought, together with the widow, assumed a debt due by testator, and the widow, for herself and children, who were then minors, received the remainder of the estate, both real and personal, the latter being sufficient to pay all debts, the executor, after the personal property was lost, having been required to pay the debt assumed by him, cannot look to such real estate for reimbursement.

[Ed. Note.—Cited in Wallace v. Craig, 27 S. C. 524, 4 S. E. 74.

For other cases, see Executors and Administrators, Cent. Dig. §§ 323, 334; Dec. Dig. ⟸81.]

[3. *Wills* ⟸836.]

But the widow having concurred in his act and enjoyed the use of the property, her interest in the land will be liable to his repayment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2150; Dec. Dig. ⟸836.]

[4. *Wills* ⟸531.]

Under the terms of this devise the widow and children took per capita.

[Ed. Note.—Cited in Rogers v. Morrell, 82 S. C. 404, 64 S. E. 143, 129 Am. St. Rep. 899.

For other cases, see Wills, Cent. Dig. § 1152; Dec. Dig. ⟸531.]

Before Pressley, J., York, March, 1879.

This was an action by Bond E. Feemster against Margaret L. Good, the widow of John H. Good, and their children.

John H. Good died leaving a will, which directed his funeral expenses and all of his just debts to be paid. Then followed paragraph two, which reads: "I give and bequeath to my wife, Margaret L. Good, all the balance of my estate, both real and personal, to dispose of as she may think best for her and our children, by the consent of my executor." B. E. Feemster was appointed and qualified as executor. Feemster paid all the debts of the estate, except one to W. J. Good, whose note was surrendered in exchange for another of like amount, signed by Feemster and M. L. Good. The executor then turned over to the widow, for herself and five minor children, all the remainder of the estate, consisting of a tract of land, negroes and other personal property necessary for farming operations. The personalty thus turned over, exclusive of land and negroes, was more than sufficient to pay the W. J. Good note. W. J.

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Good was a brother *of J. H. Good, and Feemster was a brother of M. L. Good. The arrangement was made and the extended credit given, because it was believed that it was for the best interests of the widow and children that the property should be held together and this debt paid off out of future crops; all the personalty turned over being needed to run the farm.

The personal property was exhausted and the slaves were emancipated, leaving W. J. Good unpaid. He brought his action against Feemster and obtained judgment for the amount of his debt, which Feemster paid. Plaintiff then brought this action to have the land of his testator sold and the proceeds applied to repaying the amount paid by him to W. J. Good.

C. E. Spencer, Esq., special referee, took the testimony and reported his conclusions of fact and of law. Upon exceptions thereto the case was heard on Circuit. In delivering his decree, the presiding judge said: "I concur in the report of the referee, as to the fact that this arrangement was in good faith, and then seemed best for the objects of testator's bounty, but afterwards the slaves were set free and nothing was left, except the land of testator for the payment of the said debt. The holder thereof sued plaintiff and compelled him to pay it. He now seeks repayment out of testator's land yet in possession of his legatees.

"I cannot doubt that the departure by the plaintiff from the directions of the will was made in kindness, and that it would have been best for the estate, if the war had never been. But if executors use their own judgment, even in best faith, against the express directions of the will, minor legatees will, in case of mishap, have the right to make such executors bear the loss which ensues. In this case all the defendants are minors except M. L. Good. She united with the plaintiff in the substituted note, and assented that the directions of the will be departed from, and the plaintiff is entitled to enforce his claim against one-sixth of the land, which is her share in it."

The decree concluded with an order for sale of M. L. Good's interest, gave directions as to costs, &c.

From this decree the plaintiff appealed, upon the grounds—

1. For error of law in not adjudging that the trust estate of plaintiff's testator, consisting of real estate in the hands of the

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*defendant, M. L. Good, is liable for reimbursing plaintiff for his outlay in behalf of the estate.

2. For error of law in not adjudging that M. L. Good had one-third interest in the real estate.

Mr. G. W. S. Hart, for appellant.

The land is liable for the payment of this debt. 6 S. C. 66; 2 Hill Ch. 257; 2 McC. Ch. 112. The substitution was for the benefit of the trust estate, and it is therefore liable. 1 Hill Ch. 232; 1 Strob. Eq. 56; 2 McC. Ch. 82.

The testator not having defined the interests of his devisees, the statute of distribution must govern these interests. A devise to heirs, as such, is void; for one shall rather take as heir than devisee. 2 Wash. on Real Prop. 400. And heirs in this state means hæredes facti—under the statute of distributions. 6 Rich. Eq. 35. The devise under this will would have been void, but for the power conferred. Either the widow is sole devisee, or else the will does only confer the power, without altering the fixed rule of division under the law. See 9 Rich. Eq. 471.

Mr. W. B. Wilson, for respondents.

January 7th, 1880. The opinion of the court was delivered by

McIVER, A. J. In this case we concur with the Circuit judge in the conclusions which he has reached. If an executor deliberately undertakes to depart from the instructions contained in the will which he has undertaken to execute, no matter what may be the motives which prompted him, he cannot impose the loss which may ensue from such departure from his testator's instructions upon innocent devisees or legatees. It is very clear from the report of the referee that the executor had in his hands at one time ample means for the payment of all the debts, and if he chose voluntarily to place those means beyond his reach, where they most probably would be (and have been) appropriated to other uses, he has no equity to call upon the devisees and legatees to replace those means and repair the loss which has been occasioned by his own misconduct, whether willful or not, in which they have in no wise participated. The defendant, M.

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*L. Good, having, however, not only acquiesced in such departure from the instructions contained in the will, but actually enjoyed the use of the property thus illegally diverted by the executor from its proper channel, is not in a position to resist the claim of the plaintiff.

The question as to what was the share of Mrs. M. L. Good in the estate was probably not raised or but little attention bestowed upon it in the court below, as it does not appear to be discussed in the decree of the Circuit judge. We, however, see no error in the Circuit decision in this respect. The case does not belong to that class of cases in which the gift is to a class of persons, such as heirs, relations or next of kin, and it is necessary, in order to ascertain who are the individuals embraced in such class, to resort to the statute of distributions. Here the gift is to wife and children, and in such a case no resort to the statute is necessary. It is the same thing, so far as this question is concerned, as if the testator had made the gift directly to his wife and children by name, in which case it is clear that they would all take in equal shares, and not in the proportions prescribed by the statute.

The judgment of the Circuit Court is affirmed.

Appeal dismissed.

WILLARD, C. J., concurred.

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12 S. C. 576

(Case No. 789.)

W. W. WALLACE v. CULLEN LARK.

(November Term, 1879.)

[1. *Sales* ⇐347.]

An answer alleging that the note complained upon was given as the purchase money of a horse to be used in the confederate service during the late war, and that said horse was actually so used, was held on demurrer not to state facts sufficient to constitute a defence.

[Ed. Note.—Cited in Jerkowski v. Marco & Lewenthal, 56 S. C. 246, 34 S. E. 386.

For other cases, see Sales, Cent. Dig. §§ 962–972; Dec. Dig. ⇐347.]

[2. *Contracts* ⇐102.]

Mere knowledge by the vendor that the purchaser intends to make an illegal or immoral use of the article purchased is not sufficient to defeat an action for the purchase money. Hodgson v. Temple, 5 Taunt. 181, approved.

[Ed. Note.—Cited in Pierson v. Green, 69 S. C. 564, 48 S. E. 624.

For other cases, see Contracts, Cent. Dig. § 464; Dec. Dig. ⇐102.]

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[3. *Guaranty* ⇐85.]

*An allegation that defendant, by writing his name on the back of the note, became a guarantor for the payment of the same, and that upon the strength of such guaranty B received the said note for value, is a sufficient statement that defendant guaranteed its payment.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 99; Dec. Dig. ⇐85.]

[4. *Contracts* ⇐138.]

[Cited in State v. Robinson, 70 S. C. 470, 50 S. E. 192, to the point that there can be no recovery on a contract based upon an illegal transaction in which the prosecutor actually participated.]

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700; Dec. Dig. ⇐138.]

Before Pressley, J., Laurens, June, 1879.

This was an action on a sealed note, payable to Cullen Lark, upon the back of which

are signed the names, "Cullen Lark," "Dennis Lark." Plaintiff is the owner and holder.

The complaint gives a copy of the note in its first paragraph. Paragraph 2 is as follows: That the defendant, by writing his name on the back of the said note, became a guarantor for the payment of the same, and that upon the strength of such guaranty Bennett Wallace received the said sealed note for value. Ownership, non-payment and amount due were stated, with prayer for judgment.

The defendant alleged that the note complained upon was given as the purchase money of a horse to be used in the Confederate service during the late war, and that said horse was actually so used. To this the plaintiff demurred as not stating facts sufficient to constitute a defence. Defendant demurred orally to the complaint for insufficiency in not stating facts sufficient to constitute a cause of action.

Both demurrers were sustained, and both parties appealed.

Mr. W. H. Wallace, for plaintiff.
Mr. J. W. Ferguson, for defendant.

January 7th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action brought against the defendant as the guarantor of a note under seal, executed by one Kay Burton, in favor of Dennis Lark. The defendant, in Paragraph 2 of his answer, set up the following as a defence: "That the note complained upon was given as the purchase money of a horse to be used in the Confederate service during the late war, and that said horse was actually

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so used." To this *defence the plaintiff demurred and the Circuit judge sustained the demurrer, from which the defendant appeals. That the demurrer was properly sustained is manifest from the fact that there is no allegation that either the plaintiff or his assignor, the payee of the note, knew at the time the note was given the purpose for which the horse was purchased. It is true a demurrer admits every fact stated in the pleading demurred to, but here the only facts stated are: 1. That the note was given for a horse to be used in the Confederate service. 2. That the horse was actually so used. Neither of these facts necessarily involves the idea that the vendor knew, at the time of the sale—the time when the contract was entered into—the purpose for which the horse was bought. The case, therefore, cannot even be brought within the rule established by the cases of Lightfoot v. Tenant, 1 B. & P. 551; Langton v. Hughes, 1 M. & S. 593; Cannan v. Bryce, 3 B. & A. 179; De Groot v. Van Duzer, 20 Wend. 330, that mere knowledge on the part of the vendor that the purchaser intends to use the article purchased for an illegal or immoral purpose will be sufficient to defeat an action for the purchase money.

We are not disposed, however, to rest the case here, but are rather inclined to adopt the rule laid down by Lord Mansfield in Hodgson v. Temple, 5 Taunt. 181, that mere knowledge of the vendor that the purchaser intends to make an illegal or immoral use of the article purchased is not sufficient to defeat an action for the purchase money. There must be something more; something to show that the vendor was to participate in the illegal transaction, or that his intention in making the sale was not the ordinary purpose to dispose of his goods to the best advantage, but to aid or promote the illegal or immoral purpose for which the article was bought. The rule thus laid down is sustained by the following cases: Michael v. Bacon, 49 Mo. 474; S. C., 8 Am. R. 138; Hubbard v. Moore, 24 La. An. 591; S. C., 13 Am. R. 128; Mahood v. Tealza, 26 La. An. 108; S. C., 21 Am. R. 546; Tedder v. Odom, 2 Heisk. 68; S. C., 5 Am. R. 25. In the last-mentioned case the question now before this court was before the Supreme Court of Tennessee, with the additional fact that there the vendor knew at the time the note was given, the purpose for which the horse was bought, and

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it was held that *bare knowledge on the part of the vendor that the purchaser intended to make an illegal use of the horse did not violate the note given for the purchase money. This case cannot be brought within the rule laid down, quite reluctantly as it would seem, in the case of Converse v. Evins, 5 S. C. 52; following the case of Hanauer v. Woodruff, 15 Wall. 439 [21 L. Ed. 224]; for in those cases the consideration of the notes sued upon were bonds which were adjudged to be nullities, and as never having had any legal existence as property and of which no lawful use could be made, while here the consideration of the note sued upon is a horse which was always property of which a lawful use could be made. Nor does it come within the doctrine laid down in the case of Hanauer v. Doane, 12 Wall. 342 [20 L. Ed. 439], for there the action was upon a note given for supplies and commissary stores sold to a recognized supply contractor—in fact it was practically a sale to the Confederate government—while here the sale was to a private individual.

The defendant also demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action, and the Circuit judge having sustained this demurrer, the plaintiff also appeals. In this we think there was error. It is very true that the fact that the defendant guaranteed the payment of the note is not alleged with that technical accuracy which would be expected from an artistic pleader, but still we think it sufficiently appears from

the allegations of the complaint that the defendant was sued as guarantor of the note, and that he, therefore, was not taken by surprise. The code requires that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties," (Section 182,) and that "the court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." Section 199. Construing the pleadings in this case in such a spirit, we are unable to see how the error or defect complained of here—purely technical in its character—could possibly affect the substantial rights of the defendant. See, also, Mason v. Carter, 8 S. C. 103.

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*The judgment of the Circuit Court, in so far as it sustains the demurrer to Paragraph 2 of the answer, is affirmed, but in so far as it sustains the demurrer to the complaint, it is reversed.

Judgment modified.

WILLARD, C. J., concurred.

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12 S. C. 580

(Case No. 790.)

H. H. THOMSON v. T. M. JOPLIN et al.

(November Term, 1879.)

[1. *Replevin* ⇐109.]

Where in an action for the recovery of personal property the defendant gave his undertaking with sureties for the delivery of the property or for the payment of such sum as may for any cause be recovered against him, judgment for a sum of money, as damages, and a return of nulla bona, are conclusive evidence of the breach of the bond and of the damages sustained.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 498; Dec. Dig. ⇐109.]

[2. *Replevin* ⇐123.]

The fact that the plaintiff elected to ask a recovery in damages in place of specific delivery does not discharge the sureties to such undertaking.

[Ed. Note.—Cited in Parish v. Smith, 66 S. C. 431, 45 S. E. 16.

For other cases, see Replevin, Cent. Dig. § 481; Dec. Dig. ⇐123.]

[This case is also cited in Cheatham v. Morrison, 37 S. C. 193, 15 S. E. 924, without specific application.]

Before Aldrich, J., Spartanburg, March, 1879.

The nature of this action is fully stated in the opinion of the court. The waiver alluded to is thus stated in the report of the referee in the case for claim and delivery of the personal property: The plaintiff, at the opening of the case before your referee, having elected to ask a recovery in damages in place of specific delivery of the said mare, I find he is entitled to judgment against the defendant in the sum of, &c.

Mr. E. H. Bobo, for appellants.

Mr. J. S. R. Thomson, for respondent.

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*January 7th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The action was upon a bond given by a defendant in an action for the recovery of personal property, under Section 234 of the code, in order to secure to the defendant the return of the property in suit that had been taken by the sheriff under the provisions of Section 232. The condition of the bond followed the language of Section 234 substantially, and was as follows: "For the delivery of the said property to the plaintiff, if such delivery should be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant in this action." Judgment was recovered in the action in which said bond was given, but no delivery of the property to the plaintiff was adjudged. The question is, whether proof of such judgment was conclusive evidence of a breach of the bond and of the damage sustained by reason of such breach. The Circuit Court so held, and the defendants who appeared and answered appeal therefrom.

It is clearly not the intention of the statute, which gives the language of the appropriate undertaking, to make the agreement to pay such sum as might from any cause be recovered against the defendant conditional upon there being a judgment for the return of the property to the plaintiff, and the bond must receive the same construction as the language of the act which it followed. There is no language to impart any such condition; on the contrary, the obligation of the sureties, as it regards the return of the property and the payment of any sum recovered, is stated in cumulative language, so that a separate and distinct breach may be assigned as to each. It is clear that this is one of the class of cases referred to in Smith v. Moore, 7 S. C. 209 [24 Am. Rep. 479], where the recovery of the judgment is in itself the happening of the contingency in which the surety was to become bound, and, consequently, conclusive proof not only of a breach of the bond, but of the quantity of damage resulting therefrom.

It is contended that the waiver of the plaintiff in the action in which the bond was given of claim to the delivery of the property specifically discharged the sureties on the bond. To make good this proposition it

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would be necessary to establish *that the sureties can question the regularity of the judgment recovered in the principal action.

On general principles this cannot be done, but in the present case the insertion of the words "for any cause" clearly was intended to exclude the surety from alleging that the judgment was rendered for some special cause beyond the contemplation of the undertaking.

The judgment must be affirmed and the appeal dismissed.

Appeal dismissed.

McIVER, A. J., concurred.

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12 S. C. 582

(Case No. †792.)

A. W. HEATH, Executor, v. AMANDA BELK et al.

(November Term, 1879.)

[*Executors and Administrators* ⟸261.]

In the administration of a decedent's estate, debts by specialty created since the act of March 9th, 1874, have no priority over simple contract debts, but both classes are postponed in the order of payment to bonds and debts by specialty of earlier date.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 963; Dec. Dig. ⟸261.]

Before Thomson, J., York, June, 1879.

In the administration of the estate of D. D. A. Belk, deceased, under proceedings in the Court of Probate, the assets were insufficient to pay creditors in full. Among the claims presented were sealed claims created before the passage of the act of March 9th, 1874, sealed claims created after that date, and unsealed claims contracted before, and others contracted after the passage of that act. The judge of probate held that sealed claims created before the passage of the act were preferred in the order of payment, and that, after they were satisfied, sealed claims of later date and simple contract debts, without reference to their date, should be paid pro rata. On appeal to the Circuit Court this decree was approved.

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*Mr. W. B. Wilson, Jr., for appellant, contended that the effect of the act of March 9th, 1874, was to raise up debts by simple contract from the sixth to the fifth class, and to put them upon the same footing with bonds and debts by specialty; and thus to embrace, as of one equal grade under Subdivision 5, bonds and debts by specialty, and debts by simple contract created after March 9th, 1874, and to retain, as Subdivision 6, debts by simple contract created prior to March 9th, 1874.

Mr. G. W. S. Hart, contra.

January 7th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The decision of the Circuit Court affirming the decree of the Probate Court, appears to be free from error. The question was as to the relative rank of bond and specialty debts created after March 9th, 1874, and simple contract debts created both before and after that date; and it was properly held that they take equal rank in distribution.

Immediately prior to the act of March 9th, 1874, (15 Stat. 609), the order of priority in the distribution of the assets of testate and intestate estates was as follows: (Gen. Stat. 457.) "1. Funeral and other expenses of the last sickness, charges of probate or letters of administration; 2. Debts due to the public; 3. Judgments, mortgages and executions—the oldest first; 4. Rent; 5. Bonds and debts by specialty; 6. Debts by simple contract."

Under the amending act of March 9th, 1874, the act reads as follows: "1. Funeral and other expenses of the last sickness, charges of probate or letters of administration; 2. Debts due to the public; 3. Judgments, mortgages and executions—the oldest first; 4. Rent; 5. Bonds and debts by specialty and debts by simple contract, so that after the passage of this act there shall be no distinction in the payments of the debts of persons deceased between bonds and debts by specialty and debts by simple contract."

The period of time referred to in the language of Subdivision 5, as it now stands, is the date of the passage of the amendatory act, viz., March 9th, 1874. The proviso to

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the effect "that this *act shall only apply to debts created after its passage," does not appear to be intended to form part of the language inserted into the act amended by means of the amendment, but controls the operation and effect of such amendment. There was evidently an unimportant mistake made in enclosing the words "therein contained" in quotation marks, which is corrected by the necessary sense of the language employed.

It would follow that it was rightly held that bond and specialty debts created after March 9th, 1874, enjoy no priority as it regards simple contract debts, whether created before or after that date, and that all must take equal rank together.

The act, as amended, determines every question of priority as affecting such debts, except as it regards bonds and specialty debts created before March 9th, 1874, that still retain their priority over simple contract debts created at any time, and, consequently, over bonds and specialty debts created since March 9th, 1874, that can only take rank with simple contract debts.

The appeal must be dismissed and the judgment below affirmed.

Appeal dismissed.

McIVER, A. J., concurred.

† No. 791 will appear in the next succeeding volume [Reynolds v. Witte, 13 S. C. 5].

12 S. C. 584

(Case No. 793.)

J. G. WILLIAMS v. D. RICHARDSON.

(November Term, 1879.)

[*Depositions* ⟸75.]

Where commissioners to take testimony certify, in their return, that under the instructions contained in the commission, they have qualified each other and also the witness, whose signature is appended to his deposition, the commission is competent testimony, although the form of the oath taken by the commissioners and witness, and their signatures thereto, and the jurat, are omitted.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 175, 187; Dec. Dig. ⟸75.]

Before Aldrich, J., Newberry, May, 1879.

Action on note. Defendant offered in evidence testimony taken by commission. When

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the commission was opened plain*tiff's counsel objected to the answers being read, on the ground that, so far as appeared to the court, the commissioners had not sworn to the printed oath on the commission or subscribed to the same, and that there was no record showing that the witness had been sworn. The witness subscribed his name at the end of his answers and the commissioners put the following certificate at the bottom of that:

"We, the undersigned commissioners, certify that by virtue of the authority vested in us by the commission hereunto annexed, we have this day summoned the witness, Dr. B. W. Bledsoe, before us, and after qualifying, each the other, proceeded to qualify him, the said Bledsoe, and to take down his depositions, according to instructions contained in said commission, and that, after being taken down, they were read in his hearing, and that he subscribed to the same in our presence.

"Reuben Jones, [L. S.]
"Thomas W. Caskie, [L. S.]
"W. T. Huff, [L. S.]
"Commissioners.

"This May 1st, 1876."

The presiding judge sustained the objection, and the defendant excepted and appealed to this court for a new trial.

Mr. L. J. Jones, for appellant.

Mr. J. M. Baxter, for respondent, contended that the examination of witnesses by commission was by virtue of a statute and in derogation of common law; and being an authority delegated by the court, must show exact conformity. 4 Dall. 410; 1 Wash. C. C. 13. Commissioners must take the oath, not an oath, and the record must show it. They may have misconstrued their instructions, and the record should enable us to determine.

January 7th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The only exception in this case raises the question whether the return to a commission to take testimony is invalid where the commissioners fail to return the form of oath taken by them, with their

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signatures and jurat thereto. We *are not pointed to any statute rendering the return of the form of oath requisite, and therefore cannot hold that there has been any failure to comply with the requirements of the statute in this respect. It appears by the return of the commissioners that they were duly qualified in the manner prescribed by the commission, each administering the oath to the other. This was all that the statute or the terms of the commission required, and the commission must be regarded as fully executed and the return competent as testimony in the case.

The Circuit Court excluded the commission; the judgment must, therefore, be set aside and a new trial ordered.

New trial granted.

McIVER, A. J., concurred.

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12 S. C. 586

(Case No. 794.)

J. N. ROBSON v. H. C. MILLER.

(November Term, 1879.)

[1. *Evidence* ⟸194; *Sales* ⟸440.]

Where, in an action for the purchase money of acid phosphate, the defence is failure of the article to conform to the quality warranted, material represented by defendant in his testimony to be the substance sold, may be exhibited to the jury, although defendant admits that the seller's directions for composting were not wholly complied with.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 679; Dec. Dig. ⟸194; Sales, Cent. Dig. § 1266; Dec. Dig. ⟸440.]

[2. *Contracts* ⟸201.]

When one undertakes to manufacture for another an article of known value and use, it is an implied condition of the contract that it shall be fit for the use to which it is commonly put.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 911; Dec. Dig. ⟸201.]

[3. *Sales* ⟸347.]

When a merchant introduces, under his own name and guarantee, an acid phosphate, stating that it will produce certain results when composted, his right to recover the value of certain bags of it sold by him cannot be made to depend solely upon the correctness of the chemical analysis printed upon labels and attached to the bags by the manufacturer.

[Ed. Note.—Cited in Ober v. Blalock, 40 S. C. 40, 18 S. E. 264.

For other cases, see Sales, Cent. Dig. §§ 962–972; Dec. Dig. ⟸347.]

[4. *Sales* ⟸260.]

The words, "fertilizers, compounded of the purest materials," "of the highest standard," "introduced under my own name and guarantee," amount to an express warranty of good results from the article described, as a fertilizer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 723; Dec. Dig. ⟸260.]

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*Before Hudson, J., Anderson, September, 1878.

This was an action by plaintiff against the defendant to recover the price of eight tons of Robson's acid phosphate. The defendant alleged that he purchased under plaintiff's representations, copying the statements contained in plaintiff's circular—that the acid phosphate proved to be utterly valueless and wholly unsuited for preparing a compost manure, that it injured the fertilizing properties of his cotton seed, &c.—and claimed damages.

While the defendant was on the witness stand he exhibited lumps, some of which, he testified, were taken from the compost heaps, others from the field. To this plaintiff objected, as not pertinent to the issue, and, his objections being overruled, excepted. Witness did not, in every particular, follow directions of the circular, but only varied when experience had demonstrated an improvement. To all the bags were attached tags, upon which were stated their chemical constituents. The circular of the plaintiff was as follows:

"Charleston, S. C., November 16th, 1875.

"Having been engaged for twenty years in the guano trade, with eminent success, I deemed it advisable to introduce fertilizers under my own name and guarantee. I have made arrangements to have prepared a guano under my inspection and control, called Robson's cotton and corn fertilizer. This guano is of the highest standard. It contains, among other valuable ingredients, three per cent. of ammonia, one and one-half per cent. of potash, and fourteen per cent. of available phosphate.

"I have also prepared for me a compound acid phosphate of the highest standard. These fertilizers are compounded of the purest materials, and are manipulated and tested under the supervision of Dr. St. Julien Ravenel, of this city, whose name gives a warrant for its high character and adaptation for our soil." [Then comes prices, etc.]

"I take this occasion to return my thanks to those who have so largely patronized the fertilizers heretofore offered by me, and in soliciting their favorable attention to an-

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other. I pledge my *best efforts to meet a continuance of confidence by keeping the highest standard of fertilizers adapted to cotton and corn."

There was a great deal of other testimony, but it is not material to the points made and decided here.

The plaintiff requested the presiding judge to charge—

1. That where an article of a certain and definite nature is to be manufactured, the seller can, in no sense, be considered as warranting it to be appropriate to the use to which the buyer intends to apply it, whether the seller be informed of such intention or not.

2. If the article sold failed to accomplish the results for which the defendant bought it, and there was no fraud on the seller's part, and both buyer and seller relied on the same source of information, to wit, the analysis of the chemist, the plaintiff is entitled to recover.

3. If the improper and unskillful manipulation of the defendant, that is to say, the thickness of the alternate layers of cotton seed and acid phosphate in the compost heaps contributed to, or caused the results complained of, the defendant is himself responsible for these, and the plaintiff must recover.

4. As matter of law, whenever there is an express warranty, no implied warranty can arise. The express warranty, in this case, applies only to the constituent elements of the acid phosphate and the supervision of Dr. Ravenel. If the proof offered by the defendant fails to show that these elements and this supervision were wanting, as alleged, there was no breach of warranty, and the plaintiff must recover.

The first the judge refused, saying it would only apply when the vendee gives the directions.

The second he refused, because, as he said, the chemist, in this case, was the plaintiff's agent and not the defendant's.

The third he charged as correct.

The fourth he modified by extending the express warranty to the good results as a fertilizer, as well as to the ingredients.

He had previously charged that the plaintiff had contracted to sell the defendant an acid phosphate of good quality, and valuable as a fertilizer for corn and cotton, which,

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when com*posted with cotton seed in a particular manner, would produce a good result, to all of which the plaintiff excepted.

The jury found a verdict for the defendant for $51.

Plaintiff moved for a new trial, which being refused, he appealed to this court.

Mr. B. F. Whitner, for appellant.

Mr. A. T. Broyles, for respondent.

January 7th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This was an action for the sale of goods, consisting of an article intended as a fertilizer, described as "Robson's Acid Phosphate." The defense was a counter-claim in the nature of a recoupment, on the ground of the failure of the article sold to conform to representations made by the plaintiff and intended as a warranty.

On the trial a verdict was rendered for the defendant, and the plaintiff now brings before us certain exceptions, alleging error in the rulings of the Circuit judge, and asks a

new trial. These exceptions will be separately considered. The first exception is to certain testimony and the exhibition of certain material represented to be the substance sold to the defendant by the plaintiff, and exhibited in connection with the testimony of the defendant given in his own behalf. The object of exhibiting the substance appears to have been to enable the jury to form a more intelligent judgment of the nature of the commodity sold. It is not material to inquire what inferences could be properly drawn from the appearance of the material thus exhibited; but there can be no doubt that it was competent to show to the jury what was claimed to be evidence offered by the condition of the material itself, as to whether it was in conformity to the character ascribed to it by the vendor. The plaintiff states as a reason for this objection that it appeared by the defendant's testimony that he had not followed the directions of the plaintiff in treating the substance, preparatory to its use as a fertilizer, and, therefore, the condition of the material, as exhibited, was not to be

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attrib*uted to any defect in its condition at the time of sale, but to the improper treatment of the defendant All this was matter for the consideration of the jury and is not pertinent to the question of the competency of the testimony. The jury had a right to know what was done and its effect upon the material and the exhibition of the material and the statement of the mode in which it was actually treated, had a clear bearing on the facts put in issue. This exception should be overruled.

The remaining exceptions are to the refusals of the Circuit judge to charge propositions submitted by the plaintiff for that purpose, and for alleged errors in the matters actually charged by him. The first proposition of the requests to charge is as follows:

"That when an article of a certain or definite nature is to be manufactured, the seller can, in no sense, be considered as warranting it to be appropriate to the use which the buyer intends to apply it, whether the seller be informed of such intention or not."

It may be remarked that this purports to be a rule of implying warranty where no express warranty or representation is given, and, as such, is inappropriate to the case in hand, which is altogether one of express warranty, or, as the plaintiff views it, of misrepresentation. But the proposition is, in itself, unsound in the form stated, inasmuch as it embraces cases as applied to which it would lead to conclusions contrary to law. It is equivalent to saying that when one undertakes to manufacture for another an article that has a known value and use, it is not an implied condition of the contract that the manufacturer shall produce an article fit for the use to which such article is commonly put. This is equivalent to saying that a baker is not bound to produce bread that can be eaten. The proposition was, therefore, untrue, and was properly refused.

The second proposition submitted for charge was as follows:

"If the article sold failed to accomplish the results for which the defendant bought it, and there was no fraud on the seller's part, and both buyer and seller relied on the same source of information, to wit, the analysis of the chemist, the plaintiff is entitled to recover."

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*This proposition tended to present the question as depending wholly upon the nature and quantity of the constituent chemical elements of the commodity at the time of sale, whereas the question of the value of the commodity depended upon the fact whether it would act in a particular manner when composted with certain other materials in the manner prescribed by the plaintiff, so as to make a valuable fertilizer. A circular, issued by the plaintiff, was in evidence. It was for the jury to say whether the statements of that circular constituted the basis of the purchase by the defendant. In this circular the plaintiff stated that he had deemed it advisable to introduce fertilizers—using his own words—"under my own name and guarantee." The circular does not give the chemical composition of the "Acid Phosphate." The plaintiff, in his testimony, states the value of his article to depend on the fact that when composted in a particular manner with certain materials it retains the ammonia evolved, which would otherwise escape, in a form suitable for application to plants. He alleges that his "Acid Phosphate" is not a manure in itself, but that it becomes such under the treatment prescribed for it.

It appears by the plaintiff's own case that the question at issue was not confined to the inquiry whether the article sold had, at the time of sale, certain chemical constituents of a certain character and in certain quantities.

The proposition under consideration was defective in tending to withdraw the attention of the jury from the material features of the case, and confine them to the narrow question whether such constituents were present at the time of sale. It might well be that, as it regards the analysis of the article in its condition at the time of sale, both buyer and seller might be compelled to rely on the representations of a chemist, but that fact, even in the absence of fraud on the part of the seller, could not, in itself become decisive of the plaintiff's right to a verdict, as it was made to be by the plaintiff's proposition.

The fourth request was charged, subject only to the modification of "extending the express warranty to the good results of a fertilizer, as well as to the ingredients."

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This modification, as *well as the remainder

of the charge, is in substantial harmony with what has been already held herein, and the appeal should be dismissed.

Appeal dismissed.

McIVER, A. J., concurred.

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12 S. C. 592

(Case No. 795.)

S. S. ROSS v. MARY A. LINDER.

(November Term, 1879.)

[1. *Husband and Wife* ⇐79.]

A married woman may bind herself by contract.

[Ed. Note.—Cited in Aultman & Taylor Co. v. Rush, 26 S. C. 528, 2 S. E. 402; Wallace v. Craig, 27 S. C. 519, 4 S. E. 74.

For other cases, see Husband and Wife, Cent. Dig. §§ 317–323, 329; Dec. Dig. ⇐79.]

[2. *Husband and Wife* ⇐221; *Parties* ⇐75.]

Where the wife is sued upon contracts other than for her necessary support, the husband is a formal and not a substantial party, and objection to his non-joinder is waived when not taken by answer or demurrer.

[Ed. Note.—Cited in Pelzer, Rodgers & Co. v. Campbell & Co., 15 S. C. 598, 40 Am. Rep. 705; State v. Corbin & Stone, 16 S. C. 545; Shumate v. Harbin, 35 S. C. 527, 15 S. E. 270; Anderson v. Baughman, 69 S. C. 40, 48 S. E. 38.

For other cases, see Husband and Wife, Cent. Dig. § 806; Dec. Dig. ⇐221; Parties, Cent. Dig. § 167; Dec. Dig. ⇐75.]

Before Aldrich, J., at Spartanburg, March, 1879.

The complaint alleged that Alie Lipscomb had conveyed a valuable tract of land to defendant and to H. V. Ross, in consideration whereof they entered into an agreement with Alie Lipscomb to board, clothe and provide other comforts for her; that she boarded with plaintiff for two years, and she was also provided by him with clothing, &c. Judgment was demanded for one-half of this account against the defendant.

The defendant set up a different agreement, denied the correctness of the account, &c., and set up a counter-claim.

At the trial plaintiff proved the following deed:

"The State of South Carolina,
"Spartanburg County.

"Know all men by these presents that I, Alie Lipscomb, of the state and county aforesaid, have relinquished my life interest, and all the real estate of my deceased husband, Robert Lipscomb, of the aforesaid state and county, upon condition that Lee Linder, and Mary Linder, his wife, and S. S. Ross and his wife, provide for my support decent and com-

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fortable, and in a style *conformable to my state and requirements, and the aforesaid parties to pay all doctor bills, to provide for my health and comfort during my natural life. The amount to be established by three disinterested parties, when a disagreement as to the amount necessary and requisite arises.

"This relinquishment of life interest is subject to my choice as to where I live, and with whom.

"Signed and sealed this the 19th day of February, 1876.

"Alie Lipscomb. [L. S.]

"In presence of P. O. Lemmons, G. E. Clary."

Plaintiff testified that there was an agreement made at the same time whereby defendant agreed that her mother should live with plaintiff, and that she would pay one-half of the amount necessary for her mother's support and maintenance. H. V. Ross, wife of plaintiff, was also a daughter of Alie Lipscomb.

The presiding judge granted a non-suit for defect of parties, in that the husband of the defendant was not made a party defendant. Plaintiff appealed.

Messrs. Bobo & Carlisle, for appellant.

Mr. J. S. R. Thomson, for respondent.

January, 7th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The complaint was dismissed by the Circuit Court, on the ground that the defendant was a married woman, and that her husband was not joined as defendant.

The objection of the non-joinder of the husband of the defendant was not taken by either demurrer or answer, and is therefore waived, unless it can be made to appear that such defect is material to the question whether the complaint state facts sufficient to constitute a cause of action. Code, § 171. It is necessary, therefore, in order to sustain the judgment below to establish one of the two propositions—that a married woman cannot bind herself by a contract, or that a judgment cannot be recovered in any case against a married woman without joining her husband.

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*The ability of a married woman to bind herself by a contract cannot be disputed under the provisions of General Statutes, p. 482.

There are cases in which a judgment may be recovered against a married woman without the joinder of her husband as defendant, as provided for in Section 137 of the code, so that it cannot be affirmed that a judgment recovered against a married woman without the joinder of her husband is necessarily erroneous. The provisions of the General Statutes that the husband shall not be liable for the debts contracted by the wife, except in a particular case of her necessary support, places the husband in the position of a formal and not a substantial party to suits against the wife on her individual contracts other than her necessary support, which is the nature of the present action, and failure

to take such objection by demurrer or answer is a waiver of such objection.

The judgment must be set aside and a new trial granted.

New trial granted.

McIVER, A. J., concurred.

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12 S. C. 594

(Case No. 796.)

S. ADAMS v. C. P. TURNER, Executor.

(November Term, 1879.)

[*Executors and Administrators* ⟸310.]

Where executors overpay some of the legatees, and, by decree of the Ordinary, they are directed to pay balance due to the other legatees when they have collected the amounts overpaid, such decree creates an absolute obligation upon the executors, with a reasonable time allowed to call in their over-payments.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1264; Dec. Dig. ⟸310.]

Before Pressley, J., Spartanburg, June, 1879.

The case is fully stated in the referee's report, which is as follows:

This action was commenced by summons and complaint by Sarah Adams, to recover

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her interest in the estate of Elijah *Turner, deceased. It was referred to me by an order of his Honor, the presiding judge, to hear and determine the issues in the cause. In obedience to this order, I held the reference, attended by the counsel of the parties, and now make the following report:

From the testimony taken and herewith submitted, I find the following as matters of fact: That Elijah Turner died, leaving his last will and testament, whereby he bequeathed certain property therein mentioned to certain persons named, to be equally divided among them. John Turner and L. A. Turner were appointed executors of the will, and immediately thereafter qualified as such and entered upon the discharge of their duties. In a codicil to the will, the testator directed that the portion of his estate which he had bequeathed to Sally Ellis should be divided by his executors among the eight children of Sally Ellis, named in the codicil, one of whom was this plaintiff. On the 22d day of October, 1859, the executors divided the property mentioned in the will among the parties entitled thereto, in the division the parties receiving unequal shares, some of them largely overdrawing. Notes without any security were taken by the executors for the amounts overdrawn. In March, 1860, the executors, John Turner and L. A. Turner, filed their petition for a final settlement of the estate in the Court of Ordinary for Spartanburg county, and, after notice given by publication to the parties in interest living without the state, a final settlement of the estate was made in the Ordinary's office on the 22d of June, 1860. Upon a full accounting, in which it was found that the sum of $84.38 was due to the plaintiff in this action by the executors, as her share in the estate, a statement was made up showing this, and the amounts due to some and overdrawn by others of the parties in interest, and upon this statement the following decree was filed:

"It appears from the foregoing statement that some of the legatees have received largely over their shares, it is necessary, therefore, that they pay to the executors the amounts so overpaid, with interest, from October 22d, 1859. When this is done it is ordered that the executors pay to those who

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have not re*ceived their full shares the amounts found to be due them in the foregoing statement, with interest from October 22d, 1859.

"Jno. Earle Bomar, O. S. D.

"June 22d, 1860."

L. A. Turner died in March, 1861. His executors, the defendants herein, have had nothing to do with the estate of Elijah Turner, deceased. After the death of L. A. Turner, John Turner, the surviving executor, collected in confederate money, at different times, nearly all of the amounts overdrawn. John Turner claims also to have paid out after said decree, for the benefit of the children of Sally Ellis, on January 30th, 1861, for medical services for their slave, $4; for the same, on December 21st, 1861, $5; on December 23d, 1861, for making a coffin for said slave, $3. He further set up that he attended and boarded said slave for eighteen months, and that same was worth $144. To said claims the plaintiffs pleaded the statute of limitations. With the modifications above given, I find that the allegations of the complaint are true. I find, as matters of law, that the defendant, as executor aforesaid, is indebted, by reason of the decree of the Court of Ordinary, as alleged in the complaint; but that the same is entitled to credit for amounts paid out on account of medical services and for burial of the slave belonging to the children of Sally Ellis. As there are three of said children unpaid, and all three have sued in this court, and their suits are tried along with this, and as interest amounts, at date of said payment, to more than principal, on the amount now due on said decree, there should be credited $4, being one-third of the amount so paid, the other two-thirds being credited on the claims of the two other children who have sued. The claim for $144, or other claim of payment, cannot be allowed. Even if not barred by the statute of limitations, it was no payment on the aforesaid decree of the Ordinary, and, at most, could only constitute a cause of action in favor of John Turner against the children of Sally Ellis. It can have nothing to do with the case in hand. I find, therefore, that there is

now due and owing to the plaintiff from the defendant, as executor aforesaid, the sum of

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$190.26, *and recommend that the plaintiff have judgment for the same, and for the costs and disbursements of the action.

Respectfully submitted,

S. J. Simpson, Referee.

February 7th, 1879.

To said report the defendant excepted as follows, to wit:

1. Because, by the decree of the Ordinary, the executors of Elijah Turner, deceased, were not required to pay said decree until the legatees, who had overdrawn their shares in the division of the estate, paid back the amounts so overdrawn, with interest; and it having been shown by the testimony that these amounts were paid to John Turner, the surviving executor, after the death of L. A. Turner, the referee erred in holding the estate of L. A. Turner liable therefor.

2. Because the referee erred in holding the estate of L. A. Turner liable under the said decree, when it was conclusively shown that John Turner alone was the active executor, and that no part of the estate was ever shown to have been in the possession or control of L. A. Turner.

The case came on for a hearing before Judge Pressley, who made the following decree, to wit:

These cases having been heard together on exceptions to the report of the referee, after argument of counsel, it is ordered that the exceptions of the defendant, C. P. Turner, executor of L. A. Turner, to the report of the referee be sustained. That so much of the report as finds against him be set aside, that as to him the complaint herein be dismissed, and the defendant, C. P. Turner, executor of L. A. Turner, have judgment against the plaintiff for his costs and disbursements.

From which said decree the plaintiff appealed to the Supreme Court, upon the grounds that his Honor erred—

1. In sustaining the exceptions of the defendant to the report of the referee.

2. In refusing to confirm said referee's report, and give judgment in favor of the plaintiff.

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*Mr. J. S. R. Thomson, for appellant.

Messrs. Evins & Bomar and Duncan & Cleveland, for respondent.

January 7th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The plaintiff has appealed from a judgment sustaining exceptions to the report of the referee and dismissing the complaint. The question turns on the construction and effect of a decree of the Ordinary, made June 22d, 1860, upon a settlement of the estate of Elijah Turner, to which L. A. Turner and John Turner, his executors, and all other persons in interest, were parties. The decree is as follows: "It appears from the foregoing statements that some of the legatees have received largely over their shares; it is necessary, therefore, that they pay to the executors the amounts so overpaid, with interest, from October, 22d, 1859; when this is done, it is ordered that the executors pay to those who have not received their full shares the amounts found to be due them in the foregoing statement, with interest, from October 22d, 1859." The Circuit judge, overruling the referee, held that this obligation of the executors to pay was, under this obligation, altogether conditional upon their receiving back the amounts thus overpaid and decreed to be restored. It appears that L. A. Turner, one of the executors bound by this decree, died shortly after it was pronounced, and that such repayments as had been made under the decree by way of restoring the amounts overpaid, were actually paid to the surviving executor, and hence the court concluded that the defendant, the executor of this deceased executor, was not liable under the terms of the decree.

The question is, whether the decree created an absolute or a conditional obligation on the part of the executors. It is clear that postponing the time of payment until a future event that was certain to occur, did not prevent the obligation from being absolute. According to the form of this decree, the time of payment was fixed when the over-payments should be refunded. We are not at liberty, however, to overlook the nature of

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the *obligation imposed by this decree in putting a construction on its language. It established the proposition that there had been a devastavit affecting both of the executors, thus laying a ground for personal liability, and its object was to afford a remedy for this devastavit. It is entirely inconsistent with this object to hold that the executors are only liable on this condition as to the extent of the repayment of the money. Such a construction must be avoided if it can be done consistently with the terms of the decree. In order to sustain the conclusion of the Circuit Court it would be necessary to hold that neither of the executors was liable for any sum until the whole of the over-payment was refunded, notwithstanding part thereof might have been already refunded and in the hands of the executors; and, also, that only the executor who received this fund could be called upon to distribute it. If we are to look to the form of the decree alone, and pay no regard to its purpose, then it may be that the contingency on which the executors are to pay is a single event, namely, the last payment on the full amount to be returned. In that case the liability could not arise until the last dollar was paid, and no provision was made for distributing such sums as may have already

been collected by the executors under the decree. Such a construction is manifestly absurd. It was clearly intended that if the executors should not collect the whole amount required to be refunded that they should at the least distribute so much as they had in fact collected. This shows that the decree must be read in reference to its obvious purpose, and as the parties are in a court of equity in a case based upon this decree it can well be done. Looking with that purpose, it is clear that as there had been a devastavit it must have been intended that the whole amount should be paid absolutely at same time by the executors. This conclusion is consistent with the argument of the decree that the executors should pay the whole sum overpaid, and not only such sum as they receive by way of refunding the amount over-paid, and, also, that they should pay interest on the whole sum over-paid from a day prior to the decree, although allowed to reimburse themselves pro tanto out of interest paid on the sums refunded. The conclusion must then be that it was intended to allow a reasonable time for the executors to call in the over-payments, and when

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such reasonable time had elapsed *that they should make the payments adjudged absolutely against them by the decree. No question is made as to the sufficiency of the time that has elapsed to satisfy such construction, and, therefore, the executors must be regarded as personally indebted at the date of the decree in the amount adjudged due for such overpayment, although payable at a future day. This view would render the estate of the deceased executors liable for the amount adjudged by said decree.

It follows that the judgment of the Circuit Court must be reversed, and the report of the referee confirmed, and the cause remanded to the Circuit Court for a judgment in accordance with the report of the referee.

Decree reversed.

McIVER, A. J., concurred.

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12 S. C. 600

(Case No. 844†)

FRANCIS ARNOLD v. JESSE HOUSE AND J. E. DENT.

(April Term, 1879.)

[1. *Judgment* ⟸872.]

A judgment which was valid in its origin, but fraudulently renewed for more than the balance remaining unpaid thereon, will be sustained for the amount actually due.

[Ed. Note.—Cited in Miller v. Wroton, 82 S. C. 107, 63 S. E. 62, 449.

For other cases, see Judgment, Cent. Dig. § 1641; Dec. Dig. ⟸872.]

† This case is inserted in advance of its proper place in the order of filing so as to complete, in this volume, the publication of all cases heard prior to November Term, 1879.

[2. *Interest* ⟸19.]

A purchaser at sheriff's sale is liable for interest from day of sale on so much of his bid as is applicable to judgments not his own.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 38; Dec. Dig. ⟸19.]

[3. *Appeal and Error* ⟸1008.]

The findings of fact by the Circuit Court will not be disturbed unless the evidence manifestly and plainly indicates a different result.††

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. ⟸1008.]

Before Pressley, J., Richland, November, 1878.

Hon. THOMAS THOMSON, judge of the Eighth Circuit, sat at the hearing of this case in the place of Associate Justice HASKELL, who had been one of the counsel in the cause.

On March 31st, 1858, Jesse House obtained a judgment against Jacob H. Ledingham, in the Court of Common Pleas for Richland district, for $800 and costs. October 1st, 1859, a payment was made upon the execu-

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tion in the case. February *17th, 1865, all the records and papers in the offices of clerk of the court and sheriff for this district were destroyed with the court-house in the burning of the city of Columbia.

In 1866 or 1867, Francis Arnold advanced to Kinard money to pay the debts of Falls & Kinard, of which firm Kinard was survivor, it being agreed at the time that assets of the firm sufficient to repay the sum advanced should be transferred to Arnold. Jacob H. Ledingham, a debtor by open account to the firm, at the request of Kinard, executed his note for the amount of his indebtedness, payable to Arnold, to whom it was soon afterwards delivered, in pursuance of the above agreement. Upon this note judgment was obtained by Arnold against Ledingham, and execution issued in October, 1870.

Meantime, to wit, in January, 1869, House employed counsel to institute proper proceedings to have his judgment restored and revived, under the authority of the acts of the general assembly authorizing the substitution of records destroyed during the late war. 13 Stat. 384, 411. Action was promptly commenced, House stating that the credit of October 1st, 1859, was $300 and costs; Ledingham resisted upon the ground that the proper credit was $550. The case never came to a hearing, House alleging from no fault of his.

In January, 1875, a tract of land belonging to Ledingham was sold by J. E. Dent, sheriff, under the Arnold judgment, and was bid off by a daughter of Ledingham for $1251. She subsequently assigned her bid to House. After the sale and before this transfer of bid, Ledingham under hand and seal acknowledged the recovery of the House judgment, and that there was a credit thereon of $300 of date October 1st, 1859, and consented that the record be restored and judgment substituted for

††See note at end of this case.

balance due. The amount of Miss Ledingham's bid was credited on House's judgment, and deed given by the sheriff to House, as soon as the order of the court, substituting the judgment, was obtained.

This action was commenced in August, 1877, to have the deed of Sheriff Dent to House canceled and the lands resold, or to have the money paid by House and applied to the Arnold judgment, upon the ground that

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it was fraudulently restored for a *sum largely in excess of the amount actually due. As to the correct credit upon the House judgment, and as to whether the consent given by Ledingham to House was in consideration of promises of benefit to Ledingham or his family, there was testimony pro et contra. The referee, to whom were referred all the issues, concluded "that the proceeding by which House's record was restored, has not the stamp of that bona fides which is necessary to sustain it." The report of the referee, Hon. F. W. Fickling, concluded as follows:

I find, therefore, as conclusions of law—

1. That the fifth section of the act of September 20th, 1866, does embrace judgments and decrees.

2. That the plaintiff, Francis Arnold, is a creditor without notice, in the contemplation of that act.

3. That the judgment of House against Ledingham is, as against the judgment of Francis Arnold against Jacob H. Ledingham, fraudulent and void.

4. That even if not tainted with fraud, the judgment of House against Ledingham, resting on admissions of Ledingham, made after execution levied and lien established in the case of Arnold against Ledingham, cannot divert the lien of the latter judgment, but would in any event be postponed to that judgment.

And I find the following conclusions of fact—

1. That there was paid on the judgment of House against Ledingham, on the first day of October, 1859, the sum of $500 and the costs.

2. That the substituted judgment of House against Ledingham was not obtained in good faith, and as to the judgment of Arnold against Ledingham is fraudulent and void.

And the report gave judgment against House in favor of Arnold for the amount of his bid with interest, and on failure to pay, a resale of the land, &c.

Upon exceptions to this report, Judge Pressley rendered the following decree:

The act of assembly of 1865 makes provision for perpetuating the testimony concerning lost deeds and other papers; also, for substituting new records of judgments and decrees, which have been lost or destroyed.

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*An abstract of these substitutes was to be entered, in proper abstract books, but no time was fixed within which that was to be done, nor did the act require that deeds and mortgages should be again recorded if the previous record thereof had been destroyed.

The fifth section of the act of 1866 remedies these defects by providing that "all written instruments of which a record is required by law, and of which the record has been lost, but the original preserved, and the substitutes, provided in said act for such originals, in case of their loss, shall be recorded within six months from the ratification of this act, otherwise they shall not prevail as liens against subsequent purchasers for valuable consideration, nor creditors without "notice."

It seems clear to me that the words of the above section include judgments, and require them to be recorded within the time therein limited. It has been questioned whether the word "subsequent" applied to "creditors" as well as "purchasers." I have no doubt that it does; and further, that it means creditors subsequent to the date of the said act; just as in the case of an unrecorded mortgage, which does not prevail against a purchaser subsequent to its date, even though he may have been precedent to the date fixed by law for recording such mortgage.

As the defendant, House, did not within the time required get an order of the court to substitute a new record of his judgment, the next question is, whether Arnold is a creditor without notice. His debtor, Ledingham, was originally the debtor of Falls & Kinard, and his debt to them was contracted in 1860, whilst the record of the said lost judgment yet existed. They, therefore, had such legal notice of the said judgment as would affect them and their assignee of the said debt. But, after careful examination of the testimony, I think that Arnold is not a mere assignee. In 1866 he advanced money to Falls & Kinard, they agreeing to pay the said advances in good notes of their debtors, made payable to Arnold. As soon as such notes equal to the amount advanced were delivered to him, that discharged his claim on the remaining assets of Falls & Kinard. Pursuant to said agreement, in February, 1867, they procured from Ledingham his note payable to Arnold, which he then accepted with

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other notes *of the same character. And thus, at that time, for valuable consideration, he became the creditor of Ledingham, without notice of the said lost judgment.

In 1870 Arnold obtained judgment against Ledingham on the said note, and the execution thereon was levied on the land in question in December, 1874. Before the sale in January ensuing, House gave notice of his judgment, and was about to stay the sale. Thereupon it was agreed by Arnold, through his attorneys, that their bid for the land should be the amount then claimed by House, and that the purchase money should remain with the sheriff until the determination of the steps to establish the existence of the

House judgment. That determination was had in February, 1875, and then House claimed and received from the sheriff a conveyance of the land, crediting the purchase money upon his said judgment. The referee, without any proof on the point, reports that Arnold did not have notice of the said settlement. But I think that notice to him may and must be presumed from the circumstances of the case; he had levied upon the land in question, and had been prevented from receiving the purchase money by the said notice from House; he had also agreed that the said purchase money should remain with the sheriff until the determination by the court on House's application for renewal of his judgment. Under such circumstances it cannot be doubted that he must have watched the progress of that application and knew of its determination. When, therefore, he permitted House to make the said settlement with the sheriff, that was an abandonment of the contest, and having done that, he cannot now, after so long a lapse of time, set up the claim that he was then a creditor without notice, and as such having rights superior to those of House.

But though Arnold, by his said waiver, has lost the priority which he might have maintained, yet he may still dispute the amount of House's judgment. Only lately did he discover that there was collusion between House and Ledingham, whereby the amount of the said judgment was fixed at a larger sum than then remained unpaid thereon. The referee reports that there was such collusion, and that the true amount then unpaid was only $826.86. I adopt his conclu-

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sion, not because the testimony *is entirely satisfactory to me, but because it is contradictory, and the referee, who personally examined some of the witnesses, can estimate the value of their testimony better than I can.

The referee also reports that, because of the said collusion, the said judgment should be entirely set aside as fraudulent; but I do not concur with him in this. It was free from all taint of fraud when first entered in 1858, and I find no authority for setting aside a judgment, valid in its origin, because by collusion between the parties thereto it was afterward renewed for more than remained unpaid thereon.

The defendant, House, by taking the place of the bidder, and by his settlement with the sheriff, 1875, gained, and, under this decree, is allowed to retain, very substantial benefit. I therefore hold him liable as purchaser of the said land at the price fixed at that time. On that basis there is a balance of $424.24 due by him, according to the report of the referee, after allowing him the true amount of his judgment.

It is therefore adjudged and decreed, that the defendant, Jesse House, pay to the plaintiff, Francis Arnold, the said sum of $424.24, and the costs of this case; and, upon his failure to pay the same within thirty days after this decree is filed, that plaintiff have leave to enter judgment against him under this decree, and to issue execution thereon.

From this decree, both parties appealed. The plaintiff's exceptions are as follows:

1. Because, it is respectfully submitted, his Honor erred in deciding that, although the lien of the plaintiff's judgment was prior to that of the defendant, House, and the plaintiff was therefore entitled to the proceeds of the sale of the lands of the judgment debtor, yet the plaintiff was to be deprived of the rights incident to his superior lien, because he was "to be presumed" to have notice of the "settlement" between the sheriff and House—and this contrary to the report of the referee, notwithstanding that there was not a tittle of evidence that the plaintiff had any notice, and notwithstanding that no third person could in any manner be affected by a decree restoring the parties to their legal rights.

2. Because his Honor erred in deciding

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that any agreement *was made by the plaintiff, through his attorneys, in respect to the bid to be made upon the land, or the purchase money, or any other matter whatsoever.

3. Because his Honor erred in decreeing that the substituted record of the judgment in favor of the defendant, House, should stand for the sum of $826.86, notwithstanding the same was procured by fraud and collusion.

4. Because his Honor erred in failing to charge the defendant, House, with interest upon the unpaid purchase money of the land from the day of sale.

5. Because the said decree authorizes no more than a judgment for money against the defendant, House; whereas, it is submitted the plaintiff was clearly entitled to the security of the land for the payment of his prior judgment, or any amount due thereon.

6. Because the report of the referee should have been confirmed.

The defendant, House's, exceptions are as follows:

1. Because his Honor should have held that the fifth section of the act of 1866 did not embrace within its limitations "judgment and decrees," but had reference (1) to "instruments in writing," the originals of which had been preserved; (2) or, in case of the loss of such originals, to be certified copies of any such "instruments in writing" as had been preserved; (3) and in case of there being neither original nor certified copy of such "instruments in writing" in existence, then to such substituted lost "instruments in writing" as are provided for in the third, fourth, fifth, sixth and seventh sections of the act of 1865.

2. Because his Honor should have decided that the plaintiff was not a subsequent creditor by the transactions between himself and Kinard, but was an antecedent creditor, occupying no better position than his assignee, in whose shoes he stands.

Mr. L. E. Le Conte, for plaintiff.
Messrs. Pope & Haskell, for defendants.

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*March 24th, 1880. The opinion of the court was delivered by

THOMSON, A. A. J. The plaintiff recovered, October 26th, 1870, judgment against Jacob H. Ledingham for the sum of $1029.54. Jesse House, one of the defendants, obtained a judgment in 1858, against the same party, for the sum of $800. The record of Jesse House's judgment was lost, and it was restored by a new record substituted therefor, by order of the court. The plaintiff alleged that the judgment of Jesse House was fraudulent, or set up for a fraudulent purpose, and should be postponed to his. A tract of land of Jacob H. Ledingham had been sold by the sheriff, under execution, for the sum of $1251, and was purchased by a party who transferred the bid to Jesse House. Jesse House did not pay the money to the sheriff, but claimed that the sum should be applied to his execution, and credited thereon. The plaintiff insisted that no credit should be allowed Jesse House, and that all the purchase money should be paid to the sheriff. All the issues in the case were submitted to a referee. The referee made his report, and held the judgment of Jesse House fraudulent in its renewal or restoration as a record; and even were it free from all taint of fraud in this particular, still void and of no effect as against the judgment of the plaintiff. In this view the referee was not sustained by the Circuit judge, who held a judgment "valid in its origin" could not be set aside, because it was afterwards renewed for more than remained unpaid thereon. It does not follow that an improper use of a valid security destroys the proper right under the security itself. The defect must exist in the security which is impaired by the fraudulent purpose or intent entering into the elements of the contract. The Southwestern Railroad Bank attempted to obtain an unfair preference out of the assets of a failing debtor, the Ocmulgee Bank. The effort entirely failed, and the assignment given by the latter bank to the former was set aside as against the provisions of law. But upon an attempt to exclude the debt of the Southwestern Railroad Bank from its proper share of the assets of the Ocmulgee Bank, the court held the action of the Southwestern Railroad Bank did not operate as a forfeiture of its debt also. The court said there was no principle of equity which exacts this penalty. A

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party can be per*mitted to derive no advantage from his own wrong. This seems the extent of the rule. Johnston v. Southwestern Railroad Bank, 3 Strob. Eq. 330. Upon this point there was no error in the Circuit decree.

For what sum, then, should the judgment of Jesse House stand? Upon this point the Circuit Court affirmed the referee's finding, which stated as unpaid thereon the sum of $826.86. Deducting this sum, with costs from the purchase money, a balance of $424.24 was found in the hands of House, for which the presiding judge gave a decree.

Jesse House became the actual purchaser of the land, and the sheriff executed a deed to him. He leased the land for one year to Jacob H. Ledingham, for the sum of $300. He thus obtained the profits of the property, the value of which was represented in part by money retained in his hands. This money retained was Arnold's, and should have been paid to the sheriff for the plaintiff's use. By assuming the bid and taking the title he contracted with the sheriff to pay the money into his office, or at least so much thereof as he was not entitled to have credited on his judgment. Being in the uninterrupted use of the whole land, and making profit therefrom, he should account for interest on so much of the purchase money as was not his own. Hampton v. Eigleberger, 2 Bail. 520.

The sheriff at his sales may be regarded the agent of both parties, and his entry a liquidation of the sum bid. The sum is thus rendered certain. Leman v. Blackwood, Harper 219.

Other questions were presented by the exceptions on appeal, in relation to which there was either a concurrence in the views of the Circuit judge, or which did not affect the conclusions reached by the court in the case.

This court, in its exercise of the powers of review, will not disturb the findings of the Circuit Court unless it be manifest that the evidence plainly points out another and different result from that attained by the presiding judge. Clarke v. Jenkins, 3 Rich. Eq. 338; Austin v. Kinsman, 1 S. C. 97.

Interest should be allowed the plaintiff on the sum of money decreed to him from the

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time the money should have been paid *by House in the sheriff's office, and the decree of the Circuit Court is modified accordingly.

The judgment of the Circuit Court, modified as above, is affirmed and the appeal dismissed.

Appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

NOTE BY THE REPORTER

[For the convenience of the profession, it is purposed to group together the decisions of this court since the adoption of the constitution of 1868, determining the power of the Supreme Court to review on appeal findings of fact by the courts below, and the rules which govern the exercise of such power.

The chart of their powers is contained in Article IV., Section 4, of the constitution, which reads as follows: "The Supreme Court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors at law, under such regulations as the general assembly may, by law, prescribe."

First. Appeals from the Court of General Sessions, and from the common law side of the Court of Common Pleas, are governed by the same principles, so far as the jurisdiction of this court is concerned. In either case the verdict of a jury cannot be set aside on appeal for error of fact. This is fully supported by the authorities, and there is no case to the contrary. In the leading case of State v. Bailey, 1 S. C. 1, the authority of the former Court of Appeals in this state, and of the Court of King's Bench in England, and of this court under the constitution of 1868, are considered, and the conclusion stated, that under Article IV., Section 4, of the present constitution, this court is without jurisdiction, and hence has no power to grant a new trial where it is asked upon the ground that the verdict is unsupported by the evidence; that such right rests exclusively with the Circuit judge. In State v. Cardoza, 11 S. C. 195, the point was made that where there is no evidence to sustain a verdict,

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*that it may be set aside here as being necessarily based upon matters outside the case; but the court, in the strongest language, reaffirmed the decision in Bailey's case. The same principle has been recognized in civil cases of common law cognizance; this court cannot sustain the appeal. Floyd v. Abney, 1 S. C. 114; Elmore v. Scurry, Id. 139; Winsmith v. Walker, 5 S. C. 473; Bardin v. Drafts, 10 S. C. 493; Warren v. Lagrone, ante 51.

If the damages awarded by the jury are excessive, this court cannot interfere. Craven v. Rose, 3 S. C. 72; Joplin v. Carrier, 11 S. C. 327. The power to grant relief in such cases rests exclusively with the Circuit judge, whose decision is final. If he refuses to grant a new trial, when the motion is made upon the ground that the verdict is against the evidence or unsupported by it, such refusal cannot be here reviewed. Abrahams v. Kelly, 2 S. C. 235; Gibbes v. Elliott, 8 S. C. 50; Clarke v. Harper, Id. 256. In Winsmith v. Dewberry, unreported case, No. 774, under the judge's charge, the verdict was absolutely without evidence to support it; but from the same judge's refusal to grant a new trial, the appeal was dismissed. Where a new trial is refused in cases alleging that the verdict awarded excessive damages, the same rule has been uniformly applied. Brickman v. Railroad Co., 8 S. C. 173; Steele v. Railroad Co., 11 S. C. 589. An order by the Circuit judge granting a new trial in such cases, is equally beyond the interference of this court. Byrd v. Small, 2 S. C. 388; Massey v. Adams, 3 S. C. 254; Potts v. Bonds, 10 S. C. 498.

Where in a common law action a referee decides the questions of fact, and his findings are confirmed by the Circuit judge, the report stands as the verdict of a jury and cannot be here reviewed, unless it is made to appear that the evidence is incompetent in point of law to support the conclusions of the referee; and that had the case been tried by a jury, the presiding judge would have been justified in directing a verdict to the contrary. But if the evidence is sufficient to entitle the referee to pass upon the questions as matters of fact, then his findings of fact do not constitute errors of law, and this court cannot set them aside. Kirkland v. Cureton, 4 S. C. 122; Gilliland, Howell & Co. v. Gasque, 6 S. C. 406. Where tried by the Circuit judge, without referee or jury, his decision upon the facts is not appealable, unless the judgment is totally devoid of facts

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to sustain it, thus *involving error of law, which this court may correct. Whaley v. Bank of Charleston, 5 S. C. 189. Where the evidence is insufficient in law to sustain the action, the Circuit judge's refusal of a motion made by the defendant for a non-suit, is error of law, reviewable on appeal. In such case the cause must be remanded, as this court cannot dismiss the complaint for insufficiency of evidence. Willis v. Knox, 5 S. C. 474. But when there is any evidence at all in the case, it should be submitted to the jury—a non-suit would be erroneous. Holley v. Walker, 7 S. C. 142.

From this statement of the cases, it will be seen that in jury causes this court cannot grant a new trial except for error of law; that where there is no legal evidence to sustain the demand for judgment, it would be error of law to refuse a motion for nonsuit, but not where there is any evidence, however

slight in support of such demand; that this court cannot review the decision of the Circuit judge, either granting or refusing a new trial, upon grounds involving questions of fact only; that when the case is tried by a Circuit judge without a jury, or upon the report of a referee, his findings of fact are not reviewable on appeal, where there is any evidence to sustain them, but if wholly unsupported by any evidence in the cause, they would be error of law; and the reasoning which has led to the conclusion last stated, induces the belief that whenever the point is raised this court will hold that the refusal of the presiding judge to direct a verdict, where there is no evidence to the contrary, is error of law.

Second. In "cases of chancery," this court is not limited to a correction of errors of law, but has appellate jurisdiction, and may, therefore, review and reverse findings of fact by the courts below. The only limitation upon their power in this regard are the rules laid down by their own adjudications. This was suggested in State v. Bailey, supra, acknowledged in several subsequent cases, and expressly determined in the leading case of Sullivan v. Thomas, 3 S. C. 531, at the hearing of which, Moses, C. J., was absent, but to which he signified his assent in the subsequent case of Whaley v. Bank, 5 S. C. 201.

Questions of fact, then, in "cases of a class of which the Court of Chancery could entertain jurisdiction at the time of the adoption of the constitution" of 1868, may be reviewed here, subject to the principles of the decided

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cases. Such questions have *come up under four aspects: (1.) Where the conclusions of the Circuit judge confirm those of a referee; (2.) Where they are derived from testimony taken before him in court; (3.) Where they are based upon testimony submitted to him in writing; and (4.) Where the Circuit judge reverses the findings of fact by a referee, who was required to report his conclusions from the evidence.

1. Where the Circuit judge has concurred in the findings of fact by a referee, this court will not reverse them, except on clear or overbearing evidence. Blackwell v. Searles, 1 S. C. 116. This rule has been repeatedly re-affirmed in the same or similar language. In Adger & Co. v. Pringle, 11 S. C. 548, the phraseology is, "unless it is without any testimony to sustain it, or is manifestly against the weight of the evidence." The rule has been uniform and unquestioned; the only difficulty lies in its application. Where the findings have depended upon direct testimony, involving the accuracy or credibility of witnesses, they have been invariably sustained. Barrett v. Cochran, 11 S. C. 29; Johnson v. Henagan, Id. 93; Fraser & Dill v. Charleston, Id. 486. Where the conclusions were drawn inferentially from the facts proven, the rule has caused a dismissal of the appeal in Austin v. Kinsman, 1 S. C. 97; Blackwell v. Searles, Id. 116; Hinton v. Kennedy, 3 S. C. 459; Eakin v. Knox, 6 S. C. 14; Richardson v. Chappell, Id. 146; Singleton v. Lowndes, 9 S. C. 465; Adger & Co. v. Pringle, 11 S. C. 527; and also in Bradley v. Rodelsperger, 6 S. C. 290, which is assumed to be an equity case, as the Supreme Court does not question their right to review the findings of fact by the court below. Concurrent findings by referee and Circuit judge have been reversed in the following cases: Billings v. Clinton, 6 S. C. 90; Zimmerman v. Autley, Id. 379; Arthur v. Anderson, 9 S. C. 234; Annely v. De Saussure, ante 488. The correctness of the rule is not questioned in these cases, as will be observed by reading the cases themselves. In Billings v. Clinton it was considered that the testimony was not legally sufficient to establish the fact found, and that to other testimony greater weight was attached than was permitted by law. In Zimmerman v. Autley the court say: "Had they, in drawing their conclusions as to the facts of the case passed upon, all the questions of fact involved and put at issue by the pleadings, and properly ap-

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plied *the rules of law having a bearing on the case, according to the established practice of this court, their conclusions would not ordinarily be disturbed." And the court proceed to point out the error of the referee in basing his findings of fact upon one badge of fraud only, overlooking other badges clearly disclosed by the evidence, and that the judgment did not follow necessarily from the facts found. In Arthur v. Anderson it was treated as an error of law, involving "the sufficiency of the evidence as it regards its character and tendency to establish the conclusions derived from it by the court below." Annely v. De Saussure remains to be considered. In this case the findings of fact by the referee (who was soon afterwards elevated to the bench) were concurred in by the Circuit judge and approved by one of the judges of the Supreme Court. The Chief Justice who delivered the opinion of the court reversing the findings below, while evidently differing with the referee, puts the reversal upon legal grounds. The associate justice whose concurrence made a reversal the judgment of this court, gives no assent to the legal position of the Chief Justice, but finds in the case "a total lack of evidence" to sustain the conclusions below. The reversal was thus reached by a majority of the court, one of whom put it upon a legal principle to which there was no assent, and the other upon a conclusion of fact upon which he alone was willing to rest it. And the third justice dissenting agrees with referee and Circuit judge. If the majority of the court had overruled the findings below as involving errors of fact only, notwithstanding the assent

given to such findings by one of their associates, the profession would find it difficult to learn the limitations within which the rule was applied; and it would be not easily reconciled with the language in Hinton v. Kennedy, supra, that "the onus is on the appellant to show from the facts in evidence that there is no reasonable doubt of the error alleged." The rule itself, however, stands; and to obtain a reversal of the concurrent findings of fact by referee and Circuit judge it will be necessary to convince this court that such findings are without evidence to sustain them, or are manifestly against the weight of the evidence.

2. Where the evidence is taken in open court in the presence of the presiding judge without a referee or jury, his conclusions therefrom stand upon as strong ground, as

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they do under the *head last above discussed. It does not appear that any of the cases now under consideration involved direct testimony upon the facts found; the conclusions seem to have been inferentially drawn from the testimony. In Burris v. Whitner, 3 S. C. 510, the findings of fact were sustained, there being "no clear proof to contradict his conclusions." They were also sustained in Mayer v. Blease, 4 S. C. 10, the court saying they "must stand unless shown to be so entirely erroneous as to justify our interference by impressions from the evidence altogether contrary to his own." The same result was reached in Means v. Feaster, Id. 249, where it is said: "If there was evidence sufficient to warrant the judgment of the court below on the facts, we should not overrule it, even if a close and careful examination might lead us to believe that the weight was the other way." In Lucken v. Wichman, 5 S. C. 411, the appeal was dismissed. Moses, C. J., in delivering the opinion of the court, says: "Where a decree resting alone on facts is sought to be reversed, the contestant must show that it is clearly erroneous. The obligation thus imposed upon him is necessarily a light one, for if the error is clear, there will be no difficulty in exposing it." In Daniels v. Moses, ante 138, it is recognized as the "established rule of this court to accept the conclusion of the Circuit judge where there is any evidence to sustain it. And in Glenn v. Shannon, ante 570, it is ruled that a finding of fact by a referee in an equity cause tried before him is conclusive, unless without evidence to sustain it, or manifestly against the overbearing weight of the evidence; and the appeal was dismissed. In reversing the Circuit decree in Sullivan v. Thomas, 3 S. C. 531, a case heard, it would appear, partly on written and partly on oral testimony, this court say that their conclusion was reached "not upon doubtful proof, but by a clear and overwhelming mass of testimony met by no contradiction such as the nature of the testimony demanded." This is said as to one only of the questions of fact involved, but the same reasoning is applied to the others, and clear error is pointed out. Featherston v. Norris, 7 S. C. 472, simply determines the legal bearing of the facts found to be different from that given to them by the Circuit judge. And in Shaw v. Cunningham, 9 S. C. 271, the facts are not stated. The case was remanded to the Circuit Court to have a question of fact passed upon by a jury, this court not being willing to over-

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*rule the judgment of the court below, but "not satisfied of the sufficiency of the evidence adduced to support his conclusion."

3. Where the conclusions of the Circuit judge are drawn from written testimony submitted to him, unaided by the findings of a referee, or the verdict of a jury upon issues ordered, the rule is substantially the same. Such appears to be the case of Livingston v. Wells, 8 S. C. 347, in which Willard, A. J., draws no distinction between cases heard primarily by the Circuit judge upon oral or written testimony, and cases heard upon exceptions to a referee's report. In sustaining the facts as found, he thus speaks, (p. 356): "In order to set aside the conclusions of the Circuit Court as to the force and effect of evidence upon an appeal in cases of equitable cognizance, it is necessary to show that such conclusions are inconsistent with or unsupported by the clear force of the evidence from which they are drawn. * * * It must appear that the conclusions of the Circuit Court are clearly wrong. * * * The presumptions in favor of the correctness of the Circuit decree must be completely rebutted on considerations arising from the evidence, if it appears that there was contradictory testimony, in order to reconcile which the character and position of the witnesses must be considered as presenting a question of credibility. * * * If it appears that conclusions of fact inferentially drawn from the testimony enter into the determinations as to matters of fact, the appellate court usually leaves these conclusions undisturbed, unless found to be inconsistent with inferences that are regarded by the court as irresistibly arising from such evidence. In a word, the clear result of undisputed testimony must point to a conclusion different from that which the Circuit Court has drawn from it, before it will be disturbed on appeal." This seems to be quite as strong language as that which is to be found in the cases above considered. In State, ex rel. Cathcart, v. Columbia, ante 371, a finding of fact by the Circuit Court against the appellants upon whom lay the burden of proof was sustained, there being no overbearing testimony to the contrary. Fraser v. Davie, 11 S. C. 56, was heard almost wholly on testimony in writing. This court overrules the Circuit judge, because a contrary conclusion rested on clear and indisputable grounds.

They hold his finding erroneous "as unsupported by the proper legal effect of the proofs and allegations." And in overruling him

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upon another *point they say: "the testimony is so clear and conclusive, that it does not need comment or illustration."

4. Where the Circuit judge reverses the findings of fact by a referee, a different principle governs. Five cases of this class may be found in the current series of reports, viz.: Dewitt v. Atkinson, 6 S. C. 140; Perry v. Sullivan Man. Co., Id. 310; Roach v. Ivey, 7 S. C. 434; Hughey v. Eichelberger, 11 S. C. 36; Thorpe v. Thorpe, ante 154. The case of Pool v. Dial, 10 S. C. 440, has reference only to the powers of a Circuit judge over the referee's report. Dewitt v. Atkinson is the leading case under this head. While, as stated in the subsequent case of Thorpe v. Thorpe, the Circuit judge must in every equity case reach and state his own conclusions of fact, nevertheless where such conclusions are derived wholly from testimony submitted to him in writing, and they are different from those drawn by the referee from that same testimony taken by him in person, the Circuit judge's opportunities of discovering error in the referee's findings of fact, are the same as those afforded this court, and the rules laid down under the three preceding heads of this note do not apply. This court will fully examine the testimony in such cases, and will sustain referee or Circuit judge according to the impressions thence derived. This is the doctrine of Dewitt v. Atkinson. In all of these cases, except Thorpe v. Thorpe, the referee was sustained and the Circuit decree reversed. But in each one of them, the judgment reached was the result of an examination of the testimony, to the same extent as were the conclusions of the Circuit Court.

Six cases only have been passed over, and they need to be separately considered, as it cannot be determined under what head they should fall. Leaphart v. Leaphart, 1 S. C. 199, was referred to the commissioner in equity to ascertain and report; but his findings are not stated, and, in the opinion of this court, allusion is made to a witness who was examined before the Chancellor. The appellants, regarding the testimony as unsatisfactory and conflicting, asked this court to order an issue to be tried by a jury, but it was refused, and the Circuit decree was confirmed. In Williams v. Beard, 1 S. C. 309, and in Womack v. Austin, Id. 421, it does not appear how the testimony was taken, but the conclusion of the Circuit judge was confirmed, there being "no overbearing weight of evidence against it." In Smith & Gibson

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v. *Pate, 3 S. C. 204, it cannot be certainly said how the evidence was taken. The decision of the Circuit judge in favor of plaintiffs was reversed, and an issue upon the main point of fact was ordered by the Supreme Court to be submitted to a jury, because of the "absence of all proof" to sustain it. Upon the certified verdict of the jury resolving the issues in favor of the defendant, this court dismissed the action. In Anderson v. Earle, 9 S. C. 460, we are not informed how the case was heard, what the decision of the Circuit judge was, or whether this court agreed or disagreed with him. In Arnold v. House [12 S. C. 600] the principal case, to which this note is appended, questions of fact found by the referee were confirmed in part by the Circuit judge and in part reversed, and both classes were brought here on appeal. The opinion of the court does not enable us to say which were approved and which were deemed immaterial, nor to which their remarks applied. From this review of cases of equitable cognizance, we find—

1. That in all cases of appeal from findings of fact by a Circuit judge, confirming the same findings by a referee, or deduced from testimony taken orally before the judge, or from evidence submitted to him in writing for his original findings, the burden is upon the appellant to show clear error in the Circuit decree, by reason of an entire absence of evidence to support it, or because opposed to the manifest weight of testimony in the cause. But where, in the judgment of this court, there is such clear error, the Circuit decree will be reversed.

2. In cases of difference of opinion between the judge and a referee upon the facts, this court will examine the Circuit decree, and either adopt or reject it, as the facts may appear to warrant, to the same extent as a Circuit judge passes upon the report of a referee.

It is believed that every case contained in the twelve volumes of the new series of South Carolina Reports, in which this court has been called upon to review questions of fact determined in the courts below, will be found under its proper head in this note. It will be observed that the Supreme Court have, as yet, laid down no rule governing its review of findings of fact by a Court of Probate; nor has it yet been determined whether a different rule would be applied to cases coming up from the Court of Probate, exercising the powers heretofore belonging

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to *Ordinaries, from the rule which should govern cases arising in that court under the enlarged jurisdiction conferred upon it by the constitution of 1868, and which, before that time, were within the exclusive jurisdiction of the Court of Equity.

REPORTER.]

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT

OF

SOUTH CAROLINA

VOLUME XIII

FROM NOVEMBER, 1879, TO APRIL, 1880, INCLUSIVE

BY ROBERT W. SHAND

STATE REPORTER

JERSEY CITY, N. J.
FREDERICK D. LINN & CO., LAW PUBLISHERS AND BOOKSELLERS
1881

ANNOTATED EDITION

ST. PAUL
WEST PUBLISHING CO.
1916

Entered according to Act of Congress, in the year 1881, by
FREDERICK D. LINN & CO.,
In the Office of the Librarian of Congress, at Washington.

(13 S.CAR.)

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. A. J. WILLARD.

ASSOCIATE JUSTICES.

HON. HENRY McIVER, † HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST CIRCUIT,	HON. B. C. PRESSLEY.
SECOND "	" A. P. ALDRICH.
THIRD "	" T. B. FRASER.
FOURTH "	" J. H. HUDSON.
FIFTH "	" J. B. KERSHAW.
SIXTH "	" T. J. MACKEY.
SEVENTH "	" W. H. WALLACE.
EIGHTH "	" THOMAS THOMSON.

ATTORNEY-GENERAL.

HON. LEROY F. YOUMANS.

SOLICITORS.

1st Circuit.—W. ST. J. JERVEY.	*5th Circuit.*—JOHN R. ABNEY.
2d Circuit.—F. H. GANTT.	*6th Circuit.*—T. C. GASTON.
3d Circuit.—M. J. HIRSCH.	*7th Circuit.*—B. W. BALL.
4th Circuit.—W. W. SELLERS.	*8th Circuit.*—J. S. COTHRAN.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

† Elected December 11th, 1879, as successor to Hon. A. C. Haskell, resigned.

LIST OF ATTORNEYS

ENROLLED IN THE SUPREME COURT OF SOUTH CAROLINA DURING THE YEAR 1880

ABNEY, B. L.....Edgefield.
BEAN, THOS. L.....Augusta, Ga.
BEARD, W. J.....Manning.
BELLINGER, G. DUNCAN.....Barnwell.
BENET, W. C.....Abbeville.
BOGGS, JULIUS E.....Pickens.
BOYLE, CHARLES.....Summerville.
BREEDEN, S. M.....Bennettsville.
BROWN, GEO. W.....Darlington.
BUCHANAN, OSMUND W.....Winnsboro'.
CALHOUN, WM. P.....Abbeville.
CAMPBELL, THOS. A.....Laurens.
CAPPELMANN, J. D.....Charleston.
CASTON, ROBT. T.....Cheraw.
CHISOLM, J. BACHMAN.....Charleston.
CONNORS, CHAS. T.....Lancaster.
COVINGTON, F. F.....Bennettsville.
DARGAN, W. F.....Darlington.
DAVIS, JAMES E.....Aiken.
DE VORE, J. W.....Edgefield.
DUFFIE, A. M.....Blackstock.
ELLIOTT, HENRY S.....Beaufort.
EMANUEL, P. A.....Aiken.
EVANS, D. D.....Darlington.
FARLEY, HUGH L.....Spartanburg.
FOWLS, S. B.....Newberry.
GARY, ERNEST.....Edgefield.
GIBSON, HIRAM A. H.....Walhalla.
GOGGANS, JAMES K. P.....Newberry.
GRAHAM, S. J.....Abbeville.
GRIFFIN, J. S.....Colleton.
HALTIWANGER, GEO. D.....Columbia.
HAMMOND, M. C.....Aiken.
HENDERSON, E. P.....Aiken.
HOBBS JNO. F.....Lexington.
HOLLETT, RHODERICK P.....Columbia.
INGRAM, W. H.....Clarendon.
JOHNSON, H. L.....Williston.
JOHNSON, JAMES W.....Marion.
KENNEDY, E. J.....Chesterfield.
LEE, R. D.....Sumter.
LYNCH, R. A.....Columbia.
MAYBIN, ROBT. C.....Newberry.
MAYFIELD, WM. D.....Greenville.
MCDONALD, J. E.....Winnsboro'.
MCIVER, EDWARD.....Cheraw.
MCNEIL, JNO. M.....Chester.
MELTON, PRESTON L.....Columbia.
MEYNARDIE, C. W.....Chester.
MOORE, ERNEST.....Lancaster.
MORGAN, FRANCIS T.....Chester.
MULLER, J. A.....Lexington.
MURRAY, E. B.....Anderson.
MURRAY, JR., J. S.....Anderson
NIX, J. T.....Greenville.
NORRIS, F. W.....Edgefield.
OUTZS, W. D.....Edgefield.
PEARSON, JOHN H.....Columbia.
PERRIN, L. W.....Abbeville.
PIERSON, ROBT. M.....Kingstree.
PORTER, FRANK L.....Kingstree.
RAWLS, R. R.....Union.
RAYSON, T. M.....Orangeburg.
REED, J. OTEY.....Colleton.
SESSIONS, JOSEPH.....Georgetown.
SHANNON, JR., W. M.....Camden.
SHELOR, JOSEPH W.....Walhalla.
SHEPPARD, LUTHER W.....Edgefield.
SIMONS, J. ANCRUM.....Charleston.
SPAIN, T. H.....Darlington.
STUART, J. A.....Abbeville.
THOMAS, JR., JNO. P.....Columbia.
THOMAS, W. D.....Bennettsville.
TILLINGHAST, WM. S.....Hampton.
TRACY, C. C.....Walterboro'.
WARDLAW, COLUMBUS.....Anderson.
WARDLAW, F. H.....Edgefield.
WILLIAMS, WM. H.....Greenville.
WILLIAMSON, R. C.....Darlington.
WILSON, JOHN S.....Manning.
WILSON, J. STANYARNE.....York.
WOODWARD, CHAS. L.....Edgefield.
ZEAGLER, DAVID A.....Anderson.

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ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED IN THIS VOLUME

HON. A. J. WILLARD, CHIEF JUSTICE.
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. SAMUEL McGOWAN,† ASSOCIATE JUSTICE.

*(Case No. 786.)

STATE v. CORLEY.

(November Term, 1879.)

[1. *Larceny* ⟸2.]

So much of Chapter CXXIX., Section 12, of General Statutes, as relates to live stock, is repealed by the third section of the act of March 22d, 1878. 16 Stat. 631.

[Ed. Note.—Cited in State v. Branham, 13 S. C. 394; State v. Moore, 30 S. C. 74, 8 S. E. 437.

For other cases, see Larceny, Cent. Dig. § 2; Dec. Dig. ⟸2.]

[2. *Criminal Law* ⟸94.]

Since this statute, the larceny of a cow, although below the value of $20, is punishable by imprisonment in the penitentiary, and is within the jurisdiction of the Court of General Sessions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 137–166; Dec. Dig. ⟸94.]

[3. *Criminal Law* ⟸889.]

Where the jury return an incomplete verdict, the judge may, before it is recorded and before the jury have dispersed, direct them to retire to their rooms to reconsider it; and a subsequent verdict is valid.

[Ed. Note.—Cited in State v. Anderson, 24 S. C. 114; Devore v. Geiger, 41 S. C. 140, 19 S. E. 288.

For other cases, see Criminal Law, Cent. Dig. § 2112; Dec. Dig. ⟸889.]

Before Fraser, J., Orangeburg, May, 1879.

The defendant, Erwin Corley, was indicted for stealing a cow of the value of $12. One

*2

count laid the property in a person *named, and another count in some person or persons to the jurors unknown. The jury, after retiring, dispersed for the night by the consent of the solicitor and defendant's counsel, and returned into court the next morning their sealed verdict, which read, "guilty of killing an unknown cow," and was signed by the foreman. The presiding judge held that the verdict was incomplete, and directed the jury to retire and reconsider it. To this defendant excepted. The jury returned with a verdict of guilty. Defendant objected to its publication or record, and, being overruled, excepted.

Defendant moved in arrest of judgment upon the grounds, (1) that by reason of the value of the cow being laid under $20, the court had no jurisdiction of the alleged crime; and (2) that the verdict first rendered amounted to a verdict of acquittal. The motion was overruled, and the prisoner was sentenced to imprisonment in the penitentiary and to pay a fine of $1. Defendant appealed.

Messrs. Knowlton & Lathrop, for appellant.

The crime charged is petit larcency, under Chapter CXXIX., Section 12, of General Statutes. 14 Rich. 163. This section is not repealed by act of 1878. Repeals by implication are not favored, and if two acts can stand together, they shall do so. 1 Bl. Com. 90; Broom's Leg. Max. 29; 14 Rich. 247. There are no negative words nor repealing clause in the act of 1878, hence it should be held applicable only where the live stock is of the value of $20, other cases being governed by the former law. These acts are in pari materia, and should be taken and construed together. 1 Kent 463; Dwar. on Stat. 569; 2 Bail. 554. For other rules of

†The cases in which the name of Associate Justice McGowan does not appear, were heard before his qualification.

construction applicable to this case, 1 Kent 464; 4 Bl. Com. 229; Dwar. on Stat. 770; 2 S. C. 404; and 6 Id. 464, were cited.

Mr. Solicitor Jervey, for respondent.

January 7th, 1880. The opinion of the court was delivered by

McIVER, A. J. The defendant was convicted in the Court of General Sessions of larceny, in stealing a cow of the value of

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$12. *A motion in arrest of judgment was made, upon the ground that the Court of General Sessions had no jurisdiction of the offence charged, and, upon that motion being refused by the Circuit Court, it is renewed here by this appeal.

The solution of this question depends entirely upon the determination of the question, whether so much of Section 12, Chapter CXXIX., of the General Statutes, as relates to the larceny of live stock, is repealed by the act of March 22d, 1878. 16 Stat. 631. That act does not, in express terms, repeal the section above referred to, and, if it operates as a repeal, it must be by implication. While it is quite true that repeals by implication are not favored, it is equally true that one act may repeal another by implication only. A striking instance of this, followed by the most unlooked-for results, may be found in the repeal of the act of 1789, prescribing the punishment for cow-stealing, by the act of 1866. State v. Thomas, 14 Rich. 163. There must, however, be a necessary implication; for, to repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and of the old, that they cannot be reconciled. Potter's Dwar. on Stat. 154, et seq. Every affirmative statute is a repeal of a precedent affirmative statute where its matter is so clearly repugnant that it necessarily implies a negative. 1 Bl. Com. 89. So, too, where a statute covers the subject matter of a former statute, and prescribes different penalties from those enumerated in the old law, it is, by necessary implication, a repeal of the former statute. Norris v. Crocker, 13 How. (U. S.) 429 [14 L. Ed. 210]. But, after all, the real question is, what was the intention of the law-making power, as it may be gathered from the terms of the statute? Now, to apply these principles to the act under consideration. Its title is an act to amend the criminal law, showing that the intention of the legislature was to introduce some change in that branch of the law, either by adding to or altering it. On looking into the special provisions of the act, we do not find anything that may be called an addition to the criminal law—no new offence being created, and no new modes of procedure being prescribed, but we only find provision for altering what had before been the law, and that, too, in the single matter of the measure of punishment prescribed

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for *certain offences. The first section provides for an increase of the punishment for the offences of arson and rape; the second for an increase of the punishment for the offence of burglary at common law; and the third for an increase of the punishment in cases of larceny of live stock. Now, when it is remembered that the criminal jurisdiction of a justice of the peace or other inferior tribunal, is measured only by the nature and amount of the punishment, and not by the nature of the offence, (Const., Art. I., § 19; Art. IV., § 22,) and when we find the general assembly amending the criminal law for the sole purpose of increasing the punishment prescribed for certain offences, by which increase the limits assigned to the jurisdiction of "a justice of the peace or other officer authorized by law" are exceeded, the conclusion is irresistible that the general assembly must have intended to place such offences beyond the jurisdiction of those inferior tribunals.

Again, here is an affirmative statute which, by its terms, necessarily implies a negative. It prescribes that "any person found guilty of the larceny of any horse, mule, cow, hog or any other live stock, shall suffer imprisonment in the state penitentiary," &c. It necessarily negatives the idea that a person found guilty of such an offence could be lawfully punished in any other way. The language is, "any horse, mule, cow," &c., not any such animal above or below a specified value; and it is difficult to understand by what authority a court of justice could interpolate into the statutes, as the argument of appellant necessarily demands, the words "of or above the value of twenty dollars."

It seems also that it has always been the policy of this state to treat the larceny of certain domesticated animals as a distinct and separate subject matter from the larceny of other species of property, as is evidenced by the various acts in relation to horse, cow and hog-stealing. Now this act of March 22d, 1878, is a new statute, covering the whole subject matter of the larceny of such animals, and prescribes different penalties from those provided for in the former laws on the same subject, and hence, under the rule laid down in Norris v. Crocker, supra, the latter must be regarded as a repeal of the former.

The other ground of appeal seems to have

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been abandoned; *and very properly, too, as it is manifest that it could not be sustained. The power of the court to allow a jury to correct informalities in their verdict before it is recorded, and before the jury have dispersed, is undoubted.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

13 S. C. 5

(Case No. 791.)

REYNOLDS v. WITTE.

(November Term, 1879.)

[1. *Principal and Agent* ⟸158.]

Where money of a principal was lent by his agents and the notes of the borrower were secured by a deposit of negotiable collaterals which were fraudulently misappropriated by the agents, the principal is responsible for their value.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 593, 595; Dec. Dig. ⟸158.]

[2. *Principal and Agent* ⟸158.]

A principal is civilly responsible for the fraudulent act of his agent, where the act is done in the course of the agency, and by virtue of the authority as agent.

[Ed. Note.—Cited in City Council of Charleston v. Ryan, 22 S. C. 348, 53 Am. Rep. 713; Myers v. Whiteheart, 24 S. C. 202; Cobb v. Columbia & C. R. Co., 37 S. C. 200, 15 S. E. 878; Rucker v. Smoke, 37 S. C. 380, 16 S. E. 40, 34 Am. St. Rep. 758; Whaley v. Duncan, 47 S. C. 147, 25 S. E. 54; Hutchison v. Rock Hill Real Estate & Loan Co., 65 S. C. 75, 43 S. E. 295; Mitchell v. Leech, 69 S. C. 421, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811; Bank of Spartanburg v. Mahon, 75 S. C. 258, 55 S. E. 529; Williams v. Tolbert, 76 S. C. 217, 56 S. E. 908; J. C. Stevenson Co. v. Bethea, 79 S. C. 492, 61 S. E. 99; Brown v. American Telephone & Telegraph Co., 82 S. C. 175, 63 S. E. 744; Huestess v. South Atlantic Life Ins. Co., 88 S. C. 41, 70 S. E. 403; Abbott v. Sumter Lumber Co., 93 S. C. 144, 76 S. E. 146; Robertson v. Western Union Telegraph Co., 95 S. C. 364, 78 S. E. 977; Black v. State Co., 99 S. C. 467, 83 S. E. 1089.

For other cases, see Principal and Agent, Cent. Dig. §§ 589–598; Dec. Dig. ⟸158.]

[3. *Pledges* ⟸48; *Trover and Conversion* ⟸46.]

The borrower having offered to pay the notes at their maturity, the principal is liable for the market value of the collaterals at that date.

[Ed. Note.—Cited in Gregg v. Bank of Columbia, 72 S. C. 463, 52 S. E. 195, 110 Am. St. Rep. 633; Davis v. Reynolds, 91 S. C. 442, 74 S. E. 827.

For other cases, see Pledges, Cent. Dig. § 117; Dec. Dig. ⟸48; Trover and Conversion, Cent. Dig. § 263; Dec. Dig. ⟸46.]

Before Kershaw, J., Charleston, November, 1878.

This was a controversy without action between Mark Reynolds and C. O. Witte. The facts agreed upon state neither more nor less than is sufficient for a proper understanding of the case. They are as follows:

Facts.—1. The plaintiff is a planter, residing on his plantation in Sumter county, and the defendant resides in Charleston county.

2. The plaintiff having as his factors and agents in the city of Charleston the firm of J. M. Caldwell & Sons, sent to them, in the year 1869, certain sums of money to be invested by them for him.

3. J. M. Caldwell & Sons, acting as agents

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for the plaintiff, *lent this money to defendant, and took from him notes with collateral security.

The notes were renewed from time to time. The last were in the words and figures following:

"Charleston, S. C., December 3d, 1874.

"$1000.

"Twelve months after date, I promise to pay to Dr. M. Reynolds, or order, one thousand dollars, with interest at the rate of ten per cent. per annum, I having deposited against this note two bonds of the city of Memphis, guaranteed by the Memphis and Charleston railroad, for $1000 each.

"Nos. 1283, 1054.

"(Signed,) Chas. O. Witte."

"Charleston, S. C., May 20th, 1875.

"Twelve months after date, I promise to pay to Dr. M. Reynolds, or his order, three thousand dollars for value received, and interest at the rate of eight per cent. per annum, payable quarterly.

"Against payment of this note I have delivered to Messrs. J. M. Caldwell & Sons, his agents, the following bonds as collateral security: three bonds city of Savannah, six per cent., $500 each; two bonds city of Memphis, six per cent., guaranteed by Memphis and Charleston railroad, $1000 each; two bonds city of Savannah, seven per cent., one $500 and one $1000. All of which I authorize him, or his agents, James M. Caldwell & Sons, to sell in case of non-payment of this my note at maturity.

"(Signed,) Chas. O. Witte."

"Charleston, S. C., May 23d, 1875.

"Twelve months after date, I promise to pay to the order of Messrs. James M. Caldwell & Sons, against the surrender of $4000 city of Savannah bonds delivered by me as collateral security, three thousand dollars, and interest at the rate of eight per centum per annum, payable quarterly, for value received.

"$3000.

"(Signed,) Chas. O. Witte."

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*4. The defendant, when the loan was first made and the first notes were given, delivered to J. M. Caldwell & Sons the bonds specified in the notes above copied.

5. The bonds were coupon bonds not yet due, and payable to bearer.

6. Defendant paid the interest regularly on the notes to J. M. Caldwell & Sons, and when he desired to collect the coupons on the pledged bonds, obtained the coupons from J. M. Caldwell & Sons for that purpose.

7. The bonds remained in the possession of J. M. Caldwell & Sons during the life of J. M. Caldwell, the senior partner; and after his death continued in possession of his son and son-in-law, who continued the business in the same firm name, and remained the agents of plaintiff, collecting the interest on these notes.

8. Defendant became desirous of paying his notes, and offered to do so at maturity, whereupon it was discovered that J. M. Caldwell & Sons had, sometime previous thereto, fraudulently pledged the said bonds, and raised money on them. The bonds will not pay the debt for which they are pledged. J. M. Caldwell & Sons are bankrupt.

9. The former firm of J. M. Caldwell & Sons bore an excellent reputation; up to the time of the discovery of this transaction the character of the new firm was good.

At the date of the maturity of the notes the bonds were worth, say, city of Savannah bonds, eighty-five cents; Memphis city bonds, thirty cents.

When the suit was commenced they were worth, city of Savannah bonds, sixty-five cents; Memphis city bonds, thirty cents.

At the present time they are worth, city of Savannah bonds, fifty-nine cents; Memphis city bonds, thirty-six and a half cents.

10. The notes being past due, the plaintiff demanded payment from the defendant.

11. The defendant refuses payment unless the plaintiff will contemporaneously therewith deliver to him the bonds which were left as collateral security for the notes, or account to him for their value.

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*Questions.—I. Under these circumstances, is the plaintiff liable to the defendant for the value of the collaterals given to secure the payment of said notes?

II. If this be answered in the affirmative, at what date should this valuation be made; at the maturing of the notes, or at the beginning of this suit, or at the rendition of the judgment?

Decree.

This case is submitted to me upon an agreed statement of facts under the provisions of Section 389 of the code of procedure.

The case of Scott, Williams & Co. v. Crews, 2 S. C. 533, recognizes the doctrine laid down in all the authorities, that the plaintiff in this case is chargeable on the pledge of the securities of the defendant only as the bailee of a pledge, and in this species of bailment all that can be required of the bailee is ordinary care and diligence. "A pledge," says the court, "is made on a consideration which promises gain to the bailor and the bailee. The one obtains the use of the money borrowed, and the other procures a security for that which he has loaned. Hence, in regard to the mutual advantage incident to the bailment, the bailee, in the preservation of the articles pledged, is only liable for ordinary negligence, because nothing is required of him beyond ordinary diligence."

The law does not require that the pledgee should retain custody of the pledge. He may deliver it to a stranger for safe keeping. Story on Bail., § 324; Talty v. Freedman's Sav. Bank, 93 U. S. 325 [23 L. Ed. 886].

In the exercise of the diligence required of the bailee in this case, the employment of an agent in the care of the property was necessary. The securities pledged were coupon bonds payable to bearer, the title to which passes by delivery. It would have been negligence on the part of Dr. Reynolds to have kept them in the country house where he resides, and where they would have been exposed to risk of loss from robbery or destruction by fire. The agreed statements of facts show that it was in the contemplation of all the parties to this transaction that the securities should remain in the hands of

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Caldwell & Sons. *They had been in the custody of that firm, with the knowledge of the defendant and without objection on his part, from the year 1869, when the loan was first made, down to the last renewal of the notes in 1875—a period of over five years.

When the employment of an agent in the care of the property is necessary, the principal will not be liable for loss, if he exercises due care in the choice of an agent. 2 Parsons on Cont. 110.

In this case, negligence on the part of the plaintiff has not been alleged. On the contrary, it is conceded that up to the time when the misappropriation of these securities was discovered, the character of the agents employed by the plaintiff had been unexceptionable.

The sole question in this case is whether the plaintiff is liable for the willful misappropriation of the defendant's securities by his agents, in the absence of all fault on his part. The law seems to be well settled, that while the principal is liable for the negligence of his servant, he is not liable for the criminal acts willfully committed by him, such acts not being within the scope of his authority. Story on Bail., §§ 87, 407; Foster v. Essex Bank, 17 Mass. 479; Gibblin v. McMullin, 2 Priv. Council 338.

I am, therefore, of opinion, that under the statement of facts, as agreed upon and submitted to me, the plaintiff is not liable for the loss of the defendant's collaterals.

It is, therefore, ordered that judgment be entered against the defendant in the sum of $9156.17, with costs, and that the plaintiff have execution therefor.

The defendant appealed to the Supreme Court from this decision of the Circuit judge.

Messrs. Simonton & Barker, for appellant.

The Circuit judge has overlooked the peculiar phraseology of the note of May 23d, 1875—against the surrender, &c. Here the obligation to pay is dependent upon the surrender of the bonds.

The precise question presented in this case has never been decided, so far as we can find. In Scott & Co. v. Crews, 2 S. C. 522, the act was not committed by the agents of the de-

positor. In Foster v. Essex Bank, 17 Mass
*10
479, the bailment was gratuitous. *the subject matter never entered into the business of the bank, and was not under the control of the officer who stole it. So, also, in Scott v. Bank, 72 Penna. 471. See Bank v. Boyd, 44 Md. 47, (22 Am. R. 40), and the comments on Foster v. Essex Bank in Morse on Banking 65. The Circuit decision puts the plaintiff in the position of a bailee, and holding him to the responsibility of a bailee for ordinary care, excuses him. He is not responsible, because, contrary to reasonable expectation, his agent proved to be a fraud. What is ordinary care in a bailee will depend on the nature of the subject matter of the bailment. 60 N. Y. 278. Caldwell & Sons were not bankers, nor were they agents of a security company. They were cotton factors and commission merchants. Plaintiff's right of possession during the currency of these notes, was absolute. Reynolds had a large power of disposition over these bonds. He could have pledged them to another, and such person could hold them under such pledge, even against the first owner. Story on Bail., § 324; 3 Otto 325.

We submit that the true view is that Caldwell & Sons held as agents of the plaintiff, and that when they used them as they did they acted in the course of their employment as such agents, and within the scope of the authority with which the conduct of the plaintiff had clothed them. The whole business was managed through these agents, and plaintiff knew of the negotiability of the bonds and of their possession by Caldwell & Sons. He is responsible for their act, although he did not authorize it. In the language of Benjamin, Q. C., 9 Moak 210, the Circuit judge "has failed to distinguish between the authority to commit a fraudulent act, and the authority to transact the business, in the course of which the fraudulent act was committed." In our case the action of the agents was the result of the powers with which plaintiff had clothed them, and he is responsible. Story on Agency, § 452; 1 Bl. Com. 432; 40 N. Y. 453; 25 N. Y. 596.

Now what is the scope of the authority of the agent? It can only be measured by his apparent authority, and parties dealing with him may reasonably conclude that the control which he exercises in and about the subject matter of the agency, is the extent of the authority. 15 East 43; 6 Rich. 497; 10
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Rich. *337; 11 Rich. Eq. 344; 46 N. Y. 325; 7 C. B. (N. S.) 400; 7 H. & N. 603; 2 H. & C. 175.

When defendant parted with his collaterals, he lost, for the time, all control over them. Story on Bail., § 311; L. R., 1 Q. B. 618. Plaintiff should have preserved them for us, but he placed them in such position as made their loss possible. He certainly could not recover them from the purchasers from his agents. The loss is thus traced directly to the action of Reynolds. His act not only deprived us of the security which those bonds gave, but it has also left us without remedy as against the present holders of the bonds.

Mr. S. Lord, for respondent.

The plaintiff and defendant stood to each other in the relation of pledgor and pledgee. The general property remains in the bailor; only a special property passes to the bailee. Non-payment of debt, when due, does not, of itself, work a forfeiture. 12 Johns. 147; 4 Denio 227; 2 Caines' Cas. 200. This rule applies to negotiable securities as well as to any other kind of property.

The pledgee impliedly stipulates that he will take ordinary care of the things pledged. He is not bound for the exactest care and diligence required of a borrower, and he is liable for a greater degree of care than the law exacts of a depositary without reward. Edw. on Bail., § 234. He is not liable for loss by fire or theft, if kept with ordinary diligence. 2 Kent 580, 581; 2 Ld. Raym. 909; 58 Me. 275; 34 Md. 235; 62 Penna. St. 47; Edw. on Bail. 236; 2 Barb. 326; 9 Wend. 268. These principles are recognized and applied in 2 S. C. 522.

Attention has been called to the peculiar phraseology of one of the notes. "Words alone should not be permitted to govern and destroy the design and intent." 2 S. C. 457. In construing a contract, the court will look to the motives and the object. 2 Gill. & J. 382. It is manifest here that the object was to pledge the bonds for the payment of the note, and that the expressions are unusual; used by one not familiar with our language. Certainly plaintiff's agents had no authority
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to make him an insurer *against loss. 58 Me. 276; 56 Me. 121; W. Jones 179; Chitty on Cont. 735, note i.

As pawnee, plaintiff might employ agent to keep collaterals for him. 93 U. S. 324; Story on Bail., §§ 324–327. In this case it was proper for him to commit their custody to an agent, using reasonable care in the selection. 2 Parsons on Cont. 110, note t. It is conceded that the agents had always borne excellent reputation. Defendant shared in this confidence, and authorized the agents to sell his bonds if he defaulted in his payment. It was in contemplation of both parties that Caldwell & Sons should retain the collaterals for the mutual convenience of both parties. They were really the agents of both parties. Edw. on Bail., § 50; 38 Me. 55; 8 Allen 512; 6 Cal. 643.

We come to the discussion of the only question in the case on which doubts can be entertained. The loss was occasioned by the fraud or felony of Caldwell & Sons, and the point, then, is narrowed to this consideration—whether the plaintiff is answerable, in

law, for the fraudulent conversion by his agents of the defendant's securities. It is now a well-established rule that masters are responsible for injuries done by the negligence of their servants, while acting within the scope of their employment, but never for injuries willfully committed, where they have other purposes than executing their masters' orders; unless the masters were guilty of negligence in appointing the servants or in the particular act. Story on Agency, § 456; Story on Bail., § 402; 1 Esp. 315; 1 East 106; 17 Mass. 479; Law R. 2 P. C. 317; 99 Mass. 605; 19 Ohio St. 110; 70 Penna. St. 119. The only difference here is, that it was not a gratuitous bailment, but that is unimportant, since the question is as to the liability of the principal in the absence of all negligence, on his part, for the fraud of his agent. The master is only liable for the willful act of his servant, where the servant acts in ignorance of facts, (Edw. on Bail., § 391,) and where there has been subsequent ratification. 13 Mees. & W. 834; Cro. Eliz. 824; 2 N. Y. 479; 1 Bl. Com. 429.

There is no pretence of express authority given by plaintiff to do this wrong, or of any

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subsequent assent or knowledge. The *wrong done was wholly outside the limits of the agency. 8 Ad. & E. 512; 6 T. R. 659.

It should not be forgotten that defendant knew of the risks he assumed when he selected for his collaterals negotiable securities. Plaintiff probably knew nothing of the kind of security he had taken.

January 7th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This case was submitted on Circuit upon an agreed statement of facts, under the provisions of Section 389 of the code of procedure, which is a part of the record and need not be re-stated here. The statement submitted contains copies of the notes sued on, a description of the bonds pledged by the defendant as collateral security for his notes, as well as the value of said bonds at three different periods of time —at the maturity of the notes, at the time when the suit was brought and at the rendition of the judgment. Under the circumstances stated, two questions are submitted for the judgment of the court:

First. Is the plaintiff liable for the value of the collaterals given to secure the payment of said notes?

Second. If this be decided in the affirmative, at what date should their valuation be made—at the maturity of the notes, the beginning of the suit, or the rendition of the judgment?

The Circuit judge decided the first question in the negative, which disposed also of the second, and gave judgment for the plaintiff for the whole amount of his notes, principal and interest, exonerating him from all accountability for the loss of defendant's collaterals by the fraudulent appropriation of his agents. The defendant alleges error in that judgment and appeals to this court.

The three notes of plaintiff upon which judgment has been rendered are not identical in form, and it is insisted that the same principles of law as to the proposed set-off of the collaterals may not apply to all of them. Two of the notes are made payable to the plaintiff, Reynolds, and the other to "the order of Messrs. James M. Caldwell & Sons," styled agents of Reynolds. Each of the notes in its terms differs somewhat

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from the *others; but it is manifest that the intention in all was the same—to pledge the bonds described as collateral security for the notes respectively, and, from the view taken by the court, it is unnecessary to consider the particulars in which they differ from each other.

The bonds were coupon bonds, payable to bearer. The title was transferable by mere delivery, and when Caldwell & Sons, having legal possession, transferred them to innocent bona fide holders, they were gone beyond the reach of either Reynolds or Witte; so far as the true owner is concerned, and for all the purposes of this case, they were destroyed by the fraudulent act of Caldwell & Sons. Gourdin v. Reid, 6 Rich. 497; Carmichael v. Buck, 10 Rich. 337 [70 Am. Dec. 226]; State Bank v. Cox, 11 Rich. Eq. 344 [78 Am. Dec. 458]; McNeil v. Tenth National Bank, 46 N. Y. 325; Swan v. North British Australian Company, 7 Hurlst. & Nor. 603.

Caldwell & Sons are now bankrupt, and the question is upon whom the loss of the collaterals must fall—upon Witte, who owned them and pledged them to Reynolds to secure his debt to him, or upon Reynolds, whose agents fraudulently appropriated them. The case presents an example of double agency. As to the collaterals, Reynolds was the agent of Witte of that class known as bailee, and Caldwell & Sons were the agents, factors, of Reynolds. The question of the liability of Reynolds to Witte must be determined either by his own acts or those of his agents for which he is properly responsible. The judgment below exonerates Reynolds from all responsibility in the first place, upon the ground that he did no act himself which should charge him with the loss of the bonds; that, as bailee of a pledge, his only duty was to take proper care of the property pledged, which he claims to have done; that in the transaction of the business, and the proper care of the bonds, it was necessary to appoint an agent, and, having selected agents, then of good character, and entrusted the bonds to them, he was in no way liable for their subsequent acts; that the one act of appointing agents

of good character at that time was the discharge of his whole duty in the matter. The facts submitted do not show that this was one of those cases in which the agency of a third party was so necessary that the principal must be excused from all responsi-

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bility for the acts of *the agent after his appointment, provided only he used proper care in the appointment. The transaction was simply one of lending money—taking notes therefor and collaterals to secure them. That might have been done by Reynolds in person as well as by his agents. Nor is it perceived that agents were necessary for the safe keeping of the collaterals. That does not appear to have been the purpose of Reynolds. The result has shown that in all probability they would have been as safe in Sumter county in the possession of Reynolds as in the city of Charleston in the possession of Caldwell & Sons. The agency was not necessary, but simply convenient.

There is nothing to distinguish this from the ordinary case where one, for convenience, employs another to act as his agent in a particular business, or to exempt Reynolds and Caldwell & Sons from the principles which ordinarily attach to the relation of principal and agent. Of all these principles there is not one more important than that which makes the act of the agent, within the scope of his authority, the act of the principal—"qui facit per alium, facit per se." Caldwell & Sons were the agents of Reynolds, and they misappropriated, and thereby, for the purpose of this case, destroyed the collaterals of Witte. Is Reynolds liable for that act? If Reynolds himself had done the act there can be no doubt that he would have been liable to Witte. Then what is his responsibility when not done by himself, but by his agents? Must the result to Witte be different for the reason that Reynolds chose to perform his part of the business through agents selected by himself? If Caldwell & Sons as the agents of Reynolds had lost these collaterals by negligence merely, if they had left their safe unlocked and in consequence the bonds had been stolen, it is conceded that Reynolds would have been liable; but it is insisted that he should not be held liable for the loss occasioned by their "criminal act willfully committed."

The Circuit judge says: "The only question in the case is whether the plaintiff is liable for the willful misappropriation of the defendant's securities by his agent in the absence of all fault on his part. The law seems to be well settled that whilst the principal is liable for the negligence of his

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agent, he is not liable *for the criminal acts willfully committed by him—such acts not being within the scope of his agency."

It may be true that, generally, the principal is not liable criminally for the acts of his agent done without his authority, nor civilly to third persons with whom he has no privity for his willful trespasses.

This is not a criminal but a civil claim to charge Reynolds with the value of the collateral appropriated by Caldwell & Sons. It is difficult to understand upon what ground the principal should be held liable for the negligence of his agent and not for his fraud, where the act is done or omitted to be done to the very property as to which the agency exists and in the course of the agency. Fraud by which the property is lost is generally considered one of the forms of gross negligence. What is the proper understanding of the phrase "within the scope of the agency?" Does "the scope" include negligence and exclude fraud? It cannot properly be restricted to what the parties intended in the creation of the agency, for that would also exclude negligence, as no agent is appointed for the purpose of being negligent, any more than for the purpose of acting fraudulently. The question cannot be determined by the authority intended to be conferred by the principal. We must distinguish between the authority to commit a fraudulent act and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, neither negligence nor fraud is within "the scope of the agency;" but tested by the connection of the act with the property and business of the agency, fraud in taking the very property is as much "within the scope of the agency" as negligence in allowing others to take it. The proper inquiry is, whether the act was done in the course of the agency and by virtue of the authority as agent. If it was, then the principal is responsible, whether the act was merely negligent or fraudulent. Here the fraudulent act was the appropriation of the very property of the agency—without which agency they would not have had possession of the property and could not have done the act.

We have not had our attention directed to any decided case precisely in point, nor have we been able to find one, but the

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*principles announced by eminent judges and elementary writers fully cover the point.

In the case of Scott, Williams & Co. v. Joseph Crews, 2 S. C. 522, the defendant, Crews, borrowed money from the plaintiffs, bankers, gave them notes for the money, and secured them by pledging as collateral bills of the bank of the state. These bills were not fraudulently appropriated by the bank, but were taken from its vaults by robbery. The question was simply one of negligence as bailees, and upon that issue the plaintiffs were held not liable.

The case of Foster et al., Executors, v.

President and Directors of the Essex Bank, 17 Mass. 478, comes much nearer the precise point involved here. A special deposit of $50,000 of gold was made, which was stolen by the cashier and the chief clerk of the bank. The corporation was exonerated from responsibility, upon the grounds that it was a gratuitous deposit without compensation, but for safe keeping merely, and the theft was not the act of the corporation, but the unauthorized act of the cashier and clerk, outside of their business as officers, and therefore as mere strangers. The whole case shows that if the corporation, through its proper officers and as its own act, had fraudulently appropriated the money, the court would have held them liable. Chief Justice Parker, in delivering the judgment of the court, states the principle as well as its qualifications. He says: "It was contended by one of the counsel for the plaintiff, as a proposition universally true, that the principal is civilly answerable for all frauds done by his agents; and he is supported in the use of this language by a doctrine of Lord Kenyon, in the case of Doe v. Martin; and also by Lord Ellenborough in 1 Camp. 127, and yet it must strike the mind of every man of sense that this universal proposition will admit of, and, indeed, upon principles of common sense, actually requires qualifications. No one will suppose, if my servant commits a fraud relative to a subject that does not concern his duty to me, that I shall be civilly answerable for such fraud. If I send him to market and he steps into a shop and steals, or, upon false pretences, cheats the shop-keeper of his goods, I think that all mankind would agree that I am not answerable for the goods he

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may thus unlawfully acquire. The *proposition can be true only when the agent or servant is, while committing the fraud, acting in the business of his principal or master."

In Story on Bailments, it is said: "But good faith alone is not sufficient. If there is any loss occasioned by their negligence or mistake or inadvertence, which might fairly have been guarded against by ordinary diligence, they will be held responsible therefor; and, a fortiori, they will be held responsible when they are guilty of any misfeasance."

In Smith's Mercantile Law it is said: "The principal has been thought to be responsible, not merely for the negligence, but for the deliberate fraud of his agent committed in the execution of his employment, though without the principal's authority, as, for instance, by selling false jewels for true ones." The reason given for this by Lord C. J. Holt, appears a sensible one. "Seeing," says he, "that some one must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver, should be the loser than a stranger. Such, certainly, was the opinion of the Roman lawyers."

The principle is well stated in Story on Agency, Section 452: "It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences and other malfeasances, misfeasances and omissions of duty of his agent, in the course of his employment, although the principal did not authorize or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies respondeat superior; and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."

1. The first question submitted is decided in the affirmative.

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*2. As to the second question, it is adjudged that the valuation of the collaterals be made at the time of the maturity of the notes sued on. At that time the defendant offered to pay the notes and take up his collaterals, and upon his non-delivery of the collaterals upon demand, the obligation of Reynolds became fixed.

The judgment below is reversed and a new trial ordered.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 19

(Case No. 797.)

EARLE v. CURETON.

(November Term, 1879.)

[*Costs* ⊂⊃144.]

A judgment for costs entered against one who was a surety for the costs of the action, without any proceedings against the surety to charge him upon his obligation, is wholly void.

[Ed. Note.—Cited in Hill v. Thomas, 19 S. C. 235.

For other cases, see Costs, Cent. Dig. § 559; Dec. Dig. ⊂⊃144.]

Before Aldrich, J., Greenville, July, 1879.

Action by William E. Earle against P. D. Cureton, to recover possession of a tract of land purchased at sheriff's sale, under judgment entered in the case of Detheridge v. Earle, for costs taxed against Detheridge, for which Cureton was surety. It did not appear that there was any summons, rule or notice served upon Cureton that such judg-

ment would be taken. The Circuit judge charged the jury that so long as the judgment and execution remained of force, the sheriff had authority to sell; that the judgment is presumed to be right and regular until set aside by a court of competent jurisdiction. Defendant excepted. Verdict for plaintiff. Defendant appealed.

Mr. E. F. Stokes, for appellant.

Mr. J. S. Cothran, for respondent.

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*January 8th, 1880. The opinion of the court was delivered by

WILLARD, C. J. Detheridge sued Earle on a promissory note, and being a non-resident, Cureton became his surety for costs. A judgment was entered up against both Detheridge and Cureton, his surety, and execution issued thereunder. Under this execution the lands in suit belonging to Cureton were sold and purchased by Earle, who took a sheriff's deed therefor. Earle, as the purchaser of the land, now sues for its possession, and exhibits the judgment against Detheridge and Cureton and the execution and sheriff's deed thereunder. The judgment record shows that the only position that Cureton occupied in relation to the action in which such judgment was recovered, was that of surety for costs of the plaintiff. It does not appear that Cureton has been summoned to answer or show cause why he should not be charged on his obligation as surety, and has had an opportunity to defend the same. On the contrary it excludes the idea of any regular proceeding to charge Cureton. Under such circumstances the judgment is wholly void, and cannot afford any ground for the title which Earle makes to the land in suit.

The obligation of Cureton in this case did not waive the right of defence or furnish any authority for taking a judgment against him without a regular proceeding to charge him thereunder. The judgment of the court reversing the judgment below, has already been entered.

McIVER, A. J., concurred.

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13 S. C. 20

(Case No. 793.)

MASON v. JOHNSON.

(November Term, 1879.)

[1. *Reference* ⟸58.]

Referees have the same power as the courts to allow amendments to a pleading.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 89, 90; Dec. Dig. ⟸58.]

[2. *Appeal and Error* ⟸87.]

Amendments within the power of the court to grant are not ordinarily reviewable on appeal.

[Ed. Note.—Cited in Trumbo v. Finley, 18 S. C. 315; Green v. Iredell, 31 S. C. 593, 10 S. E. 545.

For other cases, see Appeal and Error, Cent. Dig. §§ 582; Dec. Dig. ⟸87.]

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[3. *Reference* ⟸58.]

*A referee, to whom it is referred to decide all issues of fact and report, may allow defendant at the trial to amend his answer by pleading the statute of limitations.

[Ed. Note.—Cited in Hall v. Woodward, 30 S. C. 575, 9 S. E. 684.

For other cases, see Reference, Cent. Dig. § 90; Dec. Dig. ⟸58.]

[4. *Limitation of Actions* ⟸47, 102.]

A settlement by a guardian with his ward, after the ward's majority, purporting to be in full and claiming a balance due by the ward, made in the presence of the judge of probate and upon which the guardian receives from such officer his discharge as guardian, gives currency to the statute of limitations. Distinction drawn between this case and Renwick v. Smith, 11 S. C. 294.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 258, 505; Dec. Dig. ⟸47, 102.]

Before Pressley, J., Spartanburg, June, 1879.

Action by Miles P. Mason against Elias Johnson, on guardianship bond, commenced February 3d, 1879. The case was referred to S. J. Simpson, Esq., as "special referee to take testimony and decide all issues of fact arising herein and that he do report the same to this court."

At the reference, before any testimony was taken, motion was made by defendant for leave to amend his answer by setting up as a defence the statute of limitations. Plaintiff objected, but the referee allowed the amendment; and plaintiff excepted. The following are the findings of fact by the referee:

The defendant was appointed guardian of the plaintiff in 1858, and made his returns regularly to the then Ordinary until 1868. The ward (the plaintiff) came of age August, 1868.

In November, 1868, defendant and plaintiff agreed, to avoid the necessity of filing petition, giving notice, &c., to come into the Probate Court to have a final settlement of the guardianship matters. In compliance with this agreement they did meet in the Probate judge's office, November, 1868, neither party being represented by counsel. On that day the defendant made his final return as guardian and upon the same sheet, after making up a statement of the accounts, the Probate judge made the following decree: "It is decreed that Miles P. Mason refund to his guardian, Elias Johnson, the sum of money in U. S. A. currency equal to $60.85 confederate money at the time the guardian bonded his ward's money."

The plaintiff testified that he did not consent to anything that was done on that occasion. The referee is satisfied that the plaintiff did agree with defendant to be pres-

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ent, that he was present *while settlement was being made up and that he heard the decree read over to him by the Probate judge.

Afterwards, when defendant offered to turn over to him (plaintiff) the confederate bonds which had been allowed as an investment in making up the settlement, the plaintiff then said he had no use for them and arose in anger and left the room.

In September, 1869, the Probate judge, after hearing his petition, granted the defendant a final discharge as guardian. After this settlement and decree, up to the time of the commencement of this suit, the plaintiff made no complaint to the defendant, nor ever expressed any dissatisfaction on account of the decree except as above stated immediately after the decree was read over to him.

The Circuit judge sustained the action of the referee in allowing the amendment to defendant's answer, and dismissed the complaint, upon the ground that the action was barred by the statute of limitations. Plaintiff appealed.

Mr. J. S. R. Thomson, for appellant.

The Court of Probate is a court of limited jurisdiction, and was, therefore, without authority to make the decree of November, 1868. Freem. on Void Jud. Sales, §§ 4, 8; Freem. on Judg., § 517; 8 Pet. 436; 1 Bail. 457; 10 S. C. 349; Const., Art. IV., § 20; 4 S. C. 353; 20 Wall. 375; Cooley on Const. Lim. *68; 5 S. C. 117; 6 Id. 462; 1 Strob. 1.

The statute is no bar to this action, which seeks to collect the amount due by a guardian, who is a trustee, to his ward. The statute could only avail where the answer alleged, which it does not here, that there had been a disavowal of the trust. But if such allegation had been made it would not avail; no right whatever can be acquired under a void decree, nor will it give currency to the statute. Freem. on Judg., § 117; 2 Hill Ch. 232; 5 Rich. Eq. 31; 11 S. C. 294. And the statute does not run in favor of the trustee after a disavowal, if the cestui que trust be under undue influence. 24 Ga. 217, 558; 3 Jones Eq. 248; 2 Hill Ch. 71; Id. 286; 1 S. C. 423.

The Circuit judge did not, himself, allow the amendment—he approved the referee's action. The referee had no such power.

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*Section 296 of the code has no bearing upon a reference like this. 3 Wait Prac. 323, 324; 12 S. C. 154; Edw. on Ref. 33; Hoff. on Ref. 28; 32 Barb. 557; 6 Abb. Pr. R. 214; 8 Hun. 81; Voorh. Code 351, § 173, note e; 19 How. Pr. 273; 35 How. Pr. 321; 5 S. C. 288.

The discharge granted the guardian cannot affect appellant's rights, as he had no notice of the application. Spears Eq. 435; 3 S. C. 394; 7 S. C. 60. If correct, defendant should not have leave to amend. 9 S. C. 376; 2 Strob. 160; 1 Brev. 164.

Mr. J. W. Carlisle, for respondent.

A motion for leave to amend is within the discretion of the court, and not appealable. 9 S. C. 330; 38 N. Y. 206. Referees have full power to grant amendments. 22 How. Pr. 481; 31 Id. 164; Code, § 296; 10 S. C. 98. And statute of limitations may be pleaded by amended answer. 4 Wait Prac. 652, 661; 44 How. Pr. 317. The statute is a bar to this action. The settlement and the discharge are both disavowals of the trust. 1 Strob. Eq. 79; 3 Id. 42; 4 Rich. Eq. 60; 14 Id. 176; 4 Strob. Eq. 197; 11 S. C. 294.

January 8th, 1880. The opinion of the court was delivered by

McIVER, A. J. The only questions raised by this appeal are: 1. Whether the Circuit judge erred in sustaining the action of the referee in allowing the defendant to amend his answer at the opening of the reference, by adding thereto the plea of the statute of limitations. 2. Whether such plea was a bar to the action.

Referees have the same power to allow amendments to any pleading as the court has, (Code, § 296,) and, ordinarily, a motion for leave to amend is addressed to the discretion of the court and is not appealable, provided the amendment is such as it is within the power of the court to grant. Chichester v. Hastie, 9 S. C. 330; Richtmeyer v. Remsen, 38 N. Y. 206. While at one time it seemed to be thought by the courts of New York that they had no power, upon the trial, to allow the defendant to amend by pleading the statute of limitations, the latter and more approved opinion is otherwise. 4 Wait Pr. 652; Gilchrist v. Gilchrist, 44 How. Pr. 317.

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*The next inquiry is, whether the statute was a bar to the action. "If a trustee does an act purporting to be a termination of the trust; if he has a settlement which is intended to be in full; if he settles as to part and claims the residue in his own right; if he denies the trust in the presence of the cestui que trust, these acts, or any of them, will so far disturb and dissolve the strictly fiduciary relations between the trustee and his cestui que trust as that the statute of limitations will commence to run from the date of such acts." Brockington v. Camlin, 4 Strob. Eq. 189; recognized and approved in Long v. Cason, 4 Rich. Eq. 63; and again in Colburn v. Holland, 14 Rich. Eq. 241. Now in this case the settlement made in the office of the judge of probate, between the guardian and his ward, several months after the latter had attained his majority, followed up by the order of the judge of probate for the final discharge of the guardian, unquestionably indicated, in the most unequivocal manner, the purpose of the guardian to terminate the fiduciary relations previously existing, and as this action was not brought within the stat-

utory period, thereafter it must be held to be barred.

Whether the Court of Probate had jurisdiction of an action brought by a ward, after attaining his majority, against his guardian for an account, was not considered by the court below, and is not before us for determination. For the validity of the bar of the statute does not rest upon the fact that a decree had been made by a court of competent jurisdiction, but simply upon the fact that there had been a settlement, which, if it had been made by a private individual as a mutual friend of, or an arbitrator between, the parties, would have given currency to the statute, as it was an act purporting to be a termination of the trust, and so intended by the parties. This case differs from that of Renwick v. Smith, 11 S. C. 294, and other cases of that class, in the important fact that it did not appear, in that case, that the parties sought to be affected by it had any notice of the settlement or final return relied upon, while here the plaintiff was present when the settlement was made, and was fully cognizant of the result.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., concurred.

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13 S. C. *25

*(Case No. 800.)

PHINNEY v. JOHNSON.

(November Term, 1879.)

[1. *Dower* ⇐63.]

A widow is not affected by the bar of dower provided in Chapter LXXXV., Section 10, of General Statutes, as to lands of which her husband died seized, unless she has accepted a distributive share of her husband's lands.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 199; Dec. Dig. ⇐63.]

[2. *Dower* ⇐63.]

A widow is not estopped from claiming dower in lands sold under execution against herself as administratrix of her deceased husband, and upon which valuable improvements were subsequently erected with her knowledge, notice of the existence of her claim of dower having been had by the purchasers and being chargeable upon them from their title deeds.

[Ed. Note.—Cited in Marines v. Goblet, 31 S. C. 154, 155, 9 S. E. 803, 17 Am. St. Rep. 22; Gaston v. Brandenburg, 42 S. C. 351, 20 S. E. 157.

For other cases, see Dower, Cent. Dig. § 202; Dec. Dig. ⇐63.]

[3. *Dower* ⇐63.]

It is of no concern to the purchaser of such land whether or not the widow has fully administered the personal estate, or has received her full distributive share thereof.†

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 202; Dec. Dig. ⇐63.]

Before Wallace, J., Fairfield, September, 1879.

This was a petition in the Court of Probate by Mary T. Phinney against William Johnson for dower in lands of which her husband died seized, and which had been sold under a judgment obtained against her as administratrix of her husband's estate. The husband died in May, 1862, action was commenced in March, 1867, judgment entered January, 1868, sale made by sheriff April 5th, 1868, to Seigler, conveyed by Seigler to W. R. Robertson March, 1869, W. R. R. to T. R. Robertson October, 1870, and T. R. R. to this defendant February, 1877. These several deeds all referred back, in terms, to the sheriff's deed, which described the land as the property of "James M. Phinney, now in the hands or under the control of Mary T. Phinney, administratrix, to be administered." The action for dower was commenced April 5th, 1878.

The defences set up by the answer were, that petitioner was not entitled to her dower

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because she had already accepted a *share of her husband's estate under the provisions of the statutes of this state for the distribution of intestates' estates; that she had induced defendant and those from whom he derived title to suppose, by the course of her administration, her conduct, delay and laches, that she had elected not to claim dower; that the several purchasers had greatly improved and enhanced the value of the lot of land, and that the petitioner well knowing that large and valuable improvements were being erected, gave no notice that she intended to claim dower in the premises, and thereby she has estopped herself from now setting up her claim of dower.

The judge of probate held that the administratrix had not yet been discharged from her administration; that she had never accepted a share of her husband's estate under the statute of distributions; and that the several purchasers had knowledge of the existence of the petitioner's claim of dower; and that the petitioner had not, by any conduct upon her part, estopped herself from setting up her claim for dower. The writ was ordered to issue.

Upon appeal to the Circuit Court it was held that W. R. Robertson did not have knowledge of petitioner's claim, but had never had any intimation that she did not intend to make such claim. In all other respects the decree below was confirmed.

Appeal was then taken to this court upon the grounds that there was error in the findings, that petitioner had never accepted a distributive share of her husband's estate;

† When Evans v. Pierson, 9 Rich. 9, was decided, the act of 1791, (5 Stat. 163,) was of force. This act is substantially re-enacted in Chapter LXXXV. of the General Statutes, with the very important omission of Section 2. The distribution of personalty is now governed by Chapter LXXXVIII., Section 15, of General Statutes. The opinion here, therefore, deals with the law as it now stands, and not with the act of 1791.

that she had not been guilty of laches, negligence or unreasonable delay in the prosecution of her claim; that she had not by any conduct on her part estopped herself from asserting this claim; and that she was entitled to have her dower admeasured.

[For subsequent opinion, see 15 S. C. 158.]

Mr. J. H. Rion, for appellant.

1. The claim of dower in this case ought not to be favored. The widow remains silent, as far as purchasers of the property are concerned, for ten years lacking one day; she acted as if she had elected to take under the statute, and not claim dower; her administration was such as to lead any one to infer that she had elected not to claim dow-

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er; from 1862 till the end of the war *it was her interest so to elect, as she had a surplus of $3000 to pay $700 of debt; she paid unsealed debts, leaving a sealed debt unpaid, thus virtually assuming that the funds on hand would pay that debt, and leave it to her interest not to claim dower; she actually takes possession of all the personal property, and uses it as her own till petition for dower filed—this, too, when that property is such as to be worn out by seventeen years' use; she never applied for leave to sell the personal property which she kept, and never made any return but the one.

2. Her acts and her non-acts amount to an election. These are utterly inconsistent with any other supposition than that she originally made up her mind not to claim dower. Her de facto election was not induced by any fraud, as in 10 Rich. 159, where the jury found "fraud had been practiced upon her." An election may be implied. 2 Scrib. on Dower 258, § 49. Id. 484, where use of property was held to be an election.

3. Her silence under the facts proven was a constructive fraud. Besides not setting up any claim she allows valuable improvements to be placed upon the lot, which she must have known and seen. Her dower is to be given her in all these improvements. 4 S. C. 7. Hence she should have spoken, and having kept silent, should not be allowed now to set up so unrighteous a claim. Bigelow on Estoppel 501, 502, note, and 511, 578.

4. The respondent is estopped from claiming dower. The doctrine of estoppel applies to claims of dowers. 2 Scrib. on Dower 251, 252, 253. Her administration, her silence, her allowing improvements without giving warning, and the whole history of this case, make the strongest case of estoppel, not in deed, that can be conceived to arise.

The court will observe that the respondent does not deny that she knew of these improvements being made; also that the appellant, Wm. Johnson, who paid $5000 for this property, lives in Charlotte, N. C.

Mr. J. S. Reynolds, for respondent.

The demandant is said to be barred of her dower by the acceptance of a distributive share in the personalty. Could she elect? As administratrix, she was trustee for credi-

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tors, and the *personalty in her hands became depreciated to an amount insufficient to pay debts; an election was thus beyond her power. Did she elect? There is no testimony to show anything like a distribution. A waste of assets would be a devastavit, not an election. If she is held to have made election, then she gets absolutely nothing from her husband's estate.

But what is an election? Acquiescence is not. 2 Desaus. 299. It cannot be compelled until the estate is settled. 2 McC. Ch. 280; 2 Rich. Eq. 237. See, too, 3 Rich. Eq. 282; 10 Rich. 159. Whether there has been an election is a question of fact. 2 McM. 215; 10 Rich. 159.

As to demandant's negligence, laches, &c., see 2 Mill Const. R. 64; 9 Rich. 395; 10 S. C. 451.

Upon the matter of estoppel—she said nothing to mislead—knowledge of her claim was possessed by the purchasers as well as by herself; that knowledge was derived from their own title deeds. 3 Strob. Eq. 42; 4 Rich. Eq. 92; 4 S. C. 257; Wade on Notice, §§ 308, 309. The rule of caveat emptor applies. 6 Rich. 362. The sufficiency of notice is a question of fact, (2 Bail. 298; 6 S. C. 146; Wade on Notice, § 85,) and has been resolved against defendant.

January 9th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This is an appeal from a Circuit decree, affirming a decree of the Probate Court, awarding dower to the demandant, M. T. Phinney, out of lands of which her husband died seized, now in the hands of the respondent, Johnson. The husband of the demandant died in 1862, and she took out letters of administration in the same year. The estate consisted partly of personalty, that went into the hands of the demandant as administratrix, that has never been fully administered, and partly of this land in suit. This land was sold in 1868, under a judgment rendered against the demandant as administratrix, and is held by the respondent under the sheriff's title, made through such sale, and has been improved in the hands of the purchasers by the erection of buildings thereon. It is contended that the demandant has elected to take a

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distributive share of the estate *of her husband in lieu of dower, or, at all events, that she is estopped from denying such election by lapse of time and conduct on her part amounting to a representation that such election had been made.

The provision of law under which it is claimed that the demandant is barred, is as follows, (Gen. Stat. 441, § 10): "In all cases where provision is made by this chapter for

the widow of a person dying intestate, the same shall, if accepted, be considered in lieu of and in bar of dower." The chapter referred to here relates exclusively to the distribution of the lands of intestates, the distribution of personalty being governed by the provisions of a subsequent title and chapter. Unless, then, it appears that the demandant has received a distributive share of the lands of her deceased husband, she cannot be regarded as directly affected by the bar of dower provided in this act. It does not appear that she has received such a provision, or that there are any lands of her husband out of which she could receive such provision, other than the lands in suit. As these lands have been sold to pay the debts of the estate, it is manifest that she has derived no such benefit from them.

Is she, then, estopped from claiming dower at the present time? The ground alleged is her silence while improvements were being made on the premises with knowledge of such improvements, coupled with lapse of time, and having, as administratrix, the personalty of the estate of her decedent not fully administered, and failure to make annual returns. The foundation of equitable estoppel is the ignorance of the party seeking its benefit, induced by the conduct of the party against whom it is asserted. The Probate judge has found that the purchasers who successively took title under the sheriff's deed, "had knowledge of the existence of the petitioner's claim of dower in the lands sold." In addition to this finding, it must be assumed that these parties knew the nature of the title they held, and, consequently, that the lands held by them were those of which the decedent died seized. Knowledge of the demandant's claim of dower is presumable from this fact. They are also chargeable with knowledge of the fact that taking these lands for the debts of the estate, precluded the demandant from that provision

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in *the lands of her husband that alone could, under the statute, bar her claim of dower.

The possession of the personal estate unadministered, is immaterial to the present question. The respondent has no concern in the administration of the estate, as far as appears, and it is of no importance to him whether the estate was well or ill administered. Assuming that the demandant had full enjoyment of her distributive share of the personalty, that would not bar her right of dower in the lands of which her husband died seized.

It follows that there is no error in the Circuit decree, and it should be affirmed and the appeal dismissed.

McIVER, A. J., concurred.

13 S. C. 30

(Case No. 801.)

STATE v. EDWARDS.

(November Term, 1879.)

[1. *Criminal Law* ⟸407.]

The judge charged the jury that if a party hears a criminal charge against himself made in his presence, and says nothing, it is an admission on his part, and in the eye of the law the party accepts that charge as his confession. *Held*, that the charge was erroneous.

[Ed. Note.—Cited in State v. Richardson, 47 S. C. 170, 25 S. E. 220, 35 L. R. A. 238; State v. Major, 70 S. C. 389, 50 S. E. 13; State v. Sudduth, 74 S. C. 501, 54 S. E. 1013.

For other cases, see Criminal Law, Cent. Dig. § 898; Dec. Dig. ⟸407.]

[2. *Criminal Law* ⟸381.]

The weight and effect of proof of good character in cases of larceny, considered.

[Ed. Note.—Cited in State v. Barth, 25 S. C. 180, 60 Am. Rep. 496.

For other cases, see Criminal Law, Cent. Dig. § 846; Dec. Dig. ⟸381.]

[This case is also cited in State v. Sudduth, 74 S. C. 498, 54 S. E. 1013, and distinguished therefrom.]

Before Thomson, J., Spartanburg, October, 1879.

Indictment for burglary and grand larceny.

Rodgers, after his arrest, made a full confession of his own guilt and said, in the presence and hearing of the other defendants, that they were present aiding and participating in the larceny; to this statement of Rodgers there was no dissent by any of the other defendants, one of them then remarking to the prosecutor: "We know you have got us, and we want you to be as light as you can." The others heard this remark, but said nothing. There was also a written confession signed by all the defendants, but which they, with the exception of Rodgers, said had been signed when they were

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in liquor, and for the sole pur*pose of avoiding the expense of a prosecution. There was evidence as to the good character of all of the defendants except Rodgers. The charge of the presiding judge, so far as it is reviewed here, is given in the opinion of the court. Rodgers was convicted of burglary and grand larceny, Griffin was acquitted, and the other defendants were convicted of grand larceny. Motion in arrest of judgment and for new trial was refused, and the convicted defendants were sentenced. All except Rodgers appealed upon the several grounds taken on motion for new trial and in arrest of judgment.

Mr. J. S. R. Thomson, for appellants.

It was error to charge that the silence of the appellants, when Rodgers made his confession, was an admission of guilt on their part. 1 Greenl. on Ev., § 197, and note a; 1 Whart. on Crim. Law, § 696. There was error in charging that testimony as to good

character can have no weight, except in doubtful cases. 3 Greenl. on Ev., § 25; 1 Whart. on Crim. Law, §§ 643, 644.

Mr. Solicitor Ball, contra.

Good character avails only in doubtful cases. 3 Strob. 517. Confession is inferred from silence. Rosc. Crim. Ev. 53, (7th ed.). Like other confessions, it is an acknowledgment to be considered by the jury.

January 9th, 1880. The opinion of the court was delivered by

WILLARD, C. J. James Edwards, John Draper, Henry Draper, John Rodgers, Samuel Griffin and Prince Donnough, were indicted for burglary and grand larceny. Rodgers was convicted of "burglary and grand larceny." Griffin was acquitted, and the other parties convicted of grand larceny and sentenced accordingly. The grounds of appeal affect the conviction of the parties, other than Rodgers and Griffin.

The leading objection to the verdict against the parties convicted of grand larceny, turns on the fact that the confession of Rodgers was introduced, and it was shown that the other parties indicted were present when the confession was made, and did not

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*deny its truth. The Circuit judge charged "that if a party hears a criminal charge against himself, and made in his presence, and says nothing, it is an admission on his part, and, in the eye of the law, the party accepts that charge as his confession." The effect of this charge was to give the silence of the parties the legal force and effect of confession of guilt. It must, in this respect, be distinguished from the proposition that the conduct of parties under accusation of crime may be given to the jury, as circumstances to be weighed in connection with the question of guilt or innocence. To give the silence of parties such legal effect, is equivalent to holding that every person accused of crime by any person, regardless of time, place or circumstance, is bound to deny such accusation and affirm his innocence. It is clear that the law imposes no such obligation on a party accused; but, on the contrary, it is his right to stand mute, and the burden of showing the guilt is on those that make the accusation.

Where civil rights are alone concerned the silence of a party is often construed as assent to be bound by an obligation, and the equity is ground of estoppel. In both of these cases an obligation or duty to speak, coupled with an injury to the party to whom such obligation or duty is due, by reason of such silence, is the foundation of the rule. Both of these elements are lacking in the case of the silence of a party standing accused of crime.

As the verdict against the parties other than Rodgers and Griffin must be set aside in consequence of the erroneous charge just considered, it will not be necessary to examine the questions that grow out of the form of the verdict, especially as they have arisen out of accidental circumstances that may not again occur.

The charge that "good character can have no weight except in doubtful cases" might have the effect under some circumstances to divert the attention of the jury from the real importance of evidence of good character. The hearing of such evidence is directly upon the intent or motive to be ascribed to the conduct of the party, and the proof of good character may have the effect to call for a higher degree of certainty in the proofs of the conduct of the party than could be requisite if a notoriously bad character was

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shown. If a person of undoubted *character is seen in the act of lifting goods from the counter of a store, an intent to steal could not be made out against such proof of character on testimony that might be abundantly sufficient to convict a notorious thief. While, therefore, the charge is not in itself necessarily erroneous, it is apparent that it might become so under circumstances easy to conceive. Its bearing in the present case need not be considered, as the case is disposed of on other grounds.

The verdict, as it regards all the parties convicted, except Rodgers, must be set aside, and a new trial granted.

McIVER, A. J., concurred.

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13 S. C. 33

(Case No. 802.)

ADGER & CO. v. PRINGLE.

(November Term, 1879.)

[1. *Appeal and Error* ⊂⊃1191.]

A Circuit decree, which gave full directions for its execution, having been affirmed on appeal, and the remittitur filed in the court below, no further order or judgment from the Circuit Court is necessary.

[Ed. Note.—Cited in State v. Prater, 27 S. C. 601, 4 S. E. 562; State v. Cornell, 70 S. C. 414, 50 S. E. 22.

For other cases, see Appeal and Error, Cent. Dig. § 4646; Dec. Dig. ⊂⊃1191.]

[2. *Appeal and Error* ⊂⊃118.]

If such order were required, its omission would involve a question of regularity and not of jurisdiction, and would not be appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 813–822; Dec. Dig. ⊂⊃ 118.]

[3. *Appeal and Error* ⊂⊃1219.]

Further proceedings by the Circuit Court under such decree, are not affected by the pendency of a motion before the Chief Justice to withdraw the remittitur and for leave to file

a petition for rehearing, there being no order staying proceedings.

[Ed. Note.—Cited in Ex parte Dunovant, 16 S. C. 300.

For other cases, see Appeal and Error, Cent. Dig. § 4720; Dec. Dig. ⟸1219.]

Before Fraser, J., Charleston, June, 1879.

The Circuit decree referred to in the opinion, will be found at length in 11 S. C. 527, where the case, upon its first hearing, is fully reported. After the dismissal of that appeal, the remittitur, announcing the result, was filed in the office of the clerk of the Circuit Court for Charleston county. Thereafter, Mr. Bryan, the referee, filed the following report:

The undersigned, heretofore appointed special referee in this case, begs leave respectfully to report.

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*That in accordance with the decree of this honorable court, bearing date May 1st, 1878, as affirmed by the Supreme Court, he has paid out of the funds in his hands, realized from the sale of the White House and Greefield plantations, sold as the property of the estate of the late John Julius Izard Pringle, the principal and interest due upon the Gadsden and Lide bonds. There being not sufficient funds in his hands to fully pay and satisfy said bonds, he has paid the same ratably and in proportion, as follows. * * *

At a reference held for the purpose of making the distribution as above reported, the counsel for A. G. Rice, made the following objections, which were overruled, and the funds distributed as above stated.

"The defendant objects to the action of the referee in taking cognizance of the case of Adger v. Pringle, because—

"1. The referee officially knows that the case was carried by the appeals out of the jurisdiction of the Circuit Court into the jurisdiction of the Supreme Court, and the referee can only be officially informed of its restoration to the jurisdiction of the Circuit Court, by a copy of the order of the Circuit Court, making the judgment of the Supreme Court the judgment of the Circuit Court; and because—

"2. The parties in the cause are entitled to be heard in the Circuit Court, on the motion for such order as to the judgment of the Supreme Court.

"3. That the judgment of the Supreme Court sustains as debts to be paid out of the proceeds of the sale of the descended lands, the amounts due upon the lost bonds of the ancestor, John Julius Izard Pringle, at the date of the death, which bond has never yet been stated before the referee or the Circuit or Supreme Court, and, when stated, the parties affected by it are entitled to notice and opportunity to claim, as payments on account, whatever sums (with interest on such payments, if interest is allowed, on the debts,) have been paid by the heirs upon the new bonds set up as collaterals to the lost bonds.

"4. That the construction put upon the judgment of the Supreme Court by the solicitors of Lide and Gadsden, differs materially from the construction put upon it by

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the counsel for A. G. *Rice, and the Circuit Court is the proper tribunal to pass upon that question.

"5. The judgment of the Supreme Court subjects the proceeds of the lands descended and mortgaged to the payment by the heirs of the debt of the ancestor, just as the land was liable. The land was liable only subject to the right of dower of Mrs. Jane Pringle, viz., one-sixth of the fee simple value. This right having been conveyed by Mrs. Pringle in the mortgage, those who are secured by the mortgage are entitled to claim the one-sixth of the proceeds."

The question of costs has not been passed upon.

After this report was filed and on June 14th, 1879, counsel for Rice gave notice to other counsel, and served copy of petition to Supreme Court for review, and of motion to be made before the Hon. A. J. Willard, Chief Justice, for leave to file such petition, and for an order withdrawing the remittitur. On June 20th such motion was made. Before any decision thereupon, but with knowledge that such motion had been made, the Circuit judge, by order dated June 26th, confirmed the report of the referee, affirmed his acts and discharged him from all further responsibility.

To this order exceptions were taken by defendant Rice, for the purpose of appealing, upon the grounds set forth in the referee's report, and upon the additional ground that motion to recall remittitur and file petition for review, was then under advisement by the Supreme Court.

Messrs. Simonton & Barker, for appellants, cited No. 20, Rules of Supreme Court; 1 Wait Dig. 108, No. 430; 52 N. Y. 653; 1 Abb. 262; 3 Cr. 330; 8 T. R. 424; Wait An. Code 24; 51 Barb. 493; 1 Bouv. L. Dict., tit. "Judgment;" 5 Rich. Eq. 166; 3 Rich. Eq. 466; 8 S. C. 344.

Mr. S. Lord, Jr., contra.

January 9th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This cause was, at a prior term of this court, heard on appeal from the Circuit decree, and that decree was

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*affirmed. The remittitur of this court was issued and filed in the Circuit Court April 30th, 1879. In pursuance of the directions of this decree so affirmed, the referee there-

by designated proceeded to carry out the provisions of that decree, and accordingly filed his report. No exceptions appear to have been filed to that report, and it must accordingly be regarded as entirely conformable to the decree on which it was based. This report was confirmed by the Circuit decree, which is now appealed from. The objection to the Circuit decree can only be considered on the ground of alleged irregularity, for there being no exceptions to the report of the referee, and the merits not being considered in this decree apart from the question of confirming the report, we cannot regard the merits as open before us.

The objection to the decree is that no order or judgment had been entered on the remittitur previous to the action by the referee under the decree. It is contended that there should have been an order making the judgment of the Supreme Court the judgment of the Circuit Court, and that, until such order was made, the Circuit Court had no jurisdiction to proceed with the case. If the judgment of the Circuit Court had been varied or modified, there would be ground for an order making the judgment of the Supreme Court that of the Circuit Court, but such was not the case. No authority has been shown as rendering it necessary that an affirmed judgment should be supported by such an order, and there is no reason for such a conclusion. It is unimportant to consider the authorities that have been cited to show that a judgment of the appellate court cannot be enforced by execution, as a judgment of the Circuit Court, until made such by a competent order for that purpose, for that proposition has no relation to a case where a court is proceeding to carry out the principles of its own decree, with a view to a final decree that has been affirmed on appeal.

It is altogether a misapprehension to affirm lack of jurisdiction in the Circuit Court for want of such an order. It had its record in the cause before it with the affirmation of the Supreme Court upon it. The decree affirmed pointed out the means by which it was to be carried out and executed, namely, through the action and report of a referee,

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named for that purpose. No necessity *existed for an application to the court to enable the referee to perform the duties required by the decree. If such an order as the appellant contends for had been required, its omission would not involve a question of jurisdiction, but merely one of regularity, not affecting the merits, and which, as such, could not be brought here by appeal.

It is contended that knowledge was brought down to the Circuit judge that a proceeding was pending preliminary to asking a review of the former judgment of this court in the case. As there was no stay of proceedings, the Circuit judge was not bound to take notice of such application.

The appeal should be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 37

(Case No. 805.)

BLACK v. WHITE.

(November Term, 1879.)

[1. *Executors and Administrators* ⟸213; *Limitation of Actions* ⟸145.]

An administrator put upon his inventory of notes, &c., a due-bill given by himself to his intestate twelve years before his death. *Held*, that this was not a new promise, and that the claim was barred by the state of limitations.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 752; Dec. Dig. ⟸213; Limitation of Actions, Cent. Dig. § 590; Dec. Dig. ⟸145.]

[2. *Executors and Administrators* ⟸473, 474.]

An administrator sued for an accounting may, without formally pleading the statute of limitations by answer, rely upon it as relieving him from liability to account for a due-bill given by himself.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2048; Dec. Dig. ⟸473, 474.]

[3. *Executors and Administrators* ⟸213.]

A claim of an intestate against her administrator, barred by the statute of limitations, is not paid by operation of law when letters of administration are granted. The rule applies only to legal and not to moral obligations.

[Ed. Note.—For other cases see Executors and Administrators, Cent. Dig. §§ 749–753; Dec. Dig. ⟸213.]

[4. *Appeal and Error* ⟸1008.]

Concurrent findings of fact by judge of probate and Circuit judge will not be disturbed unless shown to be clearly erroneous.†

[Ed. Note.—Cited in Speer v. Meschine, 46 S. C. 511, 24 S. E. 329; In re Solomons' Estate, 74 S. C. 191, 54 S. E. 207.

For other cases, see Appeal and Error, Cent. Dig. § 3960; Dec. Dig. ⟸1008.]

[5. *Frauds, Statute of* ⟸26.]

Plea of the statute of frauds overruled, the undertaking being original and not collateral.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 35; Dec. Dig. ⟸26.]

[*Courts* ⟸202.]

†In a note to Arnold v. House, 12 S. C. 617, it is said that "the Supreme Court have as yet laid down no rule governing its review of findings of fact by a Court of Probate. Besides this case of Black v. White, my attention has been called to an unreported case filed April 14th, 1879, No. 706, Gunning v. Erwin, in which this court say: "The Probate Court was the proper tribunal for determining such questions of fact in the first instance; and having the witnesses before it had the best opportunity of judging of the weight that should attach to the testimony of the witnesses, and of drawing proper inferences of fact. The Circuit Court ought not to disturb the findings of the Probate Court on questions of fact of that nature unless clear ground is afforded for that purpose." REPORTER.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3379; Courts, Dec. Dig. ⟸202.]

[6. *Limitation of Actions* ⟸197.]

Bar of the statute of limitations held to have been prevented by repeated acknowledgments to different persons.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 722–726; Dec. Dig. ⟸197.]

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*Before Pressley, J., Spartanburg, June, 1879.

Action for accounting by Laura C. Black and Ophelia Briggs, distributees of the estate of Susan White, against W. H. White and J. H. McMillan, administrators of said estate, commenced by petition in the Court of Probate for Spartanburg county, in May, 1877. Susan White died intestate in December, 1875. The inventory returned by the administrators of notes, accounts, &c., held by the intestate, included a due-bill given by W. H. White to Susan White in 1863; the appraisers marked it "doubtful." The defendants did not, by answer, plead the statute of limitations, as relieving them from accounting for this due-bill.

In April, 1871, a decree was rendered in favor of Susan White against W. H. White as administrator of Henry White. There was testimony to the effect that this decree had been subsequently paid.

The administrator, J. H. McMillan, rendered a claim of $500 for services alleged to have been rendered Susan White during her lifetime from 1868 to 1875. The services were principally performed upon the lands of Susan White's mother, with whom she resided, but there was testimony to the effect that they were done at Susan White's special request and upon her promise to pay for them; and also that she had to several persons at various times up to a short period before her death, acknowledged her liability to pay for these services. To this claim the petitioners formally pleaded the statutes of frauds and of limitations.

George W. Nicholls, Esq., judge of probate, held that the due-bill was barred by the stat-

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ute of limitations, that the decree *was paid, and that the estate of Susan White was indebted to J. H. McMillan in the sum of $500; that this claim was due primarily by Susan White and that it was not barred by the statute of limitations.

Exceptions were taken to this decree, which, upon appeal to the Circuit Court, were all overruled. The petitioners then appealed to this court, alleging error in the decree in the following particulars, to wit:

1. In refusing to charge W. H. White, one of the administrators, with the due-bill and interest charged against him in the inventory.

2. In refusing to charge W. H. White, one of the administrators, with the share due Susan White's estate from the estate of Henry White, deceased, of which last-named estate said W. H. White was also administrator.

3. In allowing a charge of J. H. McMillan, one of the administrators, for the sum of $500 in gold against the estate of his intestate.

4. In overruling the plea of the statute of frauds and the statute of limitations against said last-mentioned claim.

5. In overruling appellants' objections as to admissibility of certain testimony for the administrators, to which said rulings exceptions were duly taken.

6. In failing to report that there was no evidence sufficient or proper to show that W. H. White had paid the decree against him in favor of W. H. White.

Mr. J. S. R. Thomson, for appellants.

Messrs. J. W. Carlisle and S. J. Simpson, contra.

January 13th, 1880. The opinion of the court was delivered by

McIVER, A. J. These proceedings were originally instituted in the Court of Probate for the purpose of obtaining from the defendants an account of their administration of the assets of the intestate, Susan White. Three questions arose: 1st. Whether the defendant, White, should be charged with the

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amount of a *due-bill given by him to the intestate in 1863 and found among the papers of the intestate. 2d. Whether the same defendant should be charged with the amount of a decree which had been rendered against him as administrator of one Henry White in favor of Susan White in her lifetime. 3d. Whether a claim for $500, set up by the defendant, McMillan, for services rendered his intestate, Susan White, in her lifetime, should be allowed. The judge of probate determined each and all of these questions in favor of the defendants, and upon appeal to the Circuit Court his decree was affirmed. The same questions are now brought here by appeal from the judgment of the Circuit Court.

The ground upon which the defendant, W. H. White, was relieved from liability for the due-bill was that it was barred by the statute of limitations at the time he administered upon the estate of the intestate, Susan White. It is contended, however, by the appellants that this claim was taken out of the operation of the statute of limitations by reason of the fact that the said W. H. White had allowed the due-bill to be inserted in the inventory and appraisement of his intestate's estate, and that this amounted to such an implied promise to pay it as would prevent the bar of the statute. The fact is conceded that at the time of the death of the intestate, and, of course, at the time of making the inventory and appraisement, the

bar of the statute was complete. Hence any promise which is relied upon to take the case out of the statute must be such as would sustain an action founded on such promise; for, after the statutory period has run out, the right of action on the original note is gone, and the action, if maintainable at all, must be brought upon the new promise. Smith v. Caldwell, 15 Rich. 365; Hayes v. Clinkscales, 9 S. C. 450. Such new promise may be implied as well as expressed, but it must amount to an unqualified admission of a subsisting legal liability and must be established by evidence unambiguous and full. Deloach v. Turner, 6 Rich. 125.

The practical question then is, does the fact that the defendant, White, allowed the due-bill to be entered upon the inventory of his intestate's estate, amount to such an implied promise to pay the debt as would support an action? We do not think so. It cannot be regarded as an unqualified admission

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of a subsisting *legal liability. The due-bill was found among the papers of the intestate, and was to be regarded as her property, and whether of any legal value or not, it was the duty of the administrator to have it inserted in the inventory. It was not for him to determine its value, or whether it was enforceable by legal process, any more than in the case of other choses in action belonging to his intestate's estate. His duty required that he should insert them all in the inventory, and whether he was to be charged with the amounts secured by them would depend upon whether it could be shown, when called upon to account, that they were collectible.

The objection raised by the appellants that the administrator cannot avail himself of the bar of the statute, because he did not formally plead it, would be entitled to great weight were this an action upon the due-bill in question, but we do not think it applies to the present proceeding. The defendant does not rely upon the bar of the statute to protect himself from the payment of a debt which is sought to be recovered from him, for the object of this proceeding is to require the defendant to account for certain assets which have gone into his hands, and to make him liable it must appear not only that the assets have gone into his hands, but that they have been, by the use of diligence, collected; and he relies upon the statute for the purpose of showing that this particular chose in action could not have been, by the utmost diligence, collected, as the right of action upon it was barred before it came into the hands of the defendant. Undoubtedly if it was sought to make him liable for the note of a third person, he might, without specially pleading the statute, be permitted to show that such note was not collectible, because it was barred by the statute of limitations. Just so here, we see no reason why he cannot show, without specially pleading the statute, that he ought not to be charged with the amount of this due-bill, because, by reason of the bar of the statute, it was not collectible.

Again, it was urged that the respondent was concluded by the rule that "whenever the character of payer and payee of any debt or obligation is blended in the same individual, by operation of law the debt is paid

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and the amount is cash in hand on the *accounts of the payee to the credit of the party entitled to the fund." Griffin v. Bonham, 9 Rich. Eq. 77. The reason of this rule seems to be, that when the same person unites in himself the character of both debtor and creditor, as the debt is no longer collectible by process of law, being incapable of suing himself, it must be regarded as paid by operation of law. Hence, the debt spoken of in the rule must be a debt which is enforceable by legal process. It must be a legal, and not a mere moral obligation. Now, in this case, when the defendant, White, became administrator the debt evidenced by the due-bill no longer constituted a legal obligation, but was only a moral obligation, which would constitute a sufficient consideration to support a new promise, but which, of itself, furnished no legal cause of action. The rule contended for cannot, therefore, be applied.

The next question is so wholly a question of fact that under the well-established rule of this court, we will not disturb the concurrent finding of the judge of probate and the Circuit judge unless shown to be manifestly erroneous, which has not been done in this case.

The only remaining inquiry is as to the propriety of allowing the claim of the administrator, McMillan. This, too, depends, in large measure, upon a question of fact, and we see no ground for interfering with the concurring judgment of the judge of probate and the Circuit judge. It is contended, however, that the plea of the statute of frauds is fatal to this claim. The court below, however, finds as matter of fact that this was an original and not a collateral undertaking on the part of the intestate, Susan White; and this finding, we think, fully supported by the evidence and conclusive of the case. The plea of the statute of frauds cannot be sustained. Nor is there any ground upon which the plea of the statute of limitations to any portion of this claim can be allowed. The intestate acknowledged it from time to time, to different persons, up to a very short period before her death, and this was sufficient to prevent the bar of the statute.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., concurred.

13 S. C. *43

*(Case No. 806.)

CRANE, BOYLSTON & CO. v. MOSES.

(November Term, 1879.)

[1. *Appeal and Error* ⇐424.]

The law requiring notice of appeal to be served upon the clerk of the Circuit Court, was repealed by implication by act of December 19th, 1878, 16 Stat. 698.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2154; Dec. Dig. ⇐424.]

2. Distinction drawn between this case and Kibler v. McIlwaine, 12 S. C. 555.

Motion to dismiss appeal upon the ground that notice of the appeal was not served upon the clerk of the Circuit Court, as required by Section 353 of the code of procedure.

Messrs. W. W. Harllee and E. W. Moise, for motion.

Mr. J. T. Walsh, contra.

January 15th, 1880. The opinion was delivered

PER CURIAM. The appeal in this case was taken since February 1st, A. D. 1879, and is accordingly affected by the provisions of the act of December 19th, 1878. 16 Stat. 698. That act does not require the notice of appeal to be served upon the clerk, and as it assumes to prescribe the mode of appealing, as well as the time within which an appeal may be taken, it must be regarded as having repealed the pre-existing provisions of law requiring such notices to be served upon the clerk. This repeal does not interfere with the provisions prescribing the mode by which its record on the appeal is to be prepared and transmitted to this court, as now prescribed by law and the rules of this court, except so far as specifically modified by the act in question. In Kibler v. McIlwaine, 12 S. C. 555, the appeal was taken before the day in which the act in question took effect, and accordingly the decree in that case is not applicable to the present question.

The motion to dismiss the appeal on the ground that notice of the appeal was not served upon the clerk, has been already denied.

13 S. C. *44

*(Case No. 807.)

SCOTT v. CARPENTER.

(November Term, 1879.)

[*Appeal and Error* ⇐434.]

The respondent is entitled to a dismissal of the appeal when the appellant fails to appear upon the call of the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2183; Dec. Dig. ⇐434.]

Motion to dismiss appeal. The case is sufficiently stated in the order of the court.

January 16th, 1880. The opinion was delivered

PER CURIAM. The appellants having failed to appear, the respondent moved for the dismissal of the appeal. Under Rule No. 11 of this court, the respondent is entitled to a dismissal of the appeal without argument when the appellant fails to appear upon the call of the cause.

The appeal must be dismissed.

13 S. C. 44

(Case No. 808.)

C., C. & A. RAILROAD CO. v. EARLE.

(November Term, 1879.)

[1. *Costs* ⇐246.]

This court has no original jurisdiction to require from the appellant, who has removed to another state, security for the costs of his appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 948; Dec. Dig. ⇐246.]

[2. *Costs* ⇐109.]

Security for the costs of a case, including the costs of appeal, could be required by the Circuit Court only from an absent plaintiff, and not from one who is made a party defendant to an action of interpleader. Semble.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 439–461; Dec. Dig. ⇐109.]

Motion for security for costs of appeal. The case is fully stated in the opinion of the court. For a report of this case upon its hearing, see No. 852, and also see 12 S. C. 53.

Mr. F. W. McMaster, for motion.

Mr. J. P. Carroll, contra.

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*January 19th, 1880. The opinion was delivered

PER CURIAM. This is a motion on the part of Thompson Earle, one of the defendants, to require Owen Smith, survivor of Owen Smith & Co., his co-defendant, who has appealed from a decree in the case, to give security for the costs of appeal, should the said appeal be dismissed. He basis his motion on his affidavit that "since the commencement of this action Owen Smith has removed from this state and is now residing in the town of Asheville, North Carolina; that he owns no property in the state, and that it was not until within the last four months that deponent was informed that the said Owen Smith was no longer a resident of South Carolina."

The case is on the appeal docket of the Fifth Circuit, but it does not appear here what was the precise nature of the proceedings, except that it was an action in the nature of a bill of interpleader by the plaintiff, and the contest was between the defendants. Nor does it appear when the decree appealed from was rendered, before or after the appellant left the state.

The motion is a novel one. We know of no law or practice authorizing this court, upon an original motion, to require security for costs from a party appealing, whether he is at the time a resident or has left the state after the commencement of the action. The appellant must conform to the law regulating appeals, and when he has done so he is entitled to have his appeal heard. It is no part of that law that he should give security for the costs of appeal in case he leaves the state after the commencement of the action. The code of procedure, Section 339, required security for costs as a condition of appeal, but that has been repealed (15 Stat. 501), showing that it is against the spirit of the law of the state to obstruct appeals, by requiring, in advance, security for the costs of appeal, as distinct from the general costs of the case.

An order requiring security for costs is administrative in its character and belongs exclusively to the court below. In that court the rule of court, which gives the form, allows it only where the plaintiff resides beyond the limits of the state. Here both the appellant and respondent are defendants. Neither of them, as actors, originated the

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proceeding, but both were brought *into court by process at the instance of another party. When the plaintiff, who is the actor, is absent from the state, and the objection is made in proper time in the Circuit Court, security for costs, which will include appeal costs, may be allowed; but when an order is made below, and the motion is first made here only for costs on appeal, this court has no original jurisdiction of the subject.

The motion is refused.

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13 S. C. 46

(Case No. 809.)

STATE, ex relatione THE ATTORNEY-GENERAL, v. HAGOOD.

(November Term, 1879.)

[1. *Statutes* ⟸60, 285.]

When the constitution prescribes certain requisites in the enactment of a statute, the court may look behind the seal of the state, the approval of the governor and the signatures of the presiding officers of the general assembly, to ascertain whether the constitutional requirements have been complied with.

[Ed. Note.—Cited in Information against Jager, 29 S. C. 443, 7 S. E. 605; State ex rel. Hoover v. Town Council of Chester, 39 S. C. 308, 17 S. E. 752; State v. Town Council of Chester, 39 S. C. 313, 17 S. E. 752; State ex rel. Lindsey v. Tollison, 100 S. C. 172, 84 S. E. 820.

For other cases, see Statutes, Cent. Dig. §§ 53, 384; Dec. Dig. ⟸60, 285.]

[2. *Statutes* ⟸15.]

An act of the legislature, as ratified by the two houses and approved by the governor, is not valid unless it has had three readings on three several days in each branch of the general assembly. Const., Art. XI., § 21.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 12, 13; Dec. Dig. ⟸15.]

[3. *Statutes* ⟸23.]

Where a specific tax levy, without having passed the general assembly, is inserted in the enrolled copy of a bill which has passed, and the enrolled bill is ratified and approved, such levy has not the force of a law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 26, 27; Dec. Dig. ⟸23.]

[4. *Statutes* ⟸39.]

Where a bill providing for a tax levy of four and one-half mills, passes both branches of the general assembly, but the enrolled copy for ratification has the one-half changed to "three-quarters," so as to read "four and three-quarters mills," in which form it is ratified and approved—*Held*, that there was no authority to levy a tax of either four and one-half or four and three-quarters mills. McGowan, A. J., dissenting.

[Ed. Note.—Cited in Curtis v. Renneker, 34 S. C. 492, 13 S. E. 664; Bray v. City Council of Florence, 62 S. C. 63, 39 S. E. 810; State ex rel. Piedmont Mfg. Co. v. Goldsmith, 96 S. C. 489, 81 S. E. 147.

For other cases, see Statutes, Cent. Dig. § 42; Dec. Dig. ⟸39.]

5. State v. Platt, 2 S. C. 150 [16 Am. Rep. 647] doubted by McIver, A. J.

This was an original application, on January 15th, 1880, by the Hon. Le Roy F. Youmans, attorney-general, for a writ of mandamus to compel the Hon. Johnson Hagood, comptroller-general, to proceed with the levy of taxes under the act of December 24th, 1879: 17 Stat. 115.

The petition set forth the following matters:

1. That on December 24th, 1879, William D.

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Simpson, gov*ernor of the State of South Carolina, approved and signed an act of the general assembly of this state, entitled "An act to raise supplies and make appropriations for the fiscal year commencing 1st November, 1879," which act had had the great seal of the state affixed to it, and had been signed in the senate and house by the president of the senate and the speaker of the house of representatives.

2. That it is the duty of the comptroller-general of this state to annually notify each county auditor of the rate per centum authorized by law to be levied for the various state purposes, and to prepare and transmit to each county auditor the necessary forms and instructions to carry into effect the provisions of the tax laws, which forms and instructions are required to be obeyed by all county, town and municipal officers.

3. That although it is the official duty, by statute, of Johnson Hagood, as comptroller-general, to perform the acts hereinbefore stated, for the purpose of carrying into effect the act of Assembly in Paragraph 1, hereinbefore mentioned, yet the said Johnson Hagood has refused and still refuses so to do,

unless herein directed by judicial authority.

4. That unless the said Johnson Hagood does perform the said duties of the office of comptroller-general, the entire machinery of the state for raising revenue and paying appropriations will be paralyzed, to the great and irreparable detriment of the State of South Carolina.

An order was signed requiring the said Hagood to show cause forthwith why a writ of mandamus should not issue as prayed for.

The return was then filed, which was as follows:

1. Johnson Hagood, comptroller-general of said state, upon whom an order of this honorable court has been served, requiring him to show cause why a writ of mandamus should not issue, as prayed for by the petition herein, for cause shows: That he admits that he has refused and still refuses to proceed, as comptroller-general, under the alleged act of the general assembly, entitled "An act to raise supplies and make appropriations for the fiscal year commencing 1st

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November, 1879;" rati*fied and approved December 24th, 1879, as stated in said petition, for the following reasons:

2. That the alleged act, as ratified and approved purports to levy a tax of four and three-quarters mills in the first section thereof, and purports to authorize the county commissioners of Charleston county to levy a tax sufficient to raise the sum of $3000 for the Charleston military in the second section thereof; whereas the act, as it passed the senate and house of representatives, purported to levy a tax of only four and a half mills in the first section thereof, and did not contain any provision whatever, authorizing the levy of any tax for the Charleston military.

That the said act, when sent, after its passage in the house, to the senate, purported to authorize a levy of a tax of four and a half mills in the first section thereof, and the senate amended the said section by striking out the words "a half," and inserting in lieu thereof "three-quarters," in which amendment the house refused to concur, and the senate receded therefrom.

That the senate amended the second section thereof, by inserting therein the following provision: "That the county commissioners of Charleston county be, and are hereby authorized and required to levy a tax upon all the taxable property of said county sufficient to raise the sum of three thousand dollars, which tax shall be paid at the same time with other taxes. The proceeds arising therefrom shall be held by the treasurer of said county, subject to the draft of the major-general commanding the first division, and shall by him be apportioned, as follows: the one-tenth thereof, for the use of the militia in said county without the city of Charleston; another tenth thereof to the use of the first regiment of the national guard; and the remaining eight-tenths to be equally divided amongst the companies composing the fourth brigade, by companies."

In which amendment the house refused to concur and the senate receded therefrom, all of which fully appears in the journals of the senate and house of representatives. Wherefore it being in the apprehension of this respondent, involved in the gravest doubt whether the said alleged act has been passed in accordance with the requirements of the

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constitution, and has *authorized any notification whatever to the county auditors of the state by this respondent as comptroller-general, and even, if so authorizing, whether this respondent should include in such notification any rate per centum as authorized by law, to be levied for the various state purposes; and if so, what rate; and whether he should include in such notification the provision as to the Charleston military in the second section of said act hereinbefore specially set forth: this respondent has felt it not to be in the line of his official duty to proceed in any manner under the said alleged act, save under sanction of the proper judicial tribunal.

Wherefore this respondent submits himself to the order of this court in the premises.

This return was verified and was not traversed; the matters therein stated were admitted to be true.

Mr. Youmans, attorney-general, for the relator.

We make no charge of contumacy against the comptroller-general. The matter being involved in doubt, it was not proper for him to proceed, nor for the governor to convene the legislature, without legal sanction.

The particular question here is novel only in the instance, but may be solved by legal formula and under well-established principles of law.

It is the highest exercise of the powers of courts in the American States, to declare an act unconstitutional. No more of an act should be declared unconstitutional than is clearly so, and that being stricken out, the remainder must be sustained. The only objection to this act is that one-quarter mill additional has been added on in the first section, and the Charleston military tax levy in another section. Strike both out and the remainder stands.

Prima facie it is the duty of the comptroller-general to execute the act as it stands on the statute-book. But under decision in Blackwell v. Barnwell, or State v. Platt, 2 S. C. 150, the court can go behind the signatures and the great seal, which seems to be the American rule; and we agree that that case is the law of this. See to same point, 4

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Otto 260. The courts, however, will *not interfere, unless the departure from the constitution is patent and plain. Fletcher v.

Peck. 6 Cr. 87, and other cases say so. They also say part may be good and part bad, and only the bad will be declared unconstitutional. There is difficulty sometimes in separating good from bad, but where, the bad being stricken out, the good part remaining is capable of execution, it must stand; the whole must fall only where the two are so interdependent that it cannot be presumed that the legislature would enact one without the other. Sedg. on Const. Law 413; Cooley Const. Lim. 177.

The precise constitutional objection here is in Article II., Section 21, of the constitution, where the ratification of an act is prescribed. This act passed the general assembly with a tax levy of four and one-half mills; there was added at the ratification an additional one-quarter mill and the Charleston military tax levy. Both of these additions, we concede, must go. Here lies our trouble, but we will show that the four and three-quarters mills is capable of separation, and that if it can be, it must be. State v. Copeland, 3 R. I. 36; and compare 13 Rich. 498 with 14 Rich. 129. So, too, in Homestead Cases. Courts hold same words good as to future contracts, but void as to past. See, too, 14 Pick. 96. We do not think four and three-quarters can stand; we do think that four and one-half can; that they are separable, that the one-quarter is not necessarily dependent on the four and one-half. The journals show that there was no struggle for diminution; the senate proposed to amend by substituting "three-quarters" for "one-half" and the house did not concur. This shows that a foreign substance, one-quarter mill, was attempted to be added, and did slip in at the ratification. This proves that the four and three-quarters mills is separable. Nothing on earth is so exactly separable as numbers, and hence mathematics is a certain and exact science. The one-quarter mill here was simply an addition which may be taken off. In approving the four and three-quarters mills, the governor approved the four and one-half mills, for majus minus continet. It cannot be said that the governor approved the greater tax, but might have vetoed the lesser. Such a course by the executive would be unparalleled; it is for the legislature to determine

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what *the tax levy shall be. Even if the amounts were grossly disproportioned, the greater would include the less.

Mr. J. T. Rhett, for respondent.

We accept the law strictly as laid down in State v. Platt, 2 S. C. 150, and confirmed in 4 Otto 260, and 3 R. I. 33. In our case all of the facts are fully stated in the return and admitted. As to the Charleston military tax levy, that is clearly within the decision of Blackwell v. Barnwell. As to the four and three-quarters mills, not being constitutionally passed, the whole act goes with it. 2 S. C. 157, 160; Cooley Const. Lim. (1st ed.), ch. VII., § 6, pp. 178, 179. The four and three-quarters mills tax levy is clearly not good in whole; is it in part? One view is that the "four" not being changed at all, neither the "one-half" nor the "three-quarters" is valid, but being lopped off, the act stands good for four mills. This sticks too much to the letter, and cannot be a proper one unless it would fit other figures; as, for instance, a substitution of five for four and one-half. This view ignores the fact that four and three-quarters is as much an entity as five or one. Another view, and that of the attorney-general, is, that the law should be enforced for four and one-half, leaving out the one-quarter mill erroneously added. To do this, you must go beyond the decision in Blackwell v. Barnwell, which simply struck out and then went back to a pre-existing law; you must replace words, and thus legislate and not adjudicate. You must also ignore the governor's right of veto, or explain it away by saying that his approval of the greater was an approval of the lesser number. This is a fanciful and mathematical view scarcely conceivable in the intent of the constitution.

Again, words are the expression of thoughts, and thoughts, whether in one word or more, are no more divisible in the mathematical sense claimed for any effectual purpose connected with the thought itself, than words are divisible in letters for any effectual purpose connected with the word itself. Four and three-quarters is a fixed quantity, an entity; a thought in itself complete and absolutely single.

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*January 26th, 1879. The judgment of the court was delivered by

WILLARD, C. J. This was an application for a mandamus to compel the comptroller-general to notify each county auditor in the state of the rate per centum of the tax authorized by law to be levied for various state purposes, and to prepare and transmit to each county auditor the necessary forms and instructions to carry into effect the provisions of the act to raise supplies, &c., approved December 24th, 1879. The return of the comptroller-general, which is not traversed, and which must, therefore, be taken to be true, raises two legal questions. First, as to the validity of the first section of the act fixing the amount to be levied for general state purposes; and, Second, as to the validity of the provision in the second section for the military organizations in the county of Charleston.

A majority of the court having reached the conclusion that the error in the first section is fatal to the validity of that section, and the court having unanimously reached the conclusion that so much of the second section as makes provision for the Charleston military organizations is without the force

of law, it is ordered that the motion for mandamus be refused.

The following opinions were subsequently filed in this case:

WILLARD, C. J. The relator asks for a writ of mandamus to compel the performance of certain duties imposed by law upon the comptroller-general where an act has been passed directing the imposition of a general tax, looking to the enforcement of such law.

No question is raised as to the propriety of the remedy, in the event that it shall be held that authority exists for the performance of the duties sought to be enforced.

The single question propounded is, whether the act entitled "An act to raise supplies and make appropriations for the fiscal year commencing 1st November, 1879," is authority for proceedings on the part of the executive officers to levy and collect a tax for state purposes.

It appears by the pleadings, and also by the journals of the general assembly, that

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the act, as passed by the two houses, di*rected a tax of four and one-half mills, but that the act, as ratified and published, directs the imposition of a tax of four and three-quarters mills.

It cannot be questioned that the amount of tax is a material part of the act, and that it cannot be enforced unless that amount is ascertained to have been fixed by the act. It is obvious that the legislature did not intend to leave the amount of the tax to be ascertained by the executive officers of the government, if such a delegation of authority is permissible; but that it was intended that the amount of the levy should be ascertained by the law itself. We must, therefore, inquire whether the act itself has ascertained the amount of tax to be levied in a conclusive and binding form.

It cannot be questioned that, independently of constitutional authority vested in this court, enabling it to look into the actual proceedings of the bodies composing the general assembly, to ascertain the fact of compliance with some constitutional requirement on which the validity of the law depends, the evidence afforded by the certificates of the presiding officers, the great seal affixed to it, and the approval of the governor, must be regarded as conclusive evidence of the action of the legislative body. Such was the law of England, from which our ideas of the force and effect of statutes were derived, and it has become embodied in our jurisprudence. It is then only when we can point to constitutional authority for the purpose that we can demand other evidence of the authenticity of an act, than that which is afforded by the customary modes of authentication.

Section 21, Article II., of the constitution of this state, provides as follows: "No bill shall have the force of law until it shall have been read three times and on three several days in each house, has had the great seal of the state affixed to it, and has been signed in the senate-house by the president of the senate and the speaker of the house of representatives." It cannot be denied that the existence of each one of these requisites is essential to the validity of an act. State v. Platt, 2 S. C. 150 [16 Am. Rep. 647]. It is not enough that the great seal shall be affixed, and that the presiding officers of the two houses shall affix

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their signatures, *but, in addition to this, the bill must have had its three readings on three several days in each house.

It will not be disputed that the courts are competent to ascertain and declare effectively whether the constitutional conditions, on which the force of an act depends, exist. To perform this duty it is necessary to ascertain the existence of the fact of the three readings, and, applying the rules that govern all judicial proceedings, such inquiry must be made in accordance with the rules of evidence that belong to the subject, according to its nature. In the present case, if we come to the conclusion that the act, as published, is not identical with the bill from which it originated, we are relieved from all intricate questions as to the nature of the proofs available for such an inquiry; for the facts admitted upon the pleadings, and the journals of the houses, read with the original bill, sustaining that statement of facts, show that the act, as ratified, was not read three times in each house on three several days. If such was the case, then the constitution denies, in express terms, the force of law to such bill, and the act, as ratified, stands as though it never existed in the form of a bill before the two houses, and is not effective as a law. If such be found to be the case, our competency and duty so to declare are manifest.

The question then arises, whether want of identity between a ratified act and the bill in which it claims to have originated, is fatal to such ratification. Stating this question in this broad manner places it beyond a doubt. If the legislative bodies enact one law and the presiding officers and the custodian of the great seal publish another, of a totally different nature, to allow force to such publication would defeat all the objects intended by the constitution. It would be placing the homage due to the great seal before the constitution, and all the practical safeguards devised by the experience of popular government for the protection of the people; it would be giving a legal stone, though ornamented with the arms of the state, for the constitutional bread of efficient protection. Fictions of law are often convenient when dynastic interests are to be upheld against the reason that commends popular rights, but have no place in interpreting the great

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*instrument from which all governmental

power springs, and by which its efficacy is to be tested. Of what avail are all the safeguards of liberty and property, with their carefully-studied provisions, giving form to legislative procedure, if the custodian of the great seal and the presiding officers of the two houses of the general assembly can, by an arbitrary act, divide between themselves public property and public power? That such efficacy should be ascribed to the great seal in England, is easily understood, for the imposition of that seal was considered as a personal act of the sovereign, who, according to legal ideas, could not do wrong, but that such a doctrine could have any advocacy in a government that professes to be one of laws and not of personal authority, is not readily accounted for.

The attorney-general has placed the case of the relators on ground that allows full force to the considerations that have just been stated; but whether he has distinguished the case successfully from one in which the ratified act is totally different from the bill as passed, remains to be examined.

It would follow, from what has been already stated, that the act, as ratified, must, to have the force of law, be substantially identical with the bill that received its several readings in the houses. What, then, is the test of such identity? Many cases may be supposed that would give rise to nice questions as to what deviations affect the question of identity and what do not, but the present case is free from any such difficulty. It is the highest prerogative of the legislative body to impose taxes and prescribe limits to the burden of taxation. The value and importance of this prerogative is expressed by the cost in blood and treasure of the establishment of the authority of the house of commons of Great Britain as the constitutional means of expressing the popular will. The quantity that the people shall be taxed is of the very life and essence of an act raising supplies for the maintenance of the government. It was not the abstract right of imposing taxes that was the matter of contest between Charles I. and the house of commons, but to what extent and in what manner such taxes should be imposed. At this day the vital question involved in every supply bill is, how much shall the people be taxed? To say, then, that a bill authorizing

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taxa*tion to a specified amount and an act fixing a different amount are identical is to hold that the amount of the tax is an immaterial part of the bill, and to contradict both public history and reason. It follows that the bill in the present case that authorized a tax of four and one-half mills was not identical with the act before us that assumes to impose a tax of four and three-quarters mills, and the act as it stands cannot have the force of law, for want of the requisite readings in the two houses of the general assembly. It was contended, however, that the quarter mill may be rejected as something superadded to the amount of the tax directed by the bill as passed, which, not having been a part of the bill, may be rejected from the ratified act, leaving the amount of four and one-half mills valid and capable of enforcement. We have not been pointed to any authority for thus disintegrating the provisions of a law and rejecting part and retaining the residue. State v. Platt, 2 S. C. 150 [16 Am. Rep. 647], is an authority for rejecting some independent provision of an act that may be severed from the other provisions of an act without affecting their efficacy, where such independent part has failed to receive constitutional enactment; but it does not go to the extent of holding that the words of an act may be changed to express the real intention of the legislature that has been imperfectly expressed in the ratified act. It is contended that the declaration of an intent to impose a tax of four and one-half mills is embraced within the direction to levy a tax of four and three-quarters mills, and that all that is necessary is to reject the excess. This argument is placed on the ground that a numerical statement is in its nature severable into its parts so that a portion of the sum stated may be good and another portion bad. It is true that the subject of a numerical statement may be regarded as in its nature divisible with reference to a known unit, but the verbal statement of that sum is not for that reason necessarily divisible. The one is a question of arithmetic and the other of logic. It cannot be claimed that the court can re-state the language of an act to make it agree with some possible conclusion as to its intention as affecting the subject matter of the act. The language declaring the intent of an act is as much beyond our power as the subject to which that declaration relates, and it would violate

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the principles of *law to change the phraseology of a statute to make it conform to the assumed purpose of the law-giver in any other way than as warranted by the rules of construction. It is not contended and cannot be claimed that the present difficulty can be overcome in conformity with the principles of construction. The proposition is, in its real nature, that we should reform the language of the statute to give it efficacy under the constitution, and that cannot be done consistently with the principles of law that bind the court. It is to be regretted that this court has no power to obviate the inconveniences that must arise from the conclusions that have been stated; but usurpation by the court of authority for that purpose would tend to inflict a permanent injury upon the balance of authority established between the legislature and the courts, while the inconveniences that result from adhering to a clear and simple line of duty will be temporary at the most.

The ratified act does not appear to have received the constitutional sanction of the general assembly, and cannot be reformed in the manner claimed by the relators. The motion should be dismissed.

McIVER, A. J. The question in this case is as to the validity of the act passed at the last regular session of the general assembly, entitled "An act to raise supplies and make appropriations for the fiscal year commencing first of November, 1879."

It is conceded that the act as enrolled and signed by the president of the senate and speaker of the house of representatives, approved by the governor, and to which the seal of the state has been affixed, provides in its first section for the levy of a tax of four and three-quarters mills on the dollar, exclusive of the public school tax, for the purpose of defraying the current expenses of the state government, &c., and in its second section authorizes and requires the county commissioners of Charleston county to levy a tax sufficient to raise the sum of $3000 for the use of the military organizations in that county; but that an inspection of the journals of the general assembly, in connection with the original bill, will show that by the act as it actually passed the two houses, the amount authorized to be levied in the first section, was four and one-half, instead of

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four and three *quarters mills, and that there was no provision therein authorizing the levy of any tax for the benefit of the Charleston military organizations. Upon this state of facts, if the case of the State v. Platt, 2 S. C. 150 [16 Am. Rep. 647], is to be regarded as good law, and it must be so regarded until it is overruled by proper authority, I think it is conclusive of the question now before the court. In that case the Supreme Court held that where the journals of the general assembly showed that by the act as it passed both houses "Blackville" was the place designated for holding the Courts of General Sessions and Common Pleas for Barnwell county, while by the act as enrolled and signed by the presiding officers of the two houses and approved by the governor, "Barnwell" was the place designated for that purpose, that so much of the act as related to that particular matter, inasmuch as it was not connected with or dependent upon any other part of the act, was a nullity and the balance of the act good. This was upon the ground that, under the constitution, it was necessary to the validity of a law not only that it should pass both branches of the general assembly but that it should also receive the approval of the governor, except in those cases provided for in Section 22 of Article III. of the constitution, which did not apply to the case then in hand. Now, as in that case, the portion of the act designating Blackville as the place for holding the courts had not received the approval of the governor it could not be the law, and as that portion of the act, as enrolled, which designated Barnwell as the place for holding the courts, had not passed the two houses it could not be law, and hence the whole attempt of legislating upon that subject proved abortive and the law remained as it was before. So, in this case, the attempt to fix by law the amount of the tax to be levied for the current expenses of the state government, as well as the attempt to provide for the levy of a tax for the benefit of the military organizations in the county of Charleston, has proved wholly abortive for the same reason which was held to have produced that result in the case of State v. Platt. The amount at which the general tax levy was fixed by one branch of the law-making power—the two houses composing the general assembly—is different from that which received the approval of the other branch—the executive—

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and neither, there*fore, can have the force of law, as there is no pretence that the act in question became a law, notwithstanding the failure of the governor to approve it, in the manner prescribed by Section 22 of Article III. of the constitution. The act cannot be regarded as authorizing a levy of four and one-half mills, because the governor has never approved such an amount; nor can it authorize a levy of four and three-quarters mills, because the general assembly has never given its assent to the levy of such an amount.

It will not do to say that four and one-half being less than four and three-quarters, must necessarily be included in it, and as the governor has approved the greater amount he must be regarded as including in such approval the lesser amount also. Such an attempt to apply mathematical principles to moral questions will almost invariably lead to erroneous conclusions. It does not by any means follow that the approval of the larger number necessarily includes the approval of the smaller. For suppose, if such a supposition is permissible, that a legislature should pass an act to raise supplies which provided for a levy of one-tenth of a mill, and the act as approved by the governor should provide for a levy of a reasonable amount—say four mills—could it with any propriety be argued that the governor had thereby approved a levy ridiculously small and manifestly insufficient for the purposes set forth? True, this may be regarded as an extreme supposition, but if the proposition that the approval of the greater number necessarily involves the idea of the approval of the lesser number, be true in any case, resting as it does upon mathematical principles, it must be true in all cases.

Take another illustration. Suppose the legislature were to pass an act fixing the age at which one should pass from infancy to majority at fifteen years, and the act as approved by the governor should fix that age at twenty years, would it follow that be-

cause he approved twenty he thereby approved fifteen—that number being included in twenty, just as four and one-half is here alleged to be included in four and three-quarters? It must be remembered also that the very purpose of the section of the act now under consideration was to fix the amount of the tax to be levied, and when the different

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branches of the law-making power *have declared for different amounts, I am unable to understand how either declaration can be regarded as law.

By the same course of reasoning it could be shown that the provision for the Charleston military organizations is open to the same objections.

It seems to me, therefore, that, unless the case of State v. Platt is overruled, which the majority of the court are not now disposed to do, the first section of the act in question as well as that portion of the second section which purports to authorize the levy of a tax for the support of the Charleston military organizations must be regarded as without the force of law.

I think, however, that the case of State v. Platt cannot be sustained, either upon principle or authority, but that on the contrary it is opposed to the decided weight of authority and establishes a rule which may, in some cases, produce disastrous results, and that it should be overruled.

The true rule, in my judgment, is that when an act has been enrolled, has had the great seal of the state affixed to it, has been signed by the president of the senate and speaker of the house of representatives and has been approved by the governor, it imports absolute verity; that its terms can only be finally ascertained by an inspection of the enrolled act, and that it is not competent to go behind it, and alter its terms either by entries in the journals of the two houses or any other evidence. Its constitutionality may, of course, be inquired into, both for the purpose of determining whether any of its admitted provisions are in conflict with the constitution, either state or federal, and also for the purpose of determining whether the journals show what the constitution requires they shall show in regard to acts for certain purposes; for instance, where an act purports to authorize the contracting of a public debt, whether the act was passed by a two-thirds vote taken by yeas and nays—because, by the express terms of the constitution, no such law can take effect until it has been passed by such a vote, which is required "to be recorded, by yeas and nays, on the journals of each house." Hence, if the journals fail to show such a record there is an absence of one constitutional requirement, which is just as fatal as if the act had not been signed by the president of the senate or speaker of

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*the house or had not been approved by the governor. But as we have decided in Grand Lodge of A. F. M. v. City of Charleston, the mere fact that the journals fail to show that a bill has been read three times, on three several days in each house, does not invalidate the act, because, while the constitution does require that it shall be so read, it does not require that the fact that it has been so read shall be so recorded on the journals, and hence the omission of such record cannot affect the constitutionality of the act.

The same doctrine has been held even in the State of Illinois (Supervisors of Schuyler County v. People, 25 Ill. 181,) a state whose decisions seem to be mainly relied upon to show that it is competent for the courts to look behind the act as enrolled and ratified, and by an inspection of the journals, or other evidence, determine whether any of its provisions have failed to receive the assent of the legislature.

But the proposition to examine the journals for the purpose of ascertaining whether certain words, clauses or sections which appear in the act as enrolled and ratified and approved by the governor, were in the original bill at the time it passed either or both houses, is a very different thing from looking into the journals for the purpose of ascertaining whether they contain such entries as are required by the constitution to be recorded therein. The journals are not made evidence for such a purpose by the constitution, they are not made so by any statute, they were not so regarded in England—a country from whence we have derived not only our fundamental rules of evidence, but a country whose parliament furnishes the model upon which the legislative assemblies of the United States have been constructed. Cush. Law and Practice of Leg. Assemb., § 197.

In King v. Arundel, Hob. 109, it was held that the journal "hath no power to satisfy, destroy or weaken the act, which being a high record must be tried only by itself." But while it is conceded that such is the rule in England, it is argued that it cannot be applied here, where we have a written constitution. I am unable to perceive how this can affect the question unless it could be shown that our constitution contains some

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provision *which would have the effect of altering the rule, and none such can be found.

The constitution in Article II., Section 26, does require that each house shall keep a journal of its own proceedings; but it does not prescribe what shall be therein entered except in certain instances. For example, in Section 24 of the same article, where it requires that "in all elections by the general assembly, or either house thereof, the members shall vote viva voce, and their votes thus given shall be entered upon the journal of the house to which they respectively belong," and in Section 7 of Article IX., where it requires that the vote upon a bill to authorize

the contracting of a public debt shall be taken by yeas and nays and recorded on the journal. But there is no requirement that the terms of a bill shall be entered on the journal; and, as matter of fact, the provisions of a bill are never spread upon the journal, but only its title and the amendments proposed, and this is oftentimes done in such an imperfect and unintelligible manner as to render it necessary to refer to something else to make them intelligible. As, for example, in this very case, where, without reference to the original bill, it would be difficult, if not impossible, to tell what was the amendment to the first section.

It appears to me, too, that the decided weight of authority in this country is in favor of the English rule. In Pangborn v. Young, 32 N. J. 29, decided in 1866, the question was discussed with great ability and learning, and the conclusion was reached that, both upon principle and authority, it was not competent for a court to go behind the act as ratified and approved by the governor, and inspect the journals with a view to ascertain whether the act as actually voted upon and passed, contained different terms from that which had been ratified, approved by the governor and filed in the office of the secretary of state. The same doctrine has been held in Connecticut, in 1849; Eld v. Gorham, 20 Conn. 8. In Maryland, in 1858, Fouke v. Fleming & Douglass, 13 Md. 392, and again in 1870, in Mayor v. Harwood, 32 Md. 471; though the court in that state, in the subsequent cases of Berry v. Baltimore and Dunn Point Railroad Company, 41 Md. 446, decided in 1875, and Legg v. Mayor, 42 Md. 203, decided also in 1875, while not

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overruling the two *cases first mentioned do seem disposed to take a somewhat different view of the question. In Indiana, in 1869, in Evans v. Browne, 30 Ind. 514. In New York, in 1865, in People v. Devlin, 33 N. Y. 269. In Louisiana, in 1871, in La. State Lottery Co. v. Richoux, 23 La. Ann. 743. In Nevada, in 1875, in State v. Swift, 10 Nev. 176. In the Nevada case, which is one of the most recent decisions upon the point that I have been able to find, the American authorities are elaborately reviewed. In that case it is said that question "appears to have been decided in fifteen states; in nine states, viz., Connecticut, New York, New Jersey, Maryland, Missouri, Iowa, North Carolina, Indiana, California, the old rule is upheld. In six states, viz., Alabama, Arkansas, Illinois, South Carolina, Minnesota and New Hampshire, it is repudiated. In Michigan there are dicta in favor of the new departure. In Ohio and Kentucky the question has been noticed but its decision waived. In Mississippi the court divided on the question." The learned judge then proceeds to show that the decisions in the six states above alluded to, with the exception perhaps of those of New Hampshire, either ignore all precedents or are rested upon authorities which have either been overruled or do not establish the position which they are cited to support. Not having access to all the cases he refers to I have not been able to verify his assertion, but so far as I have been able to prosecute my researches I find his assertion, in the main, sustained. It is very manifest that the decision in this state does not purport to rest upon the authority of any decided cases, as not a single one is referred to. The Illinois cases, which seem to be principally relied upon to support the new rule, do not, as it seems to me, furnish that support. The constitution of that state, adopted in 1848, which was of force at the time the earlier cases were decided, as well as that adopted in 1870, which is now and was of force at the time the later decisions were rendered, provides (the italics being mine) that on the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house," differing in this respect very materially from the constitution of this state. Now the Illinois cases which

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are relied upon as sup*porting the new rule, all seem to be cases in which the question was whether it was competent to resort to the journals for the purpose of showing that this constitutional requirement had not been complied with.

They therefore may rest upon the same principle which has been adopted here, viz., that where the constitution requires, in express terms, that in order to make an act valid, certain entries must be made upon the journals, the absence of such entries is fatal to the act. But the same court, as we have seen above, in the case of Supervisors of Schuyler County v. People, has held that the fact that the journals fail to show that a certain bill was read three times on three several days, does not affect its constitutionality, because, while the three readings are required by the constitution, the fact that it has been so read is not required to be entered on the journals. This distinction seems to be recognized in the case of Osburn v. Staley, 5 W. Va. 85, decided in 1871, where the decision was placed upon the ground that as the constitution of that state, then in force, like the constitution of Illinois above quoted, required all bills to be passed by a vote taken by ayes and noes, which must be entered on the journals, the court could look to the journals to see if this constitutional requirement had been complied with.

It seems to me that the English rule is supported by the decided weight of authority in this country, and as is abundantly shown in the able and elaborate opinion of the Chief Justice of New Jersey, in the case of Pangborn v. Young, supra, to which especial attention is invited, that it is founded upon

well-settled principles and is recommended by every consideration of public policy.

It is an entire mistake to suppose that this rule rests upon the idea that any peculiar sanctity should be attached to the great seal of the state. The question to be determined, in cases of this kind, is one of fact: what are the terms which have been used by the legislature in a statute—not what the construction of admitted terms should be, nor whether certain requirements of the constitution have been complied with, which are questions clearly within the scope of judicial cognizance. If an act as enrolled, signed by the presiding officers of the two houses, with

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*the seal of the state attached, and bearing upon its face the approval of the governor, is not to be regarded as conclusive of the terms which it contains, then, indeed, is the question as to what is the written law of the land involved in the greatest uncertainty. If courts can go behind such an act and inquire whether each and every word of it has actually received the assent of the legislature, then the question very naturally arises how far can they go, and what kinds of evidence may be resorted to? Are the journals conclusive, or can they, as is said to have been done in one of the Illinois cases (Turley v. County of Logan, 17 Ill. 151,) receive parol evidence "and on recollection of members, and by the manuscript notes of the clerk," amend the journals and thereby alter the terms of the enrolled act? If so, then rights which depend upon a statute are held by the most shifting and uncertain tenure. There is no mode by which the question as to whether a statute actually contains or should contain certain terms, can be finally tested and definitely set at rest, if the rule established by the case of State v. Platt is allowed to prevail. When the question is as to the construction of the terms used in a statute, whether terms are in conflict with any constitutional provision, or whether the journals show what the constitution requires that they shall show, a decision in one case, being a decision of a question of law, would be binding in all subsequent cases; but when the question is whether certain words or clauses which are found in a statute which has been duly enrolled, ratified and approved, actually received the assent of the legislative will, a decision in one case would not be conclusive in another like case, between different parties, because it would depend upon the solution of a question of fact, and the decision of such a question could only bind the parties to such case and their privies. When the question arises again between different parties it would be entirely open, and the result might be that in one case the statute would be held to contain certain provisions, while in another the reverse might be decided. So that what was supposed to be law one day, in one county, would not be law the next day in another county. But if it should be argued that the journals are to be regarded as conclusive and that no other evidence can be received, then the question

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very naturally *arises, why should the journals, made up, as they are, hastily, amidst the excitement and confusion incident to most legislative bodies, by subordinate officers of the two branches of the general assembly, be entitled to any more credit than the enrolled act, reported by committees of the bodies themselves as correctly enrolled and ready for ratification, and authenticated by the signatures of the presiding officers?

Why should the journals, which are kept by a subordinate officer, be any more entitled to respect than the work of another subordinate, supervized as it is required to be by committees of the two houses and authenticated by the signatures of the presiding officers? If anything, the latter would seem to be entitled to the higher degree of credit.

It will not do to say that the journals are read over daily in the presence of the members and are adopted by them as correct, for to say nothing of the weight which this suggestion would probably have in the minds of those who are familiar with the usual custom of legislative bodies in this regard, it is very certain that the journals of the last day of the session, which are apt to contain some of the most important proceedings, are not so read over, even in theory, and cannot, therefore, be said to have received the approval of the members. Nor will it do to say that the rule contended for leaves the legislation of the country at the mercy of a careless or dishonest engrossing clerk, for if the committee on enrolled bills do their duty, as every court is bound to assume that they will, there can be no danger of any improper or careless addition to, or omission from the bills as they actually have been passed.

No rule that can be devised will prove absolutely perfect, and the great matter is to have a certain definite rule, capable of easy application, which is best calculated to effect the end in view. The practical question, therefore, is, whether it is better to adhere to the rule which has prevailed for ages in the country from which our jurisprudence has been mainly derived, and which, having worked well there, has been adopted by a number of the states of this Union, and which undoubtedly has the merit of being simple, definite and easy of application, or shall we adopt another which undoubtedly

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tends to render the law uncertain, *which has not, as yet, assumed any definite shape, and which will be attended by the gravest inconveniences and perhaps dangers by opening the door for frauds and affording the strongest temptation to tamper with the journals of the legislature?

The new rule, as it may be called, certainly has not, as yet, assumed any definite shape,

for although it is said in Berry v. Baltimore and Duna Point Railroad Company, 41 Md. 446, in speaking of the cases in which the new rule has been adopted that "they all seem to concur in maintaining that no statute, having the proper forms of authentication, can be impeached or questioned upon mere parol evidence," yet, as we have seen in the case of Turly v. County of Logan, above referred to, parol evidence was received to amend the journals and thereby correct the enrolled act. So, also, in Gardner v. Collector, 6 Wall. 511 [18 L. Ed. 890], the Supreme Court of the United States said that in a question of this kind "the judges who are called upon to decide it, have a right to resort to any source of information, which in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such a question"—language which would surely warrant a resort to parol evidence. And in the case of State v. Platt no such limitation of the rule is to be found. On the contrary, that case holds that resort may be had to the journals or other appropriate evidence, which, certainly, does not necessarily forbid a resort to parol evidence. Indeed, few, if any, of the cases undertake to prescribe what kind of evidence should be received for the purpose of correcting the terms of an enrolled act, and therefore, it seems to me, the question may be regarded as still an open one.

While, therefore, I have been compelled by the view which I take of the case of State v. Platt to concur in the result reached by the CHIEF JUSTICE in this case, I have thought it to be my duty to place on record the grounds of my dissatisfaction with the rule established by that case.

McGOWAN, A. J. This is a petition by the attorney-general of the state against the comptroller-general for a writ of mandamus commanding him forthwith to notify each county auditor of the rate per centum author-

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ized by "An act to raise supplies *and make appropriations for the fiscal year commencing 1st November, 1879," and approved 24th December, 1879.

Under the law, it is the duty of the comptroller-general, as the head of the fiscal department of the government, to have enforced acts of the legislature which levy taxes, and to issue to subordinate officers in that department all instructions and forms necessary for that purpose. But for the reason which appears in his return, the comptroller-general refuses to have said act carried into effect; wherefore the attorney-general filed this petition for mandamus to compel him to do so.

The return is not traversed and must be taken to be true. It contains the following statement of facts:

"That the alleged act, as ratified and approved, purports to levy a tax of four and three-quarters mills in the first section thereof, and purports to authorize the county commissioners of Charleston county to levy a tax sufficient to raise the sum of three thousand dollars for the Charleston military in the second section thereof; whereas the act, as it passed the senate and house of representatives, purported to raise a tax of only four and one-half mills in the first section thereof, and did not contain any provision whatever authorizing the levy of any tax for the Charleston military.

"That the said act, when sent, after its passage in the house, to the senate, purported to authorize a levy of a tax of four and one-half mills in the first section thereof, and the senate amended the said section by striking out the words 'one-half' and inserting in lieu thereof 'three-quarters,' in which amendment the house refused to concur and the senate receded therefrom. That the senate amended the second section thereof by inserting the provision for the Charleston military, (copied in full,) in which amendment the house refused to concur and the senate receded therefrom; all of which fully appears in the journals of the senate and house of representatives," &c.

Upon these facts, admitted and confirmed by the journals, the question is purely one of law, whether the act referred to is constitutional and valid in whole or in part, for if it is, the mandamus must be granted to enforce it, and otherwise not.

The act is found among the archives in the

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office of the sec*retary of state with other public acts passed at the last session, signed by the president of the senate and the speaker of the house of representatives, approved and signed by the governor, and having attached the great seal of the state.

It is a record of a very solemn character, and must be regarded as constitutional, certainly until the contrary clearly appears. It may be assailed, and whether it is what it purports to be, a valid law under the constitution, is a judicial question. The courts have the right to declare an act of the legislature unconstitutional in whole or in part, but that right should be exercised with great caution. It is a solemn act to declare that that body to whom the people have committed the sovereign function of making the laws, have disregarded the limitations imposed upon them, and it should only be done in cases where the constitution has been clearly, palpably and plainly violated, and then only to the extent of such violation.

It is not suggested that the act under consideration is unconstitutional because it violates any principle in regard to the subject matter, such as impairing the obligation of contracts, &c., but that as it was enrolled and now stands upon the statute-book, it was not, in two of its most important parts, passed by the legislature according to the forms of the constitution, and is therefore not law.

The constitution declares as follows: Article II., Section 21—"No bill shall have the force of law until it shall have been read three times and on three several days in each house, has had the great seal of the state affixed to it, and has been signed in the senate-house by the president of the senate and the speaker of the house of representatives."

Article III., Section 22—"Every bill or joint resolution which shall have passed the general assembly, except on a question of adjournment, shall, before it becomes a law, be presented to the governor, and if he approve it he shall sign it; if not, he shall return it, with his objections, to the house in which it shall have originated, which shall enter the objections at large on its journals and proceed to consider it," &c.

Most of the states of the Union have constitutions with provisions more or less similar

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to those in our constitution above *quoted. In many of them the question has been much discussed, whether an act regular in form, signed by the proper officers of each house, approved by the governor, and having attached to it the great seal of the state, constitutes a record from a co-ordinate branch of the government so solemn as to make it conclusive evidence of the passage of the act as enrolled; or whether the journals of each branch of the legislature may be considered and treated as authentic records of the proceedings of the legislature, to ascertain whether the two houses, in fact, concurred in the passage of the act. In this discussion it is conceded, on both sides, that in England an act of parliament proves itself, and is not subject to judicial inquiry—that the act, as enrolled by the clerk of parliament, so long as it existed, was held to import absolute verity. There are two distinct currents of opinion in the states having written constitutions—one holding that it is not only legal but wise to adhere to the old English rule, and the other that the judiciary department may, and indeed must, look beyond the seal and inquire whether that which purports to be law has been passed in the manner prescribed by the constitution. The states seem to be about equally divided upon the subject. In New Jersey, Nevada and some others, the old English rule is upheld. In Illinois, New Hampshire, Minnesota, Alabama and others, the opposite view is taken. In this conflict of opinion South Carolina has ranged herself with the latter class and in favor of what may be called the American doctrine on the subject. In considering the effect of the provisions of our constitution already cited, this court, in the case of State ex rel. Attorney-General, v. Platt, 2 S. C. 150 [16 Am. Rep. 647] has held "that the enrolled act, duly authenticated, as the constitution requires, and approved and signed by the governor, is not conclusive evidence of the terms of a bill as it passed the houses of the general assembly; but the journals of the houses, or other appropriate evidence, may be received to show what those terms were, and whenever it appears that the enrolled act differs from the bill as it passed, in a substantial matter, the judiciary department of the state may declare the whole act, or the part affected by the change, unconstitutional and void."

According to the well-established rule of

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stare decisis, the *principles here announced are law in South Carolina, and they must decide this case.

Let us apply them to the act under consideration. It appears in the most conclusive manner—in fact it is admitted—that the act as ratified, and the bill as it passed the two houses, "differ" in two important particulars. The one levied in the first section four and one-half mills, and nothing in the second section, for the Charleston military; the other levied, in the first section, four and three-quarters mills, and in the second section provided a tax to raise $3000 for the Charleston military. It is not denied that the particulars in which they "differ" are substantial; then it must follow, from the case of Platt, that we may declare the whole act, or the part affected by the change, unconstitutional and void. These new provisions were not passed in the manner prescribed by the constitution, but are mere interpolations, and we have no hesitation in holding that, to the extent of these interpolations, the act is unconstitutional and void, and that no mandamus should be issued to enforce the act, so far as they are concerned.

Then how does the act stand with these provisions declared null? Is the remainder binding as law, or does that necessarily have the effect of invalidating the whole act or of the whole section in which the bad parts adhered? If that is the law, it must be so declared; but it would be a strange and unfortunate result that, even after the interpolations are annulled, they should have the effect of destroying that which, but for their presence, would be regular and valid.

It is said, in more than one of our decided cases, that it is the business of the court to give effect to the intention of the legislature when it can be ascertained, and not to lend too ready an ear to hinder or subvert it. Here the intention of the legislature is in no way doubtful. They intended to levy a tax of four and one-half mills in the first section, and to authorize no levy for the Charleston military in the second. That was expressed in the bill as it passed both houses, and if the effect of declaring null the interpolations can be limited to those parts, the act will stand as it passed the houses and express the exact intention of the legislature.

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*The supply and appropriation act, from its very nature, has many different provisions, distinct from each other. It has one general purpose, but in carrying out that purpose sep-

arate and distinct subjects are introduced; and it would seem reasonable that if one of these limbs should be unsound it might be amputated without destroying the whole body. It is no new thing in South Carolina that part of an act should be declared to be unconstitutional and the other part remain unaffected.

The constitution of the state was adopted by the people as a whole, uno flatu, yet parts of it have been declared void, leaving the remainder in full operation. Calhoun v. Calhoun, 2 S. C. 283; Cochran v. Darcy, 5 S. C. 125. The act of the legislature known as the stay law, has been declared unconstitutional in part (State v. Carew, 13 Rich. 498 [91 Am. Dec. 245]) and the remainder declared constitutional in another case. Wardlaw v. Buzzard, 15 Rich. 158 [94 Am. Dec. 148].

An act of the legislature contained, among others, a provision that the court for Barnwell county should be held at Barnwell courthouse. That part as to the place where the court should be held was declared bad, and the remainder of the act left in full operation. In that case it is said "the residue of the act beyond that portion held by us not to be of force as law, is unaffected thereby, inasmuch as that is a distinct and independent matter, in no way affecting the scope and efficiency of the act, according to the intention of the law-maker." Accepting this principle as the test, there is no doubt that the declaring null the provision for the Charleston military in the second section, leaves unaffected the remainder of that section and the act, inasmuch as that is clearly a distinct and independent matter. The integrity of the act is not affected, for it is left in that respect as it stood originally.

Can we affirm the same as to the portion of the first section which remains, after declaring null the bad quarter mill injected into it? This is the most difficult question in the case, and it must be determined by the fact whether the interpolation can be eliminated from the act as a separate and independent matter. The enrolled act reads "four and three-quarters mills." We have already declared that one-quarter mill of that is bad, and if the bad quarter mill had been

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added by a separate clause like this, *and one-quarter mill in addition thereto, leaving the original text, four and one-half mills, unchanged, there would be no difficulty, for then the supplemented sentence might be declared void and still leave the remainder of the sentence as law, reading four and one-half mills. But the original text expressing numbers, the addition was made, not by a separate sentence, but by simply changing the arithmetical expression four and one-half to four and three-quarters. The addition made was, in effect, precisely equivalent to making it by a separate sentence. The difficulty arises, not from the nature of the thing, but from the manner in which it is expressed. We do not understand that the matter expressed in the enrolled act, "four and three-quarter mills," is an indivisible unity, but, as we know, is only the manner of expressing at least two other quantities, "four and one-half" and "one-quarter," as to both of which we have a distinct conception. The history of this matter itself shows that it is divisible. As the bill passed the houses, it read four and one-half mills—in some way one-quarter mill was added, so that it now reads "four and three-quarters mills." These are clearly distinct and separate. Is it possible that the bad quarter mill cannot be eliminated only because of the phraseology in which it was incorporated? The law aims at the substance of things. Judge Cooley, in his Constitutional Limitations, p. 178, says: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall." The quarter mill added is "distinct and separable," although it is not expressed separately, but is included in the compound arithmetical phrase "four and three-quarters mills."

A motion to strike out and insert is an entirety, and, if it is not passed, nothing is stricken out. It is not proposed to insert anything in the act that is disclaimed as beyond the jurisdiction of the court, but, in effect, to restore it as it passed the houses, and thus give effect to the clear intention of the law-makers. I can see no insuperable difficulty in declaring it null and void as to one-quarter mill, and as law to the extent of four and one-half mills.

I am of opinion that the writ of manda-

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mus should be granted *to enforce so much of the act as is herein declared to have the force of law, viz., the levy in the first section, to the extent of four and one-half mills; and the second section, except the provision for the Charleston military.

Application refused.

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13 S. C. 74

(Case No. 812.)

Ex parte SWEARINGEN.

(November Term, 1879.)

[1. *Extradition* ⊂=24.]

Whenever the governor of a state demands of the governor of another state the body of a person as a fugitive from justice, producing at the same time a copy of indictment found or affidavit made, certified to be authentic by the demanding governor, and showing that the person demanded is charged with the commission of some crime in the state from which he has fled, it is the duty of the governor upon whom the demand is made to cause the arrest and de-

livery of the person demanded. Willard, C. J., dissenting.

[Ed. Note.—Cited in Ex parte Massee, 95 S. C. 323, 79 S. E. 97, 46 L. R. A. (N. S.) 781.

For other cases, see Extradition, Cent. Dig. § 28; Dec. Dig. ⟸24.]

[2. *Extradition* ⟸24.]

It cannot be objected to such arrest and delivery that the prosecution was instituted and the affidavit made by a citizen of this state, in the state where the crime was alleged to have been committed.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 28; Dec. Dig. ⟸24.]

[3. *Extradition* ⟸32.]

The absence of an affidavit charging the prisoner to be a fugitive from justice, is not fatal to the requisition. Willard, C. J., dissenting.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 36; Dec. Dig. ⟸32.]

[4. *Extradition* ⟸30.]

The term "flee from justice" in Article IV., Section 2, of the Constitution of the United States includes cases where a citizen of one state commits a crime in another state and then returns to his home.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 32; Dec. Dig. ⟸30.]

[5. *Extradition* ⟸36.]

Where a prisoner is in the hands of the sheriff under a mandate issued by the governor of this state in pursuance of a requisition from the governor of Georgia, and such mandate requires the delivery of the prisoner to an agent of the governor of Georgia, the prisoner will not be discharged because that the mandate contains no order for his arrest.

[Ed. Note.—Cited in Ex parte Moscato, 44 S. C. 337, 22 S. E. 308.

For other cases, see Extradition, Cent. Dig. § 41; Dec. Dig. ⟸36.]

Original application to this court by John C. Swearingen for discharge from custody under writ of habeas corpus. The case is fully stated in the opinion of the court.

Mr. M. W. Gary, for petitioner.

The petitioner is not a fugitive from justice. Burr. L. Dict.; 2 Carter 396; 1 Archb.

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Cr. Pr. & Pl. 140. There must be an *actual fleeing from justice, and of this the governor of the state of whom the demand is made, as well as of the state making it, should be satisfied. This is commonly shown by affidavit. 6 Penna. L. J. 412; 6 Am. Jur. 226; Lewis Cr. L. 266; Hurd on Hab. Corp. 606; 12 Am. L. R. 603. Has the governor of South Carolina followed the practice in such cases, or complied with act of 1793? Under the act of congress, on its provisions being complied with, the governor is required to order him to be arrested. 1 Hill 327. The representations of the executive of the demanding state are of no effect unless supported by a duly authenticated copy of the indictment found or affidavit made. The warrant is void without these, and should show on its face that they had been produced to the executive. 9 Tex. 635; 1 Archb. Cr. Pr. & Pl. 140, 141; 9 Wend. 212; 1 Sand. 701; 1 Hill 346. The paper issued by Governor Simpson was clearly not a warrant. What is a warrant and what an arrest? Burr. L. Dict. The governor being an executive officer cannot issue a warrant. 24 How. 104; 31 Vt. 299; Const. U. S., Art. XIV., § 1; Const. S. C., Art. I., § 26.

Mr. Solicitor Abney and Mr. S. Dutcher, solicitor-general of Georgia, contra.

February 14th, 1880. The opinion of the court was delivered by

McIVER, A. J. In compliance with petition of the prisoner alleging that he is unlawfully detained in the custody of John C. Gaston, sheriff of Edgefield county, he was brought before this court under a writ of habeas corpus, and now claims his discharge upon various grounds, which will be hereinafter more particularly noticed. The return of the sheriff to the writ states that the petitioner is detained by virtue of a mandate from the governor of this state issued in pursuance of a requisition from the governor of Georgia demanding the petitioner as a fugitive from justice, requiring him to deliver the petitioner to one John R. Ivey, the agent of the State of Georgia, and craves reference to these papers—the requisition from the governor of Georgia and the mandate of the governor of this state—as part

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*of the return. The requisition shows that the petitioner stands charged with the crime of riot, committed in the State of Georgia, and that he is demanded as a fugitive from justice. A copy of an affidavit made before a magistrate in the State of Georgia, duly authenticated by the governor of that state, accompanies the requisition, in which the petitioner is charged with having committed the crime of riot in Georgia.

The constitution of the United States, Article IV., Section 2, provides that, "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." For several years after the adoption of the constitution of the United States there was no legislation providing the mode by which this clause of the constitution should be carried into effect, and as a natural consequence controversies arose between the states in regard to this matter, one of which, between Pennsylvania and Virginia, doubtless gave rise to the passage of the act of 1793, (Rev. Stat. U. S., § 5278 [U. S. Comp. St. 1913, § 10126]) prescribing the mode of carrying this clause of the constitution into effect; for when the governor of Virginia declined to comply with the requisition from the governor of Pennsylvania, the latter sent all the papers to

President Washington, calling especial attention to the objections of the authorities of the State of Virginia based on the necessity of future legislation upon the subject, and suggesting that the matter be brought to the attention of congress. The president referred the papers to his attorney-general, Mr. Randolph, who gave an elaborate opinion as to the proper construction of the clause of the constitution in question, from which the necessity for further legislation was apparent. The president accordingly brought the attention of congress to the matter by a message in November, 1792, and in the following February the act of 1793, above cited, was passed. That act, so far as it is necessary for the purpose of this case to state, in substance provides that whenever the executive authority of a state shall demand any person as a fugitive from justice of the executive authority of any state to which such person shall have fled, and shall pro-

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duce a copy of *an indictment found, or an affidavit made before a magistrate of any state charging the person so demanded with having committed treason, felony, or other crime in the state from which the demand proceeds, certified as authentic by the governor of the state from whence the person so charged has fled, it shall be the duty of the governor of the state to which such person has fled to cause such person to be arrested and secured and delivered to the agent of the state from which such demand proceeds. It will be observed that three things are necessary to be done by the governor of the state making the demand. 1st. He must demand the person as a fugitive from justice. 2d. He must produce a copy of an indictment found, or an affidavit made before a magistrate of a state, showing that the person demanded is charged with having committed some crime in the state from which he has fled. 3d. Such copy of the indictment, or affidavit, must be certified as authentic by the governor of the state making the demand. The only inquiry, therefore, in this case, is, whether these requirements of the act of congress have been complied with; for, if so, the governor of this state was not only authorized, but was required to issue his mandate requiring the arrest of the petitioner and his delivery to the agent of the State of Georgia. As Taney, C. J., says in Kentucky v. Dennison, 24 How. 104 [16 L. Ed. 717]: "It will be observed that the judicial acts which are necessary to authorize the demand are plainly specified in the act of congress, and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the state where the fugitive is found. He has no right to look behind them, or to look into the character of the crime specified in this judicial proceeding."

An examination of the papers referred to in the return satisfies us that all of the requirements of the act of congress have been fully complied with, and that the petitioner is not unlawfully detained in the custody of the said John T. Gaston. The requisition shows, upon its face, that the petitioner is demanded as a fugitive from justice, and the copy of the affidavit accompanying it, duly authenticated by the governor of Georgia, shows that the petitioner stands charged with the crime of riot, committed in the State of Georgia.

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*It only remains to consider the grounds upon which the motion for the discharge of the petitioner has been urged. The first ground taken was that the person who originated the prosecution in the State of Georgia was not a citizen of that state, and having no interest in the enforcement of the laws, and not contributing anything in the way of taxes to the expenses of courts of justice in Georgia, could not lawfully commence a prosecution there. It is quite sufficient to say that we are not at liberty to consider such a question. The authorities of the State of Georgia have undoubtedly recognized the fact that a prosecution has been lawfully commenced in that state, and it is not for us to question it. Whether the charge has been made in proper legal form, or whether it can be sustained by legal evidence, are questions which belong exclusively to the tribunals of the state where the crime is alleged to have been committed, as they alone have jurisdiction to determine whether the laws of such state have been violated. Even, however, were the point raised a matter within our jurisdiction, we are altogether unable to discover any valid reason why a citizen of South Carolina may not commence a prosecution in the State of Georgia for an offence committed within the territorial limits of that state.

The next ground taken was, that the absence of an affidavit that the petitioner was a fugitive from justice is fatal to the requisition. A sufficient answer to this is, that the act of congress which was passed for the express purposes of prescribing the steps to be taken in order to carry into effect this provision of the constitution does not require any such affidavit. And in this connection it is not unimportant to remember that this was one of the grounds upon which Mr. Attorney-General Randolph, in his opinion above referred to, regarded the requisition of the governor of Pennsylvania upon the governor of Virginia as defective, and yet, though this opinion, coming from the highest law officer of the government, was before the congress which in large measure was composed of those who participated in framing the constitution, when they passed the act of 1793, and doubtless prompted the passage of such act, yet they deliberately

omitted from such act any provision requiring an affidavit that the person demanded is a fugitive from justice, for the reason,

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perhaps, *that in most, if not in all, cases that fact would sufficiently appear from the papers required by the act of 1793, and from the necessary course of proceedings in executing the provisions of the act. It is very true that the constitution does seem to contemplate, as one of the conditions of the right to demand, that the person demanded shall not only be charged with a crime committed in another state, but that he shall also be a fugitive from the justice of such state. But while the act of congress expressly prescribes the mode by which the fact that the person demanded is charged with crime shall be authenticated, it does not prescribe any mode by which the fact that he is a fugitive from justice shall be authenticated.

If, therefore, it is necessary that such fact shall be made to appear, it certainly is not essential that it shall be proven by an affidavit certified by the governor of the state making the demand, as authentic. Indeed, the governor's authentication of such an affidavit would have no force and effect here, as that is not the mode prescribed by law for the authentication of the records and judicial proceedings of another state, and the only reason why the governor's authentication of the indictment or affidavit showing that the person demanded is charged with crime is sufficient, is that it is expressly so provided by the act of 1793. It follows, therefore, that if the fact that the person demanded is a fugitive from justice must be proven, it must be by some evidence other than that which would be furnished by an affidavit authenticated by the governor of the state making the demand. Whether evidence of such fact is necessary, and how it ought to be adduced, we do not think it necessary, in this case, to inquire, for we think it sufficiently appears from the papers before us that, prima facie at least, the petitioner is a fugitive from justice, in the sense of those terms as used in the constitution of the United States. The copy of the affidavit accompanying the requisition, which is duly authenticated in the manner prescribed by the act of congress, and which we are bound to assume as at least prima facie true, shows that the petitioner committed the offense of riot in the State of Georgia, and this is sufficient to show that he was then in that state, and his appearance here, as well as his statements in his petition, shows that he was afterwards found in this

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state, *and this, in our judgment, is quite sufficient to show that he is a fugitive from justice in the sense of those terms as used in the constitution, for, manifestly, those terms were intended to embrace not only a case where a party after committing a crime actually flees, in the literal sense of that term, from the state where such crime was committed, but also a case where a citizen of one state, who, within the territorial limits of another state, commits a crime, and then simply returns to his own home. The object of the constitution was to enable a state whose laws had been violated, to secure the arrest of the person charged with such violation, even though such person might be beyond the reach of the ordinary process of such state. In addition to this, while the petitioner does say, in his petition, that "he is not conscious of having committed any offence against the laws of the State of Georgia or of this state, and that he is not, and never has been, a fugitive from justice from the State of Georgia," he does not deny that he was in the State of Georgia at the time when and place where, by the affidavit, he is charged with having committed the crime of riot, and his denial that he is a fugitive from justice must be regarded as a mere denial of a legal conclusion, and not a denial of the fact that he was in the State of Georgia at the time when and the place where the crime was alleged to have been committed. It may be remarked, however, that to allow the existence of this fact to be put in issue before the courts of the state upon which the demand is made, would, in many if not most instances, draw after it the right to inquire into the merits, the very thing which the constitution and the act of congress was designed to prevent. For if a party, when in custody in this state under a warrant of extradition, could, upon an application for his discharge under a writ of habeas corpus, by his own affidavit or otherwise, raise the question as to whether he was in the state where he was alleged to have committed a crime at the time when and the place where such crime was alleged to have been committed, it is perfectly manifest that the tribunals of this state, which have no jurisdiction whatever of the offence charged, would thereby be called upon to determine the sufficiency of at least one ground of defence, that of alibi, which the party charged would be at liberty to set up,

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and would, to that extent, be *entering upon the trial of a case of which they confessedly have no jurisdiction.

It seems to us that the true rule is that when a requisition comes to the governor of this state for any person found in this state, which shows upon its face that all the requirements of the act of congress have been complied with, it is the duty of the proper authorities of this state to recognize the statements of fact made therein as true, and to surrender to the agent of the state making the demand the person demanded, in the fullest confidence that he will receive ample justice at the hands of the authorities

of such state. The very fact that there is no mode of enforcing the performance of the duty imposed upon the governor of the state upon which the demand is made, by mandamus or otherwise, (Kentucky v. Dennison, supra) makes it all the more obligatory that he should be scrupulously exact and prompt in the performance of such duty, and the courts should not lend their aid to defeat the provisions of the constitution so essential to the preservation of that good will which ought always to exist between sister states, by demanding more than is required by the act of congress.

The views hereinbefore presented are, we think, amply supported by the following cases: Kingsbury's case, 106 Mass. 223; Clark's case, 9 Wend. 212; In re Voorhees, 32 N. J. 141; Johnston v. Riley, 13 Ga. 133, as well as by an elaborate article upon the subject of extradition between states, in Am. L. Rev., (Jan., 1879,) vol. XIII., p. 181.

The case of In re Jackson, decided in the United States District Court for the Western District of Michigan, and reported in Am. L. Rev., (April, 1878,) vol. XII., p. 602, seems to have been mainly relied upon by the counsel for the petitioner, and does seem at first view to maintain the proposition contended for by him. But aside from the fact that this decision is not authority which is of any binding force here, a close examination of the case will show that it does not really sustain the position of the counsel under the facts presented in the case now before the court. In that case Jackson was in the custody of the agent of the State of Massachusetts, and in his return to the writ of habeas corpus he sets up the warrant issued by the

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governor of *Michigan as the cause of the petitioner's detention. The objection to the warrant was that it did not state that it had been satisfactorily shown to the governor of Michigan that Jackson had fled from the State of Massachusetts or from justice, and the only question considered by the judge was whether such a statement in the warrant was sufficient proof of the fact that Jackson was a fugitive from justice. He manifestly did not have before him the evidence which we have in this case, viz., the copy of the affidavit showing that the person demanded is charged with crime, and if he had, would probably have come to the same conclusion which we have reached. For he says: "Unless it be shown that the relator was in Massachusetts at or about the time when the offence is charged to have been committed, and has since that time departed that state, there would be no just or legal ground for saying he had fled from justice in Massachusetts." Here, as we have seen, these facts do appear from the copy affidavit accompanying the requisition and from the other proceedings in the case. The judge cites and relies upon the case of Ex parte Thornton, 9 Tex. 635, but admits that the exact point now made was not raised in the case. The question in that case was as to the sufficiency of the governor's warrant, which merely recited that it had been represented by the governor of Arkansas that Thornton stands charged with the crime of forgery, but failed to state that such representation was accompanied by an authenticated copy of an indictment or affidavit charging Thornton with the crime, and so far as we can see, from the statement which is made of the case, in the opinion of the District judge, not having access to the book of reports in which the case is contained, no question whatever as to the necessity of proving that the person demanded is a fugitive from justice was raised. The case of Ex parte Smith, 3 McLean 121 [Fed. Cas. No. 12,968], is also cited and relied upon. In that case the requisition was made by the governor of Missouri on the governor of Illinois, the state in which Smith lived. From the affidavit on which the proceedings were founded it appeared that the affiant, while sitting in his house, in Missouri, was shot at, with intent to kill, and that the affiant believed that Smith was "accessory before the fact of the intended murder," but it nowhere appeared in the

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affidavit *that Smith had fled from or had ever been in the State of Missouri, for it might be entirely true that he was an accessory before the fact, and yet never have left his home in Missouri. The court held that it should have appeared distinctly in the affidavit that "Smith had committed a crime, and that he committed it in Missouri." This case, therefore, so far from being in conflict with, sustains the view which we have adopted. Here the affidavit does show that Swearingen committed a crime and that he committed it in Georgia.

Another ground taken is that even if the requisition from the governor of Georgia be, in every respect, in conformity with law, yet the mandate issued by the governor of this state was insufficient to authorize the arrest of the petitioner, inasmuch as it does not, in express terms, order the arrest of the petitioner, but only directs that he be delivered to the agent of the State of Georgia. We do not think it at all important to inquire whether the mandate was sufficient to authorize the arrest of the petitioner. The petitioner claims that he is illegally detained in the custody of the sheriff, and the only question before us is not as to the legality of his arrest, but as to the legality of his detention, and the cause shown for that is the mandate of the governor of this state, issued in pursuance of a requisition from the governor of Georgia. If that requisition is in conformity to the provisions of the act of congress, as we have already ascertained it to be, the mandate of the governor of this state to deliver the petitioner to the agent of

the State of Georgia necessarily follows, and it matters not in this inquiry how the sheriff originally acquired the custody of the petitioner. Dow's case, 18 Penna. St. 37. When he is brought before us the return shows that he is now in custody by a lawful warrant for a lawful purpose.

We are unable to see any ground upon which the petitioner could claim his discharge. His motion has, therefore, been heretofore refused, and an order remanding him granted.

McGOWAN, A. J., concurred.

WILLARD, C. J. I am unable to concur with the majority of the court. In my judg-

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ment, the provision of the constitution *under which the demand for the rendition of the relator is made, confers upon the state of which the demand is made authority to determine whether the conditions on which the right to demand a fugitive from justice exist. One of these conditions is, that it shall appear that the person demanded has fled from justice to the state of which the demand is made. Unless the congress of the United States have, in a competent and effective manner, prescribed otherwise, the question arising under the constitution is a judicial question. It involves the existence of a condition on which the liberty of the citizen depends, and therefore is, in its nature, judicial. No statute of this state prescribes the authority by which this fact is to be determined. There is nothing, then, to prevent the court from inquiring whether the conditions exist warranting the interference that is claimed with the liberty of the relator, unless the act of congress provides in a competent manner for the mode of ascertaining whether the person demanded is a fugitive from justice, and that fact must be established conformably to the laws of this state where it is questioned in a court of competent jurisdiction. The act of congress is entirely silent as to the proper means of establishing the fact that the person demanded has fled from justice, and, indeed, does not render it necessary that the executive of the state making the demand should affirm the existence of such fact. Under these circumstances, as it is not competent for congress to dispense with the constitutional requirement in this respect, it must be concluded that the question of the authority of the laws of the state, in ascertaining the proper mode of exercising the power conferred by the constitution, remains unaffected by the act of congress, and that such was the intention of that act.

It is necessary, therefore, that the demandant state should show in some competent manner that the relator has fled from justice. As this court has a general competency by habeas corpus to inquire into the validity of any claim to deprive a citizen of his liberty, this proceeding being of that nature, it is the duty of the demandant state to establish before us the fact that the relator has fled from justice in the sense of the constitution.

I am of the opinion that this has not been done. It is the duty of the demandant state

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to allege the facts upon which the *right of demand depends. The requisition of the governor of Georgia does not, in my judgment, affirm in a competent manner the important jurisdictional fact that the relator has fled from justice as the constitution prescribes. The requisition merely states that it has been represented to the governor of that state that the relator has fled from justice from that state; but it is not stated that such representations are satisfactory to the governor making the demand, or that he believes such representations to be true.

There is, in my judgment, an equal defect as it regards the proof demandable of the State of Georgia. The process under which it is sought to deprive the relator of his liberty is in derogation of the common law, and every fact necessary to warrant it is jurisdictional, and must be both alleged and proven. The competency of the proof must be determined by the laws of this state, where there is no conflicting rule established by competent authority displacing these laws. The only evidence on the part of the demandant state to which our attention has been called for the purpose of proving that the relator has fled from justice, is contained in the affidavit taken in Georgia before a magistrate of that state, which constitutes the charge made against the relator in the Criminal Court of Georgia, a copy of which only is before us, having been transmitted by the governor of Georgia. It is clear that a copy of an affidavit sworn in the State of Georgia before a person not competent to administer an oath, so as to make competent testimony to be used before the courts of this state, is, in itself, incompetent proof of any fact in which the liability of the citizen depends in the courts. Before testimony can subserve such a purpose, it must, except in a restricted class of cases, to which the present does not belong, be given under the sanction of an oath, carrying with it the penal consequences of false swearing. The proof in question can only be received where it is made such by competent authority. It will not be pretended that the act of congress makes the copy of the indictment or affidavit transmitted by the demandant state proof of any fact beyond that, that the relator has been charged with crime in the State of Georgia.

It certainly does make the requisition of

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the governor of *Georgia, when accompanied by a true copy of the indictment or affidavit constituting the charge, competent proof that such charge had been made in the state, but

beyond that it does not accredit the copy affidavit with authority as proof in the courts of this state. It may be said that the affidavit in question only inferentially states that the relator was in the State of Georgia at the time when the alleged offence was committed, such inferences being based on the formal expressions that constitute the allegations of time and venue material to the certainty of the charges, and that if it was conceded that the affidavit was competent for any purpose other than that of proving the existence and nature of the charge that was made by means of it, still it lacks the certainty material to the allegation of a fact on which the claim to interfere with the liberty of a citizen depends; but as I am satisfied that the affidavit is incompetent as proof of any fact except as to the existence and nature of the charge made in Georgia, it is unnecessary to comment on this particular defect of the proof sought to be obtained from the affidavit.

In my judgment it was for the demandant state to affirm and establish the fact that the relator had fled from justice, and if it be true that the relator has not traversed that fact, that circumstance is immaterial, as he was not bound to traverse it until it was alleged in a competent manner. One cannot be prejudiced by his silence except when the law compels him to speak, and the relator had a perfect right to remain silent and cast upon the demandant state the onus of showing its right to interfere with his liberty.

There are certain legal conclusions that arise from the very foundation of our ideas of judicial administration, so rooted in principle and sanctioned by a common sense of justice that even the construction of statutes and constitutions must yield to their irresistible force. It is such a conviction that leads me to the conclusions that have already been stated. Is it possible that a state would, by its judicial authority, surrender to another state one of its citizens, to be tried on a charge of crime, where it appears that the crime was of such a nature that it could not have been committed, unless the party charged with such offence was personally present in the state at the time of the alleged com-

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*mission of the offence, and when it further appears that such citizen had never been in the state where, it is alleged, such offence was committed! Such a proposition coming from a state neglecting so important a public duty could only be regarded as an abdication of its dignity and authority, either through neglect of duty or timidity in discharging it. So it would be equally reprehensible to dispense with the sanctions of the rules of evidence that govern the administration of justice, in order to yield a mere perfunctory obedience to the requirements of the act of congress, when it is called upon, in my judgment, to perform an important judicial act, no less than that of applying to the citizen the safeguard of liberty, secured by the constitution of the United States itself.

In my judgment there is not competent proof to warrant the surrender of the relator to the public authorities of the State of Georgia.

Motion refused.

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13 S. C. 87

(Case No. 813.)

MURRAY v. EARLE.

(November Term, 1879.)

[1. *Mechanics' Liens* ⟸99.]

Where a contractor undertakes to build a house and to furnish all labor, materials, &c., at his own cost, a mechanic employed by him without the owner's consent, has, for his labor, no lien on the building erected. Semble.

[Ed. Note.—Cited in Gray v. Walker, 16 S. C. 148; Geddes v. Bowden, 19 S. C. 8.

For other cases, see Mechanics' Liens, Cent. Dig. §§ 131, 132; Dec. Dig. ⟸99.]

[2. *Mechanics' Liens* ⟸207.]

Where a mechanic, before commencing work upon a building in course of construction, agreed with the owner that he would look only to the contractor for his pay, he thereby waived any right which the law might otherwise have given him, to a lien upon such building.

[Ed Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 381; Dec. Dig. ⟸207.]

Before Hudson, J., Greenville, November, 1878.

Petition under mechanics' lien law, commenced by J. W. Murray against Sallie F. Earle. The case is sufficiently stated in the opinion of the court. Judgment for defendant, and plaintiff appealed.

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*Mr. W. L. Wait, for appellant, cited Gen. Stat., ch. CXX., § 10; Potter's Dwar. 196; 4 Gray, 289; 5 Heath 409; 5 Dutcher 415; 1 Id. 474; 2 McC. 218; Phillips on Mech. Liens 57, 58, 124; Sodini v. Winter, 32 Md. 130.

Mr. A. Blythe, for respondent, cited Gen. Stat., ch. CXX., § 47; Phillips on Mech. Liens, §§ 40–62, 117, 123, 272, 273; 18 Wall. 549, 623.

February 18th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was a proceeding to enforce a mechanics' lien which the petitioner claimed had attached upon a certain building erected for the respondent, as well as upon the lot of land on which it stood. The facts were that one W. A. Hudson, by a contract in writing, agreed with T. T. Earle, the husband of the respondent, to "erect and finish" the building in question, and "at his own cost and charges to provide all manner of materials and labor, scaffolding and implements of every description for the due performance of all the work." While the building was being

erected T. T. Earle conveyed the property to the respondent, but, as her agent, continued the contract with Hudson. The work done by the petitioner, for which the lien was claimed, was done under a contract with Hudson, to which neither Earle or his wife were parties. There is no allegation in the petition that the labor performed by the petitioner was done by virtue of an agreement with, or by consent of, the owner of the property upon which the lien was claimed, or by virtue of an agrement with, or by the consent of, any person having authority from, or rightfully acting for, such owner in procuring or furnishing such labor, but, on the contrary, the respondent, in her answer alleges "that the petitioner worked upon said building by virtue of his agreement with the contractor, the said W. A. Hudson, and not by virtue of any agreement or consent of this respondent, or by virtue of any agreement or consent of the said T. T. Earle, the former owner of the aforesaid lot, or by virtue of any agreement with any person rightfully acting for this respondent or the said T. T. Earle;" and these

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allegations *seem to be fully sustained by the evidence. Under this state of facts it may well be doubted whether the petitioner, a mere sub-contractor, could acquire a lien under the provisions of our statute upon the subject. Gen. Stat., ch. CXX., § 7, p. 550. For it will be observed, that in order to entitle a person to the lien provided for in that section, there must be not only a debt due for labor performed upon the structure upon which the lien is claimed, but it must be a debt due "by virtue of an agreement with, or by consent of the owner of, such building of structure," or by virtue of an agreement with, or by consent of some person "having authority from, or rightfully acting, for such owner in procuring or furnishing such labor." Hence it is difficult to understand how in this case the petitioner could establish his lien. The labor which he performed upon the building was not performed by virtue of any agreement with either the owner or her authorized agent, or by their consent. Under the written contract Hudson was bound to furnish all such labor at his own cost, and the owner had nothing whatever to do with it. But as this point does not seem to have been raised in the court below, it is perhaps better that we should not rest our decision upon this ground.

It seems that before any work was done by Murray, the respondent, by her agent, gave him verbal notice that she would not be responsible for any labor he might perform upon the building, whereupon the petitioner expressly agreed, before the commencement of his work, "to look to the contractor, Hudson, for his pay, and to no other source," and this agreement the Circuit judge held "was a waiver of any right to a lien upon the building which the law might otherwise have given to the petitioner." We concur with the Circuit judge. While the statute does provide that the notice shall be in writing it is very manifest that this provision is intended for the benefit solely of the mechanic, and he may, if he chooses, waive it, just as it has been frequently held in regard to tender—that while nothing but gold and silver (and now legal tender notes, perhaps,) would be a legal tender, yet if a tender is made in bank notes it is good unless objected to at the time on account of its not being made in gold or silver, upon the ground that

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the party, by not *objecting at the time to the tender on account of its being made in bank notes instead of in coin, is construed to have waived his right to demand coin. So here the petitioner might have refused to receive the verbal notice and demanded one in writing, but he not only did not do so, but on the contrary, by his express agreement to look alone to Hudson for his pay, practically dispensed with the written notice. It is argued here that this agreement upon the part of the petitioner was without consideration, and therefore a nullity. We do not so regard it. It is not at all unlikely that, but for this agreement, the respondent would have given the written notice required by the statute, and if she was induced not to do so by this agreement on the part of the petitioner, that would constitute a sufficient consideration, which may be not only a benefit to the person who makes the promise, but also a loss or disadvantage to the person to whom the promise is made, as, for example, forbearance to sue. This case differs materially from the case of Sodini v. Winter, 32 Md. 130, cited and much relied upon by the appellant. In that case the conversation relied upon as a waiver of the lien took place after the materials were furnished, and therefore after the right to the lien had attached, while here the agreement which was relied upon as a waiver, was made before any work was done, and hence before any right to a lien could have attached.

Under this view of the case the other suggestions by the ground of appeal cannot properly arise, and therefore need not be considered.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., concurred.

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13 S. C. 90

(Case No. 815.)

McCROSKY v. PARKS.

(November Term, 1879.)

[1. *Infants* ⇐112.]

A decree not appealed from is binding upon infants properly made parties defendant thereto, although the guardian ad litem, who answered

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formally, *was appointed upon the motion of the complainant's solicitor. Such decree cannot be questioned in collateral proceedings.

[Ed. Note.—Cited in Tederall v. Bouknight, 25 S. C. 283; Robertson v. Blair & Co., 56 S. C. 106, 34 S. E. 11, 76 Am. St. Rep. 543.

For other cases, see Infants, Cent. Dig. § 320; Dec. Dig. ⟸112.]

2. The principle decided in Bulow v. Witte, 3 S. C. 308, approved.

[This case is also cited in Robertson v. Blair & Co., 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543, and distinguished therefrom.]

Before Fraser, J., Abbeville, April, 1879.

This was an action brought in 1877, by B. B. McCrosky and Irene C., his wife, and Flora P. McCrosky, against John T. Parks and Elizabeth C. Upton, administrators of the estate of John G. Barrett, the sureties on the administration bond, two infant children of John G. Barrett, and others. Irene C. McCrosky and F. P. McCrosky were children of the intestate. The action was for an accounting of the intestate's estate, and there was also a prayer that certain proceedings had in the Court of Equity for Abbeville district in 1868 be held no bar against the accounting here demanded. These proceedings were set up in the answers as a bar to this action: that the matters here complained of had been there adjudicated.

The equity proceedings of 1868 were as follows: Elizabeth C. Upton, widow of John G. Barrett, and administratrix upon his estate, with her husband, W. A. Upton, filed their bill of complaint against John T. Parks, a brother of Elizabeth C., and her co-administrator, offering to account themselves and demanding from Parks an accounting, and praying for a final settlement of the estate. The four children of the intestate, all infants, were made parties defendant and were served with process. A guardian ad litem was appointed for them upon the nomination of the complainants' solicitor, and such guardian put in a formal answer. The commissioner in equity, by his report, relieved E. C. Upton and also John T. Parks, of liability to account for large sums of confederate money received by them, and also for the purchase money of negro slaves bought by them at the estate sale in 1864. To this report no exceptions were taken, and in July, 1868, it was confirmed by Chancellor Carroll, and made the decree of the court. No appeal was taken.

This is a sufficient statement of the case under the view taken of it by this court.

The Circuit judge held that the decree

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of 1868 was binding *upon the infant parties thereto, and that the matters here brought to the attention of the court, were res adjudicata. The plaintiffs appealed upon the grounds, inter alia:

1. That his Honor erred in decreeing that the infant defendants were properly made parties to the equity suit of 1868, and hence were bound by the decree of Chancellor Carroll, although the guardian ad litem, who represented them, was appointed by the solicitor of the complainants, whose interests were adverse.

2. That whether the infant defendants were properly made parties or not, they were entitled to a day after coming of age, to show cause, if any, against the decree, and that the plea of res adjudicata has no application to infants until that opportunity is given, and that his Honor erred in deciding to the contrary.

Messrs. Lee & Blake, for appellants.

To what extent judgments are conclusive is considered in 2 Sm. Lead. Cas. 474; 1 Greenl. on Ev., § 528; 1 Hill Ch. 14. But it is only binding upon parties and privies. 1 Stark. on Ev. 217; 1 Bail. 242. As to its conclusiveness upon infants. 9 Rich. Eq. 324; 4 Rich. Eq. 411; 5 Id. 197; 7 Id. 43. Process is served upon an infant as upon an adult. 1 Daniell's Ch. Pr. 500. But he must appear by guardian. Ib. 205; 1 Smith Ch. Pr. 254; and see particularly 3 S. C. 308, and note the difference between that case and this in appointing a guardian. A guardian should never be appointed upon the nomination of an adverse party. 8 Pet. 128; 2 Paige 304; 2 Hoff. Ch. Pr. 173; 7 Rich. Eq. 43. In this case, the whole proceeding was perfunctory; no testimony was taken, as to the rights of the infants—two counsel represented all parties—formal answers, formal accounting, formal report and formal decree. There has been no transfer of interests, no sales; the decree can be opened without prejudice to the rights of any.

Besides: the infants are entitled to a day after coming of age to show cause against the decree. 3 Bac. Ab. 614, 615; Bing. on Inf. 115; 1 P. Wms. 736; 1 Daniell's Ch. Pl. & Pr. 311; 2 Kent 245; 3 Johns. Ch. 368; 3 M. & K. 409; 1 Desaus. 109, 125, 201; 3 Id. 18; 4 Id. 86. The infant is not bound to wait until he comes of age, but may apply for that

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purpose as soon as *he thinks fit, and may do this by bill of review, rehearing, or by original bill, alleging specially the errors in the former decree. 1 P. Wms. 736; 3 Bac. Ab. 614; 1 Daniell's Ch. Pr. & Pl. 211. The procedure in this case has been by original bill.

Mr. S. McGowan and Mr. E. G. Graydon, contra.

February 24th, 1880. The opinion of the court was delivered by

WILLARD, C. J. We are entirely satisfied with the conclusions of the Circuit judge. The question of the binding efficacy of a decree to which infants are parties, is substantially disposed of by Bulow v. Witte, 3 S. C.

308. The effort in that case was to get rid of a decree or final order upon a petition for the sale of infants' estate, upon grounds including the objection that the infants were not properly made parties. The foundation of the argument on which the judgment of the court in that case rested, was this proposition —that when infants are properly made parties to a bill in equity, they are bound by a decree made upon such bill, and cannot impeach it, collaterally or otherwise, than by a direct appeal therefrom. The same rule was there applied to cases coming into the Court of Chancery by a petition for the sale of an infant's estate. It is clear that if a decree against infants in a suit to which they are duly made parties binds them to the extent of divesting them of their title to real estate, it will bind them in all other respects in the same manner as it would bind adult parties.

The argument of the appellants merely amounts to an objection to the decree by which it is held that they are bound on the ground of error and irregularity. Such objections to the decree can only be taken upon appeal therefrom, and cannot be heard in a proceeding merely collateral thereto, such as is the present suit.

The judgment appealed from should be affirmed and the appeal dismissed.

McIVER, A. J., concurred.

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13 S. C. *94

*(Case No. 817.)

DUNCAN & SHUMATE v. HELLER.

(November Term, 1879.)

[1. *Guaranty* ⟸7.]

A written offer to guarantee the debt of another in consideration of forbearance to the principal debtor, is not a complete contract, nor binding upon the writer until notice of acceptance is given to him, even though forbearance is afterwards granted. Thomas v. Croft, 1 Strob. 40.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9; Dec. Dig. ⟸7.]

[2. *Guaranty* ⟸7.]

Notice of acceptance by the creditor to the debtor, who delivers the letter of guaranty, is not notice to the guarantor, there being no proof of agency.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9; Dec. Dig. ⟸7.]

Before Aldrich, J., Greenville, July, 1879.

The case is stated in the opinion of the court. One of the plaintiffs testified that Elizabeth Heller brought the letter to him from her brother at a time when witness was about to foreclose his mortgage; that he told her he would accept the proposition and grant the time asked for, which he did; that in consequence of this letter he forbore to foreclose his mortgage, and that the indulgence would not have been granted but for this letter; that in consequence of the subsequent depreciation of real estate he had lost his debt.

Verdict was for plaintiffs. Defendant, J. B. Heller, appealed.

Mr. A. C. Garlington, for appellant, relied upon Pars. on Cont. 448–450; 1 Chitty on Cont. 15, 16; Thomas v. Croft, 1 Strob. 40.

Mr. W. E. Earle, contra.

The letter is a clear undertaking to pay the debt. Chitty on Cont. 86. The intention is clear, and that is sufficient. 2 Pars. on Cont. 5; 2 S. C. 414. If any ambiguity, the construction must be most strongly against maker. Chitty on Cont. 98; 8 Port. 497; 5 Rep. 7, b; Plowd. 287; 19 Vt. 202; 3 B. & P. 399; 9 East 15; 6 Bing. 244; 3 M. & P. 136. The letter is to be understood as the other party had a right to understand it. 11 Vt. 493; 31 N. Y. 294. In the construction of an instru-

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*ment there is no difference between guarantor and principal. 13 N. Y. 232. Whether the plaintiffs accepted was left to the jury, and their verdict is final. Acceptance is necessary, but notice is not, where a debt already existing is secured and notice is not asked for. 2 Pars. on Cont. 14; 24 Wend. 35; 6 Hill (N. Y.) 543. But notice was given to the debtor, who, by bearing the letter to the plaintiffs, became her brother's agent. As to what constitutes a guaranty, and as to acceptance and notice, see 2 S. C. 414; 1 Strob. 40.

February 21st, 1880. The opinion of the court was delivered by

McIVER, A. J. The plaintiffs by this action sought to charge the appellant, J. B. Heller, as guarantor, by virtue of a letter of which the following is a copy:

"Newberry, S. C., February 9th, 1877.

"Shumate & Duncan—Gentlemen: My sister, Elizabeth Heller, informs me that she is due you some one hundred dollars, for which you have a mortgage on her land, and she fears that you intend to push the matter. She has been down to see me to get help, and I am sorry to say that at the present time I am not able to help her, but if you will wait with her until next fall I will try and take up the mortgage. Hoping that you will consent to wait until fall, I remain yours respectfully. J. B. Heller."

There was no evidence that J. B. Heller had ever been notified by the plaintiffs of their acceptance of his offer to guarantee the payment of the note of Elizabeth Heller, if indeed the terms of the letter be regarded as sufficient to amount to such an offer. This we think was fatal to the plaintiffs' case. While there may be a contrariety of decisions as to the necessity for notice of acceptance of a guaranty, we think the rule adopted by Parsons in his work on Contracts, vol. II., p. 14, is the correct one, viz., that every guaran-

tor is entitled to notice of the acceptance of his guaranty, unless the transaction is such that of itself it gives him the requisite notice.

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Here, putting a construction *upon the terms of the letter most favorable to the plaintiffs' case, it is very obvious that it was not an absolute and complete guaranty, but only an offer to guarantee upon condition that the plaintiffs would wait with the principal debtor until the fall. Until that offer was accepted the contract was not complete and the defendant incurred no liability. The fact that forbearance was in fact exercised cannot alter the case. The forbearance which alone could constitute the consideration of the contract upon which the appellant was sued, would not constitute such consideration unless the plaintiffs bound themselves at the time the letter was received to extend such forbearance, even though they may have in fact afterward granted such indulgence. Thomas v. Croft, 1 Strob. 40.

It is argued here that even if notice to the appellant that his offer to guarantee would be accepted, was necessary, that such notice was in fact given to the appellant through his agent, Elizabeth Heller. A sufficient answer to this is that there is no evidence whatever that she was the agent of the appellant. The mere fact that she carried the letter to the plaintiffs cannot be sufficient to make her the agent of the appellant, for if so, in most if not all cases the rule which requires notice of the acceptance of the guaranty would be evaded, as the principal debtor ordinarily delivers the letter of guaranty to the person to whom it is addressed, and he of course knows whether the guaranty is accepted and acted upon. If, therefore, the mere fact that he carries the letter is sufficient to constitute him the agent of the guarantor, so that his knowledge will be imputed to the guarantor also, then the rule which requires notice to the guarantor, and which is solely for his benefit, so as to enable him to take such steps as he may deem necessary to indemnify himself against the risk which he has assumed, becomes practically nugatory.

The judgment of the Circuit Court is set aside and a new trial is ordered.

WILLARD, C. J., concurred.

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13 S. C. *97

*(Case No. 818.)

MILLS v. G. & C. R. R. COMPANY.

(November Term, 1879.)

[*Waters and Water Courses* ⇐=171.]

The breaking of a culvert under the embankment of defendant's road, in a freshet, having caused an accumulation of water, which, the embankment being opened, overflowed plaintiff's land to his damage, the Circuit judge charged the jury that if the servants of the defendant let off the water, the defendant was liable for the actual damage therefrom ensuing to the plaintiff, no matter how much care and caution they exercised. *Held* erroneous, and that the defendant was not liable unless guilty of negligence in setting free the accumulated water.

[Ed. Note.—Cited in Henry v. Southern Ry., 93 S. C. 130, 75 S. E. 1018.

For other cases, see Waters and Water Courses, Cent. Dig. § 216; Dec. Dig. ⇐=171.]

[This case is also cited in Patton v. McCants, 29 S. C. 597, 6 S. E. 848, and distinguished therefrom.]

Before Mackey, J., Greenville, April, 1878.

Action by Otis T. Mills against the Greenville and Columbia Railroad Company for damage done to his crops of corn, &c., in June, 1876. Action commenced October, 1876.

Brushy creek, near the city of Greenville, passed through a culvert under an embankment, over which the track of the defendant company passed. During a freshet in the month of June, 1876, the culvert fell in, and the flow of the stream being thereby obstructed, the water accumulated in large quantities up the channel of the creek and on the lands adjacent, and covered a highway. Several days afterwards the road-master, with his employés, cut an opening in the embankment, through which the water passed off, slowly at first, but with increasing volume as the opening was enlarged by the action of the waters, when it flowed with the force of a freshet; and damage was thereby done to the lands of the plaintiff below. It was for such damage that this action was brought. The testimony showed that the freshet which broke the culvert was extraordinary.

The presiding judge ruled, during the examination of a witness, that "it makes no difference how the company let the water off; whether the greatest possible care was exercised. If the company let the water off and it flowed upon plaintiff's lands and damaged the same, the company is liable." And he charged the jury that if the company's agents

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let off the water and damage *ensued to the plaintiff's land, the defendant is liable for the actual damage sustained, no matter how much care and caution they exercised. To this ruling and charge the defendant excepted.

Verdict for plaintiff for $375. The defendant appealed, alleging error in the ruling and charge, to which exceptions were taken.

Mr. I. M. Bryan, for appellant.

The company, by its charter, had the right to construct the dam or embankment, bound only to the exercise of ordinary care that it should not injure others, but not liable for injuries arising from extraordinary causes. The testimony shows that the culvert was amply sufficient for even more than ordinary storms. 8 Bush 404; 27 L. J. Exch. 417; 12 Me. 238; 56 Penna. St. 445; Angell on Water-courses, § 348; Sherm. & Redf. on Neg., §§ 445–576. These authorities show

that the company were not responsible for the presence or accumulation of the large body of water above their embankment, and that the same came about by the operation of the vis major. Finding the water there after the storm was over, what was the defendant's duty in the premises? They were common carriers and bearers of the mail; the water was backed over a public highway leading into the city of Greenville, and covered the lands of third parties. It was their duty to let this water off, exercising as much care and caution as possible; if carelessly done, the defendants were liable; otherwise, not. Had the floods carried away the embankment and injured the plaintiff's lands, the company would clearly not be liable. This case should be distinguished from the class of which Fletcher v. Rylands, L. R., 1 Exch. 265, and 3 H. L. 330, is a leading authority. But in our case the defendants did not turn loose a dangerous element which had been introduced by themselves upon the premises; the rule in our case is ex damno sine injuria non oritur actio. 2 W. Bl. 898; 8 B. & C. 360; 16 Ark. 308; Hill & Den. 193; 8 Wis. 255; 1 Add. on Torts 3. Again: Necessitas inducit privilegium quoad juria privata. In such cases the owner is liable only in the absence of ordinary care. 5 Vt. 371; 10 Allen 306; Angell on Water-courses, § 337.

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*No counsel appeared for respondent.

February 25th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The action was for damages to the plaintiff's land by water flowing in a natural water-course, but in unusual quantities, due, as alleged, to the following facts: The water-course in question had become choked up at a point above the plaintiff's land, where it passes the embankment for the defendant's railroad, by a culvert, and an extraordinary accumulation of water had been occasioned. The defendant's servants made an opening by which the water thus accumulated should flow into the water-course below the obstruction, and thus flow along its natural channel. The flow of water thus caused was alleged to have occasioned the damage complained of.

The charge of the Circuit judge dispensed with the necessity of a finding of negligence on the part of the defendants and placed the plaintiff's right of recovery on two facts, namely, that it should appear that the defendant's servants discharged the accumulated water into the water-course, and that such water caused the damage in question.

The cause of the damage was water in a natural water-course moving in obedience to its own laws; it was not, therefore, a case of actual trespass. The question, then, was whether the damage was consequential to an unlawful act of the defendants or their servants acting under their authority. It is the concurrence of damage and injury that constitutes the only ground of defendant's liability. The plaintiff could not sustain injury unless the act of the defendants, either in its nature or the mode of its performance, was unlawful. Removing an obstruction to the flow of water in a natural water-course, on the defendant's land, is in itself a lawful act, and as such no ground for alleging injury. When a lawful act is performed, which, in its nature, is liable to occasion injury to the person or property of another, the law charges the party performing such act with the duty of exercising care and skill in its performance. The neglect of this duty is legal negligence, and it is in a legal sense the proximate cause of any damage di-

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rectly resulting from it, although such *damage is immediately occasioned by the operation of natural laws.

The question for the jury was, then, whether the defendants were guilty of negligence in the mode in which the accumulated water was set free in the water-course. It was error to place the liability of the defendants on grounds that rendered it unnecessary for the jury to inquire as to the existence of such negligence.

There must be a new trial.

McIVER and McGOWAN, A. J.'s concurred.

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13 S. C. 100

(Case No. 819.)

STROMAN v. O'CAIN.

(November Term, 1879.)

[1. *Limitation of Actions* ⇐46.]

Where A receives money from B under written promise to apply it to a debt due by B to a third person, and fails so to apply it, a cause of action for its recovery accrues to B against A within a reasonable time thereafter; and the pleadings and the referee having here fixed twelve months as such reasonable time, the statute of limitations commenced to run in A's favor at the expiration of the twelve months.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 242; Dec. Dig. ⇐46.]

[2. *Limitation of Actions* ⇐102.]

This is not one of those technical trusts to which the statute of limitations does not apply.

[Ed. Note.—Cited in Boyd v. Munro, 32 S. C. 253, 10 S. E. 963.

For other cases, see Limitation of Actions, Cent. Dig. §§ 494–505; Dec. Dig. ⇐102.]

[3. *Limitation of Actions* ⇐66.]

In such case no demand is necessary. Cases considered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 361; Dec. Dig. ⇐66.]

[This case is also cited in Strong v. Weir, 47 S. C. 322, 25 S. E. 157, without specific application.]

Before Kershaw, J., Orangeburg, October, 1878.

This was an action for the recovery of money commenced September 12th, 1874, by Joshua G. W. Stroman against W. A. O'Cain and others, administrators of J. H. O'Cain, and A. B. Smith. By consent it was referred to a referee in connection with a creditor's suit. The complaint alleged as its cause of action the following instrument of writing:

"November 25th, 1868.

"Received of Mr. J. G. W. Stroman the

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full sum of four *hundred dollars as his agents, to be kept in our possession, he losing the interest, for the purpose of paying a certain claim in the sheriff's office against him as surety for P. C. Stroman to E. V. Snell, now to est. of S. G. Fair.

(Signed) "J. H. O'Cain.
"A. B. Smith."

The complaint alleged that twelve months was a reasonable time for the execution of said trust, but that the money had never been paid over, and demanded judgment for $400, with interest from November 25th, 1869. The administrators of J. H. O'Cain put in a general denial. A. B. Smith, by answer, alleged that the money had all been received by J. H. O'Cain, admitted that twelve months was a reasonable time for the execution of the trust, and plead the statute of limitations as a bar to the action.

C. B. Glover, Esq., the referee, found the facts to be as stated in the complaint, that twelve months was a reasonable time within which to execute the trust, and that the statute of limitations was a bar to the action against Smith.

The plaintiff excepted to the referee's conclusion of law as to the statute of limitations. The Circuit judge sustained the exception, and ordered judgment against the defendant, Smith.

The defendant, Smith, appealed to this court upon the grounds: (1.) Because the facts, as found by the referee, to which there was no exception by the plaintiff, do not establish any liability on the part of the defendant, Smith. (2.) Because the statute of limitations was a bar to the recovery of the plaintiff.

Mr. M. Glover, for appellant.

(Upon the plea of the statute of limitations, his argument was as follows:)

The plea of the statute is a bar to the recovery. This is a legal demand, and the statute commenced to run when plaintiff might sue. The complaint says twelve months was a reasonable time, the answer admits it, and the referee finds it; there was then a breach of duty, and plaintiff could sue. He recognizes it by demanding interest

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from November 25th, 1869. 7 Johns. *Ch. 111; 2 Rich. 133; Angell on Lim., § 178; 2 Chitty on Cont. 1062; 4 Pet. 172; 66 Penna. St. 192; Cheves 22.

No demand was necessary. 2 Chitty on Cont. 1071; 7 Pick. 214; 9 S. & R. 11; 24 Wend. 203. If demand is necessary, none has been proven and action is premature.

Mr. S. Dibble, contra, contended that there was no cause of action until demand made, but that the writ was a sufficient demand; and cited 1 Hill Ch. 67; 2 Bail. 51; 1 Taunt. 572; 1 N. & McC. 214; 2 McC. 246; 7 Johns. Ch. 111; Perry on Trusts, § 863.

February 25th, 1880. The opinion of the court was delivered by

McIVER, A. J. The only question in this case is whether the statute of limitations is a bar to the action as against the appellant, Smith, he alone having interposed the plea of the statute.

To determine this question it is only necessary to ascertain when the cause of action accrued. If, by the terms of the obligation, the money received from the plaintiff was to have been paid over on a certain specified day, there can be but little doubt that a failure to pay the money on that day would have forthwith subjected the defendants to an action, and nothing more would have been necessary to enable the plaintiff to recover than to prove the agreement to pay on that day and the failure so to do. Here no specific time was fixed for paying the money, and in such case it is conceded that the law prescribes that it shall be done within a reasonable time. Twelve months has been ascertained to be such reasonable time by the referee, and no exception has been taken to his finding. Indeed, the plaintiff in his complaint alleges that twelve months was a reasonable time for the performance of the obligation, evidenced by the receipt, and demands interest after the expiration of that time. The case, then, may be regarded as practically an action on a contract by which the defendants obligated themselves to pay the amount named on November 25th, 1869, twelve months after the date of the obligation, toward the purpose specified in the receipt. It must be manifest that upon such a

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contract a cause of action *would immediately accrue upon a failure to pay on that day, and therefore the statute would then commence to run.

It is very obvious that this is not one of those technical trusts to which the statute does not apply, but that it is a specific agreement to do a certain thing at a certain time; for, as we have seen, though the time is not expressly designated in the contract sued upon, yet the law has ascertained the time, and when so ascertained it is as if it were so expressly stated in the contract. As is said in Estes v. Stokes, 2 Rich. 133: "Every man who receives money to be paid to anoth-

er or to be applied to a particular purpose is, to some extent, a trustee; but when he fails to perform his undertaking an action will immediately lie, and from that time the statute will commence to run." And as it is said in Lever v. Lever, 1 Hill Eq. 62, the very fact that an action at law will lie shows that it is not one of those technical, express, continuing trusts to which the statute of limitations does not apply.

It is argued, however, that until a demand has been made no cause of action would accrue, and several cases have been cited by respondent to sustain this proposition, which will be hereinafter considered. This may be true in the case of a sheriff or other public officer, or a factor, or a general agent who collects or receives money under a contract, either express or implied, to hold the same subject to the order of the person for whom it is collected or received. Hence, until such order is given or demand is made for it, the officer, factor or agent holds the money for the person to whom it belongs and there is no breach of duty and consequently no cause of action for such breach until there is a failure to comply with the demand. But when one person receives money from another under an agreement to apply the same to a specified purpose at a specified time, a failure to comply with the terms of such agreement is a breach of contract for which an action will immediately lie, and there is no more necessity for a demand than there would be in a case where one person agrees to pay another a sum of money, or to do any other act, at a certain time, and fails so to do.

The cases relied upon by the respondent will next be considered. Wright v. Hamilton, 2 Bail. 51 [21 Am. Dec. 513], was an action against the sheriff for money collected by him

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as such for the plaintiff, and the *court said: "By the exigency of the writ he was bound to have the money before the court, at its return, to render to the plaintiff. Now if the plaintiff was not there to demand or receive it, he could not maintain an action, for no wrong had been done him. * * * It was not the duty of the sheriff to pursue the party entitled wheresoever he might be." Hence, until the money was demanded of the sheriff and payment refused, there was no breach of duty on his part and no cause of action could accrue against him. The case of Treasurers v. Moore, 1 N. & McC. 214, was likewise an action for money collected by a sheriff, in which the court said "there can be no violation of the obligation of a sheriff to pay over money collected by him until it is withheld and until it is demanded of him. The evidence of that fact is wanting, for it certainly is not the duty of a sheriff to traverse the world in pursuit of an individual whose money he may have collected." The question in both of these cases was as to the time when interest would commence to run on money collected by a sheriff under process of the law, and it was held that interest would not commence to run until demand and refusal—manifestly for the reason that the sheriff's duty only required him to collect and safely keep the money, subject to the order of the person for whom it may be collected, and of course, therefore, until such order is given or demand made, there could be no breach of duty on the part of the sheriff and no cause of action against him.

The case of Topham v. Bradick, 1 Taunt. 572, was a case where the plaintiff had consigned goods to a firm to be sold and disposed of on his account. It was held that the statute of limitations would not commence to run until demand and refusal to pay, for the very good reason that until such demand there could have been no breach of duty on the part of the defendants, for until then their only duty was safely to keep the plaintiff's money ready to be accounted for, whenever called upon to do so. Lever v. Lever, 1 Hill Eq. 62, is also cited by the respondent, but in that case the evidence showed a continuing agency or trust, by which the father was to have the management and control of his son's entire estate, to transact all of his business and provide for him generally, upon

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the ground of the son's mental weakness *and want of education. The bill was for an accounting, brought by the son against the executor of the father, to which the plea of the statute was interposed. The court held that the statute would not commence to run until demand, because until there was a refusal by the father to comply with some demand of the son, there was no cause of action, as by the very terms of the arrangement the father was to retain the possession and control of the son's property and income and apply it to the uses of the son. Hence there could be no cause of action, and the statute could not commence to run until there was a failure to comply with these terms. It will thus be seen that the difference between these cases and the one now under consideration is, that in these cases there was no duty or obligation to pay until called upon, while in the case now before us there was both a duty and obligation to pay on a day certain.

The judgment of the Circuit Court is set aside and a new trial is ordered.

WILLARD, C. J., and McGOWAN, A. J., concurred.

13 S. C. 105

(Case No. 820.)

MITCHELL v. NELSON.

(November Term, 1879.)

[*Landlord and Tenant* ⟸152.]

The owner of a rice plantation rented it in December for the ensuing year, under a written agreement that $1000, to be advanced in equal parts by himself and his tenant, should be expended in improving the place, so as to enable the tenant to make a crop, the amount advanced by the tenant to be a credit on the rent until such $1000 had been expended in repairs, if so much were necessary; and that if such amount should be insufficient to make such repairs thorough, the owner would advance something more, so as to render the repairs complete; and the tenant agreed to return the plantation in good order at the end of the year. In April an unusually high tide broke the river banks and flooded a portion of the plantation, and the mending of this break was necessary to the making of the crop, and also to the preservation of the plantation, and required a large expenditure of money. *Held*, that under their agreement the owner was liable for this expenditure.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 540; Dec. Dig. ⟸152.]

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*Before Fraser, J., Charleston, July, 1879.

Action by Charles T. Mitchell against Peter Nelson and William F. Colcock, Jr., commenced in January, 1879. The case is fully stated in the Circuit decree, which is as follows:

This case was heard by me, by consent of counsel, in open court, without a jury, at the term of the Court of Common Pleas for Charleston county, ending July 11th, 1879.

On December 28th, 1877, the plaintiff and defendants entered into an agreement, in writing in reference to the rent of a certain plantation on Cooper river, in Charleston county, known as "Buck Hall," for the year 1878, which is as follows, to wit:

"State of South Carolina.—Memorandum of an agreement made and concluded between C. T. Mitchell, of the first part, and Messrs. Nelson & Colcock, of the second part, this 28th day of December, in the year of our Lord 1877, witnesseth, that the said party of the first part does hereby agree to hire to the party of the second part, all that plantation called 'Buck Hall,' on the east side 'of the western branch of Cooper river,' containing about 175 acres, more or less, of rice land, with all the high lands attached, until 1st January, 1879, for the sum of one thousand dollars; said party of the second part agrees to cultivate the place with rice, on their own account and risk, and for their benefit. The party of the first part agrees to allow the party of the second part to appropriate the amount, say one thousand dollars, in improving the trunks and banks on said place, provided so much be necessary, to enable the party of the second part to make a crop. The party of the second part agrees to advance one-half of the amount, say five hundred dollars ($500), in equal amounts with the party of the first part, until the sum of one thousand dollars ($1000) has been expended in making the repairs aforementioned, provided so much be necessary; and the party of the first part further agrees that should one thousand dollars ($1000) prove insufficient to make the repairs aforesaid thorough, he will advance something more, on being advised, so far as to render the repairs complete, and to furnish a flat, at his own expense, to enable

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the party of the first *part to do the work of repairs. The party of the second part agree to pay the balance of rent, say five hundred dollars ($500), on the 1st January, 1879, and to return the plantation to the owner, on said day in good order.

(Signed) "C. T. Mitchell.
(Signed) "Nelson & Colcock.

"Witness:
(Signed) "S. W. Fisher.
(Signed) "John B. Milliken."

It seemed to be conceded that the word "first" on the sixth line (the last line on page 106,) from the bottom of this agreement, should have been written "second." That defendants entered into possession of said plantation and proceeded to repair and plant rice on the same. Up to the time of the high tide in April, 1879, defendants had expended $752.55 in repairs, according to the contract, of which plaintiff furnished $500 and defendant the balance, and defendants afterwards expended a sufficient sum to make the whole amount ($937.72). During the month of April sixty-eight acres were planted in rice, and the rice made on it was, at the proper time, gathered by defendants. At the high tide in April occurred a break in the dam, out of which this controversy has arisen. By this break one hundred acres of the land were overflowed, and when this break was repaired it was too late to plant this portion of the land. This break was not caused by any defect of the trunks or ordinary leak in the dam itself, or by its being cut away by water running over it, but I infer from the testimony that it was caused by the heavy pressure of water at an unusually high tide, which caused the foundation of the dam to give way; that there were no indications beforehand which pointed to any special danger to this point of the dam, or which showed that any repairs were necessary for it; that very soon after the break, April 22d, 1878, defendants notified plaintiff of the condition of affairs, and requested an advance of money to make the repairs. This request was refused, except on condition that defendants would give security for the return of the money, and thus do the work at the expense of defendants. That this condition be-

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ing declined, *the plaintiff proceeded at his own expense to repair the dam, expending thereon at this break about $3000.

This break in the dam was not such as is most common, but was caused by a state of things to which prudent rice planters on Cooper river look when making their estimate of their prospect of success as planters. It is to recover this amount thus expended that this action is brought, on the ground that defendants, Nelson & Colcock, agreed to return the plantation to the owner on January 1st, 1879, in "good order." The demand for judgment is for the amounts thus expended, and it is admitted that the bill of particulars contains only about $3000, which is claimed, the other items being expenditures for other purposes.

If this were an ordinary contract to rent the plantation to the defendants for one year, without any further covenants on the part of plaintiff, I would hold that the agreement to turn over in "good order," carried with it an obligation to do everything necessary to enable the tenant so to "turn over" in "good order." I would also hold that the cause of disaster in this case is not such as would exempt the defendants from their liability on such a contract to repair. The contract in this case, however, contains other covenants on the part of plaintiff, and the liability of defendants depends upon the performance by plaintiff of his part of the contract. What are those covenants on part of plaintiff? An examination of the contract shows that the plaintiff agreed to allow the defendants "to appropriate $1000 in improving the trunks and banks," if so much be necessary, to enable the defendants "to make a crop," and if $1000 "prove insufficient to make the repairs aforesaid thorough, he will advance something more on being advised, so as to render the repairs complete." The amount which plaintiff agreed to advance was $500, the defendants were to advance $500 out of the rent for the year, and then the plaintiff agreed to advance "something more" for this purpose—a very indefinite sum, certainly. It is unreasonable to hold that the defendants were bound to provide against such disasters as this break in the dam in April, 1878, by their agreement to turn over in "good order," and that plaintiff was not bound to provide against the same disaster by his agreement to furnish the means to put

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the plantation in *proper repair "to enable defendants to make a crop." In point of fact the plantation was never in such order, and the fact was shown by the condition of things when one hundred acres were rendered unfit for cultivation in 1878, and the plaintiff's agreement covered the period not only of planting, but making the crop, not until April, but until October or November. If the break had occurred after this period when the crops had been gathered, the condition of the parties would have been changed, and defendants might then have been liable under their agreement "to turn over" in good order, "to pay for repairs."

It was the duty of defendants, after they had information of the break, or if there had been any danger apparent, to advise the plaintiff, so that he could furnish the money according to his contract, and defendants have done their duty in this respect. It seems clear that the advisement of plaintiff, as to the necessity of furnishing something more, was to depend on information gained by experience after the expenditure of $1000.

The answer seems to admit, in one of its clauses, that the plantation was "put in order for the making of a crop," but there is no admission that the repairs were so "thorough" and "complete" as is contemplated by the written agreement, as shown by other averments in the answer. This is a case in which the parties in this court stand upon their covenants, and in the view taken by the court of this agreement, the plaintiff is not entitled to recover on the contract to "turn over" the plantation in "good order" the amount expended by him in repairs, and the complaint is dismissed with costs.

The plaintiff appealed upon the grounds—

1. Because his Honor erred in holding that, under the covenants in the lease, the plaintiff was bound to make the repairs.

2. Because his Honor erred in holding that the defendants were not bound to make the rapairs.

3. Because, by the common law, and by their covenants in the lease, the defendants were bound to keep the premises in repair, and to return the plantation to the owner in good order; and, having failed to make the

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repairs needed, they were liable to re*imburse the plaintiff for the moneys expended by him in that behalf, and his Honor should have so decided.

4. Because his Honor erred, through misapprehension, in stating that it was admitted that only $3000 were expended by plaintiff on the repairs in question, a larger sum having been so laid out.

5. Because the decree is contrary to law.

Mr. W. H. Brawley, for appellant.

Mr. T. G. Barker, for respondents.

The defendants were not bound, by common law, to mend this break, at an expenditure three times their rent. It was the act of God or inevitable accident, and not voluntary or permissive waste. 4 Kent 77; Smith's Land. & Ten. 195, 248; Add. on Torts, §§ 319, 321; 10 B. & C. 312; 4 Otto 68; Broom's Leg. Max. 50, 69. The stern measure of responsibility established in 1 Dyer 10, because of the lessee's express covenant, has been extended in the interest of landlords in some cases, loosely, to cases of agreements, not so solemn in the eye of the old common law as a covenant by deed indented, and in some of the United States it has been held that wherever, by express contract, the tenant has bound himself to re-

pair, and does not take care to stipulate against the act of God, he will be held bound to rebuild in case of destruction of the premises by fire or tempest. But it has not been so held in South Carolina, and the leaning of the courts has been the other way. 4 McC. 447. The plaintiff relies on our agreement to return in good order. But this is only implied, and the authorities above cited show that a liability to rebuild can only arise from express covenant to repair. We say further, that we did return in good order, as these words only mean a covenant against voluntary waste. 4 Otto 68. If such construction were tenable, it is dependent upon plaintiffs' previous covenants to repair. Taylor's Land. & Ten., § 360; 69 E. C. L. R. 916.

Mr. Brawley, in reply.

It is clear that the repairs were to be made by the lessee. As the repairs necessary for

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planting were to be judged of and made *by the lessees, and as the lessor has not failed in any part of his covenant to furnish the money to repair "when advised," the defendants cannot escape from their express covenant to "return in good order." 3 Ves., J. 38, note 2; 16 M. & W. 541; 16 Mass. 238. They were to repair, and the lessor was to pay a certain sum and "something more," which was not called for and could not mean three times the sum fixed. The rule is that "if the lessee covenant to repair and restore the premises or to surrender them in good condition or in terms to that effect, he will be bound to make good his covenant and rebuild the premises if destroyed, and in the meantime to pay his rent, though the loss may have happened without his fault." 1 Washb. on Real Prop. 441, 446; Story's Eq. Jur., § 101; Taylor's Land. & Ten., §§ 357, 364. According to the testimony, the usage is for the tenant to repair. 2 Phil. Ev. 787, 796; 9 Wheat. 582; 2 Parsons on Cont. 536-539. The lessor has performed his covenant; the lessees have failed to perform theirs, for they are bound to make all repairs necessary during their term. 4 Cush. 385. Such breaks were ordinary incidents, and therefore not the act of God. If they were of rare occurrence, they should have been stipulated against, and not having been, the lessees are bound by their contract to return in good order. Story's Eq. Jur., § 101; Dyer 33 a; 2 Saund. 422, note; 6 T. R. 650, 750; Arden v. Pullen, 10 M. & W.; 2 N. Y. 86; 4 McC. 431; 2 Parsons on Cont. 672.

February 25th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The appeal in this case brings up only the rulings of the Circuit judge as to matters of law. The whole case turns on the question of the construction of a lease of lands for rice planting. If by the construction of the lease the lessee was only bound to advance a certain sum in making repairs, from whatever cause the necessity for such repairs might arise, whether before the commencement of the lease or during its continuance, then the Circuit judge properly held that the plaintiff could not recover. The agreement is set forth in the opinion of the Circuit judge, and the conclusion of fact

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there stated must *be regarded as conclusive on the present appeal, where not affected by errors which we are called upon by the appeal to consider. Plaintiff claims to have expended on the leased premises, during the term of the lease, a large sum of money, and demands that such expenditure be repaid by defendants. Such a demand, to be sustained, must have a foundation in the contract of the parties. No agreement affecting the subject, made subsequent to the lease, has been established, so the demand must be determined by the terms of the lease itself.

The question arises, then, was the lessee, by the terms of the lease, bound to advance more than $500 in repairs, from whatever cause the necessity for such repairs might arise? It is not contended that the necessity for such repairs arose from any misconduct on the part of the defendants. The lease contains a covenant to return the plantation in good order. It will not be necessary to consider what would have been the right of the parties if they had been wholly dependent on the covenant to return in good order. The lease contains a specific agreement as to repairs, and the duties imposed by such specific agreement must be considered in construing the covenant to return in good order. If, then, it should appear that the duty of the lessee to repair is limited in a particular manner by the special agreement, the general covenant must be sustained to that limit, otherwise the agreement could not stand together as a whole, but would be inconsistent with itself.

The part of the lease important to the question is as follows: "The party of the first part agrees to allow the party of the second part to appropriate the amount, say $1000, in improving the branches and banks on said place, provided so much be necessary to enable the party of the second part to make a crop. The party of the second part agrees to advance one-half of the amount ($500) in equal amount with the party of the first part until the sum of one thousand dollars ($1000) has been expended in making the repairs aforementioned, provided so much be necessary; and the party of the first part further agrees, that should one thousand dollars ($1000) prove insufficient to make the repairs aforesaid thorough, he will advance something more, on being advised, so far as to

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render the repairs complete, and to *furnish a flat at his own expense to enable the party

of the first part to do the work of repairs. The party of the second part agrees to pay the balance of the rent on the 1st day of January, 1879, and to return the plantation to the owner on said day in good repair."

According to this agreement a sum of $1000 was to be made up to make the repairs, the plaintiff contributing to that sum $500 and the defendants a like sum. The advance made by the defendants was to be credited on account of the annual rent of $1000, and the balance on the rent was to be paid by the defendants at the expiration of the lease. The defendants nowhere covenant expressly that they will make the whole repairs that might be necessary independent of the sufficiency of the sum supplied under the contract for that purpose, and their agreement in that respect cannot be extended by implication, because such implication would conflict with the agreement of the plaintiff to extend the amount of $1000 to an indefinite amount beyond that sum. For this purpose it is unimportant to inquire whether the contract contemplates merely a small advance or such as circumstances might render necessary, for in either case the idea that further improvements should call for further advances, whether large or small, on the part of the plaintiff, and for no such advance on the part of the defendants, is in irreconcilable conflict with an implication that the defendant was bound to indefinite repairs. This conclusion is aided by the circumstances that the agreement, considered at large, recognizes the duty of repair as resting on the plaintiff, and only demands of the defendants an advance payment of rent. It follows, then, that if the class of repairs upon which the plaintiff claims to have expended the money demanded of the defendants, are embraced in those repairs that are the subject of the special agreement, then the limit of the duty of repair imposed by the lease on the defendants was to the expenditure of such sums as should be supplied by the plaintiff for that purpose, including the limited advance to be made by themselves.

The agreement speaks, in one place, of the subject of the special expenditure as "im-

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provements," and in another place as *"repairs," so that it must be concluded that all needed improvements and repairs were intended to be provided for. The improvements and repairs to be made are not confined by any expression whatever to cases where the necessity of the cause existed at the date of the lease. It is not competent to insert such a limitation in the language on the ground afforded by the evidence in the case, that a large amount of repairs were called for at the date of the lease, as that would be making a contract for the parties rather than interpreting the contract made by themselves. The object of such improvements and repairs is stated, namely, "to enable the party of the second part to make a crop." To make a crop is to plant, cultivate and harvest it, and we must understand the contract to use it in that sense. It is competent to look to the object of an agreement to define and limit the means proper for attaining that object where no particular means are specified or excluded.

The question, then, presents itself whether an injury sustained by the premises after the date of the lease of such a nature as to interfere with the making of a crop, would have been a proper object for the expenditure of the fund specially applicable to improvements and repairs. It is clear that it would have been. Such being the case, it must be concluded that the repairs made by the plaintiff in their nature belong to the class provided for in the special agreement.

Whether the necessity for these repairs arises from an ordinary or extraordinary casualty is immaterial, for the agreement draws no such distinction, and the rights of the parties must be determined by the agreement alone.

In view of the foregoing conclusions it is unnecessary to consider the limit of the plaintiff's obligation to make repairs, for the defendants' obligation being limited the plaintiff's demand in excess of that limitation must fail. Nor is it necessary to put a precise construction on the covenant to return in good order, it being sufficient for the purposes of the present case to say that that covenant did not impose any general obligation to make repairs in excess of what had been provided for in that part of the agreement that professed specially to deal with that subject.

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*It is clear that the conclusions of the Circuit judge are correct. The appeal must be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 115

(Case No. 821.)

GRAHAM v. MOORE.

(November Term, 1879.)

[1. *Wills* ⇐603.]

By the will of a testator who died in 1810, a tract of land was devised to A, and if A should die not having any male heir, then to B: and by a subsequent clause the land devised was not to be alienated nor conveyed by A nor his heirs, but should, at his death, descend to his oldest male heir and so on in regular succession. A having issue a son, conveyed the land, and afterwards during A's lifetime the son died without having had issue. *Held*, a fee conditional in A, and that his vendee took a good title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1354; Dec. Dig. ⇐603.]

[2. *Wills* ⟸603.]

The grandson of A, the son of his deceased daughter, having survived him, doubted whether A died without a male heir within the intention of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351–1359; Dec. Dig. ⟸603.]

[3. *Trial* ⟸136.]

Where a case depends solely upon questions of law, it is the duty of the Circuit judge to direct a verdict.

[Ed. Note.—Cited in Hillhouse v. Jennings, 60 S. C. 401, 38 S. E. 596.

For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. ⟸136.]

[4. *Wills* ⟸625.]

[Cited in Powers v. Bullwinkle, 33 S. C. 301, 11 S. E. 971, to the point that there may be a valid executory devise upon a fee conditional.]

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1447–1451; Dec. Dig. ⟸625.]

[This case is also cited in Mangum v. Piester, 16 S. C. 327, as to the interpretation of the phrase "die without issue."]

Before Pressley, J., Abbeville, September, 1879.

Action commenced in September, 1877, by A. J. Graham against W. H. Moore, for the recovery of a tract of land. Both parties claimed under the will of James Graham, the elder, who died in January, 1816, the plaintiff under deed from William Graham, the brother of James Graham, Jr., executed after the death of James Graham, Jr., and the defendant under deed dated January 11th, 1877, from John W. Moore, who purchased from James Graham, Jr., December 5th, 1844. The defendant also claimed by adverse possession. James Graham, Jr., died in September, 1875. On December 5th, 1844, James Graham, Jr., had a son, but this son died without issue in his father's lifetime. At the time of James Graham, Jr.'s, death, his sole heir was a

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*grandson, the son of a deceased daughter. The land in dispute is embraced within the terms "all other lands not hereafter mentioned," used in the will. The will is sufficiently stated in the opinion of the court.

The presiding judge held that the will of James Graham (after the death of his wife and son William) gave an absolute estate to James Graham, grandson, a fee defeasible, but that the contingency upon which the remainder to "his brother William" was to take effect had not happened; and that having had a son Valentine, who died before his father, at the age of sixteen years, the sale and conveyance by James Graham, grandson, to John W. Moore conveyed good title; and he directed the jury to find for the defendant. To all of this charge and direction, the plaintiff excepted.

Verdict for defendant, and plaintiff appealed.

Mr. Eugene B. Gary, for appellant.

No words of limitation necessary to create a fee by devise. Gen. Stat. 443. The last clause in a will revokes the first where inconsistent. 1 Hill Ch. 360. Limitations to a class successively are valid, where they must necessarily take, if at all, within the required limits. Lewis on Perp. 421–423. It must take effect within a life or lives in being and twenty-one years afterwards. 12 Rich. 396. The oldest male heir is designatio personæ, who takes by purchase and not by descent, thus avoiding the rule in Shelley's case. The person thus described took a contingent remainder, for the son of James Graham, Jr., was not in esse when the limitation took effect. The contingent remaindermen were barred by the alienation, and the estate at his death revoked to testator's heirs. 10 S. C. 376; Dud. Eq. 115. In 11 Rich. Eq. 527 and 12 S. C. 168, the person who was to take at the termination of the life-estate were in being at the time the limitation to the life-tenant took effect. The rule distinguishing vested from contingent remainders will be found in 1 Strob. Eq. 43; 13 Rich. Eq. 114. The Circuit judge held that defendant could not claim by adverse possession upon the authority of Rich. Eq. Cas. 361; 2 Rich. Eq. 259; 4 Johns. 390; 2 Wend. 357. In this

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will the latter clause controls the *first. If plaintiff is entitled to any portion of this land, by purchase from one of testator's heirs, he should recover that portion. 1 McC. 161.

Mr. O. T. Calhoun, same side.

Mr. S. McGowan, contra.

February 27th, 1880. The opinion of the court was delivered by

McIVER, A. J. This case depends upon the construction of the will of James Graham, Sr., and the question is, whether the attempted limitation over to William Graham, after the devise to James, the grandson, is good. In one clause of the will the testator declares as follows: "And my will is that at my son William's death, the above-mentioned plantation and all other lands not hereafter mentioned, shall be vested in and be the property of my grandson, James Graham, and son of William Graham; and if the said James Graham should die not having any male heir, then and in that case the above lands to be the property of his brother, William Graham." After making several similar devises to others of his grandsons, the testator proceeds as follows: "And my will is, and be it well understood, that the before-mentioned lands that is hereby willed to the before-mentioned legatees, shall not be alienated or conveyed by them nor their heirs, but shall, at each of their deaths, descend to each of their oldest male heirs, and so on in regular succession."

The clauses in the will are not numbered, but as these two, which are above quoted, are

the only ones which throw any light upon the question under consideration, they will, for convenience sake, be referred to as the first and second clauses.

It appears from the evidence that James, the devisee named in the first clause, married and had issue—a son and a daughter by his first wife, and two others, children of a second wife—and after the birth of such issue and before their death, he conveyed the land in dispute to the person under whom the defendant claims. The said James

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died lately, leaving no child surviving *him, but leaving a grandson, the child of a daughter. After the death of James, William, the remainderman named in the first clause, conveyed the land to the plaintiff.

The provisions of the act of 1853 (12 Stat. 298) cannot be applied to this case, inasmuch as by the express terms of that act its provisions are to be applied only to deeds or other instruments in writing not testamentary, executed after the passage of the act, or to wills of testators dying after that act was passed. Here the testator died long before the passage of the act of 1853, and therefore the inquiry must be what was the estate created in the grandson James, by the terms of the will under consideration, construed by the law as it stood prior to the passage of that act. If the first clause of the will stood alone, it is very obvious that the attempted limitation over to William must fail for remoteness, and the devise to James would create in him a fee simple. The words "shall be vested in and be the property of my grandson James," would, if nothing more were added, undoubtedly give him the fee. For, although this will took effect prior to the passage of the act of 1824, and although there are no words of inheritance in the devise to James, yet it has been settled by repeated adjudications in this state that the provisions of that act simply declare a rule of construction and apply as well to wills taking effect before as to those taking effect after the passage of the act of 1824. Dunlap v. Crawford, 2 McC. Eq. 171; Hall v. Goodwyn, 4 McC. 442; Peyton v. Smith, 4 McC. 476 [17 Am. Dec. 758]; Bowers v. Newman, 2 McM. 472. What, then, is the effect of the superadded words: "and if the said James Graham should die not having any male heir, then and in that case the above lands to be the property of his brother, William Graham." The words "die not having any male heir," must be regarded as not so effectual to tie up the generality of the expression as the words "die not leaving any male heir;" for, as Johnson, Chancellor, in Hay v. Hay, 3 Rich. Eq. 387, in speaking of the word "leaving," says, it is "a word that has been held to indicate the time of the first taker's death, as pointing out the juncture when he leaves (separates or departs from) his issue, who are then left living behind him." And yet, ever since the case of Forth v. Chapman, 1 P. Wms. 663,

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the rule has been well established in *England that the words "die leaving no issue," or other equivalent words, would not create a valid limitation over of real estate, but that such limitation, as to that kind of property, would be too remote, as importing an indefinite failure of issue, and not a failure of issue at the time of the death of the first taker. The rule established by that case was adopted in this state and uniformly followed until the legislature saw fit to interpose by passing the act of 1853, which, as we have seen, does not apply in this case. Mazyck v. Vanderhorst, Bail. Eq. 48; Adams v. Chaplin, 1 Hill Eq. 265; Hay v. Hay, 3 Rich. Eq. 384; Curry v. Sims and Jeter, 11 Rich. 489.

The manifest intention of the second clause of the will above quoted was to create a perpetuity in the male line of the testator, and, as this is contrary to the policy of the law, such a construction is inadmissible. But the two clauses of the will should be read together, and so reading them we have a devise to James, and, at his death, to his oldest male heir, and in case he should die not having any male heir, then over. This would create a fee conditional in James (Whitworth v. Stuckey, 1 Rich. Eq. 404,) and he having alienated after the birth of issue the alienation is good, and not only cuts off the descent to his male heir per formam doni, but defeats the reversion to the testator or his heirs upon the failure of such issue, even though such issue may have died before him. Barksdale v. Gammage, 3 Rich. Eq. 271.

Again: James Graham did have a male heir at the time of his death, a grandson, who was the son of a daughter, and, under the case of Beckham v. De Saussure, 9 Rich. 531, it may well be doubted whether the contingency has happened in which the estate was to go over to William.

It seems to us, therefore, that in any view which may be taken of the case the judgment of the Circuit Court must stand.

So far as the third ground of appeal is concerned, it is only necessary to say that, inasmuch as the case depended solely upon questions of law, it was not only the right but the duty of the Circuit judge to instruct the jury as he did.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., concurred.

13 S. C. *120

*(Case No. 822.)

LAWRENCE v. GRAMBLING.

(November Term, 1879.)

[1. *Appeal and Error* ⇐204.]

Objections not raised at the proper time cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1265; Dec. Dig. ⇐204.]

[2. *Execution* ⇐275.]

A purchaser at sheriff's sale is not affected by irregularities in the execution under which he purchased, especially so in an action to try the title between the purchaser and the defendant in such execution.

[Ed. Note.—Cited in Darby & Co. v. Shannon, 19 S. C. 538; Garvin v. Garvin, 21 S. C. 90.

For other cases, see Execution, Cent. Dig. §§ 16, 148, 345, 791–796; Dec. Dig. ⇐275.]

[3. *Execution* ⇐3.]

The act of 1873 (15 Stat. 495), amends not only the sections of the code therein mentioned, but also other sections containing matter necessarily inconsistent with the amendments introduced by that act.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 3, 144; Dec. Dig. ⇐3.]

[4. *Execution* ⇐73.]

Since the act of 1873, an execution may be issued without leave at any time within three years after entry of judgment, and with leave upon motion at any time while the judgment remains unsatisfied.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 161; Dec. Dig. ⇐73.]

[5. *Execution* ⇐102.]

If issued without leave after three years have expired, the execution is not void, but only voidable for irregularity.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 203; Dec. Dig. ⇐102.]

[6. *Execution* ⇐102.]

The want of leave to issue may be supplied by proof of consent, and such consent may be presumed from the failure of defendant to move to have the execution set aside; and a payment upon an execution irregularly issued is proof of actual assent.

[Ed. Note.—Cited in McNair v. Ingraham, 21 S. C. 74; Freer v. Tupper, Id. 83.

For other cases, see Execution, Cent. Dig. § 203; Dec. Dig. ⇐102.]

[7. *Execution* ⇐275.]

A failure by the sheriff to levy on personalty before selling real estate, and defects in the advertisement of the land, do not affect, prejudicially, the purchaser's title.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 791; Dec. Dig. ⇐275.]

Before Aldrich, J., Spartanburg, March, 1879.

Action commenced February 23d, 1878, by Joseph Lawrence against Henry Grambling, for damages in trespassing upon land. By consent of parties an order was passed directing the issues to embrace the title to the premises as well as damages for the trespasses. Henry Grambling claimed title as the purchaser of the land in dispute at sheriff's sale, as the property of Lawrence. The sale was made under execution in the case of James McMakin v. Joseph Lawrence, judgment by confession in summary process, October, 1859. The petition was not signed nor sealed by the clerk, and there was no mark of entry or filing, but it was enrolled by the clerk, and the taxation of costs was approved and signed by him. The first execution upon this judgment was issued in November, 1859, a second in August, 1866, and a third in February, 1875. These two

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last executions were not issued *under proceedings by scire facias nor by leave of the court, but were issued and endorsed as alias executions. Under the one of latest date the land was levied upon, and in August, 1867, was sold to Bobo and Cleveland, who afterwards conveyed to the defendant. It was in proof that Lawrence had personal property more than enough to pay the executions. After the sale the plaintiff here paid to the sheriff the balance claimed to be due on the McMakin judgment. The sheriff's deed described the land as three hundred acres, more or less, the same said to be lots Nos. 7 and 8 of a survey made, &c.; this description of the land by lots did not appear in the advertisement.

The defendant's counsel requested the presiding judge to charge—

1. If judgment has been entered previous to the adoption of the code of procedure and execution issued thereon within five years and returned unsatisfied, an alias or pluries execution may issue at any time without application to the court, though five years have elapsed since the issuing of the last execution.

2. If the execution was active at the time of the adoption of the code, it may be renewed at any time afterwards without application to the court.

3. If the purchase by plaintiff was under an execution which, at the time of the sale, had lost its active energy, then the plaintiff's claim must fail, even if the defendant had shown no color of title, and the plaintiff must establish a clear title in himself.

4. That the payment by the plaintiff on the execution of McMakin after the sale by the sheriff to Bobo and Cleveland, was an acknowledgment that the execution was unsatisfied and validated the sale.

All of which request to charge his Honor, the presiding judge, refused.

At the request of the plaintiff's attorneys, the presiding judge then charged the jury—

1. That the execution should have commanded a levy on personalty, and the sheriff should have levied upon such personalty before levying upon and selling real estate.

2. In order to renew the execution under

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which the land was *sold, it was necessary to obtain the consent of Lawrence on the executions or an order of court.

3. If the jury believed that Lawrence did

not give his consent, and no order of court was granted, then the sale under said execution conferred no title on Grambling.

He further charged that if the advertisement and deed do not describe the lands sold by the sheriff, they may be void for uncertainty.

To all of said charges the defendant's counsel excepted.

The jury found for plaintiff the land in dispute and $500 damages, and judgment was entered thereon, and defendant appealed.

[For subsequent opinion, see 19 S. C. 461.]

Mr. J. B. Cleveland, for appellant.

The sheriff's deed, under which appellant holds, conveyed a good title. 9 S. C. 288; 33 How. Pr. 289. The case of Pierce v. Crane, 4 How. 256, is authority sufficient upon this point. The execution was ratified as binding by the payment made on it. What is the object of a renewal by sci. fa.? It is to satisfy the court that its process is still unsatisfied. Payment is an acknowledgment. It can ratify a contract, renew a debt. Why not revive an execution? 11 S. C. 79. It was error to charge that a levy should have been made on personal property before levying upon real estate. 39 Barb. 396; 3 Wait's Act. & Def. 97; 12 Rich. 54; 2 Bail. 421.

Mr. J. S. R. Thomson, contra.

The execution sale under which appellant claims was void. (1.) Because the executions were renewed without authority of law. 15 St. 499, § 15. The renewal of an execution without the sanction of a statute, is impossible. Freem. on Ex'ns, § 66, note; 27 Ill. 540. Section 307 of the code is repealed by act of 1873. Sedg. on Stat. 104–106, 365; 11 Wall. 88; 33 Penna. St. 511; 15 Gray 24. (2.) Because the execution does not describe the judgment. The judgment is for $46.30, with interest from October 28th, 1859; the execution was issued for $48.81, with interest from November 1st, 1859. Freem. on Ex'ns, § 42; 1 Nev. 413; 8 Ired. 221. (3.)

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Because the execution should *have commanded a levy on personalty. Freem. on Ex'ns. § 109. (4.) Because the levy was excessive. The land was worth $2000, and there were two lots, and the debt was less than $150. Rorer on Jud. Sales, §§ 398, 402, 586; Kerr on Fr. & Mis. 188; 19 How. 303; Story's Eq., §§ 244, 246; 3 Desaus. 292. (5.) The judgment as proved, will not support the sale of the land, being neither signed, sealed nor filed by the clerk. 2 Mill C. R. 248; 2 Bro. 186; 2 Hill 438.

The sheriff's deed is void for uncertainty, as it does not describe the land sold by the sheriff. Freem. on Ex'ns, § 330; Rorer on Jud. Sales, § 577. The payment afterwards made by Lawrence does not validate the sale. He really paid all the debt, and up to that time Bobo and Cleveland had not complied with their bid. 3 Hill 289; 4 Strob. 293; 2 McC. 264; 1 Rich. Eq. 351. If any of the judge's rulings were correct, and would sustain the verdict, other erroneous rulings would be immaterial. 3 S. C. 58; 5 S. C. 5; 9 S. C. 457; 10 S. C. 247.

March 1st, 1880. The opinion of the court was delivered by

WILLARD, C. J. This is an action of trespass, but the issues were framed by the consent of parties so as to raise the question whether the plaintiff or the defendant had title to the premises described in the complaint. The questions brought before us by the appeal depend upon the fact that the defendant claimed to have purchased the premises in question at sheriff's sale under a judgment recovered by one McMakin against the plaintiff. The regularity of the execution under which the defendant purchased is questioned. An objection was taken in argument that the judgment on which the execution was issued was not duly proved. It does not appear that any objection was made at the trial to the proof offered to establish this judgment, nor that the objection is raised in either the requests to charge or the charge as reported, and that objection cannot, for that reason, be considered on the present appeal.

The objections to the execution present, as a preliminary inquiry, the question, whether the plaintiff can dispute in this action the regularity of the execution under which the defendant purchased. It will be noticed that

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the plaintiff, in the pres*ent case, was defendant in the execution under which the land was sold, and the present defendant was not a party thereto.

It is well settled that a purchaser at a sheriff's sale under a judgment cannot be prejudiced by irregularities in the issuing of the execution under which he purchased, where such irregularities do not, in their nature, render the execution void, but merely voidable. Ingram v. Belk, 2 Strob. 207 [47 Am. Dec. 591]. The reason of the rule is that such irregularities may be cured by consent or acquiescence on the part of the defendant in the execution or by amendment against such defendant; and if the defendant in the execution neglects to take advantage of such irregularities in a direct proceeding, neither he nor any one claiming under or through him shall make them available against the purchaser. Williamson v. Farrow, 1 Bail. 611 [21 Am. Dec. 492]. The reason of this rule has the strongest application where the defendant, who has neglected to take advantage of such irregularities in a direct proceeding to set aside the execution, is in possession of the land sold, and claims to hold it against the purchaser under such execution on the ground of the existence of such irregularities. Even third parties, who have no right to a direct proceeding to

set aside the execution for irregularity, cannot take advantage of such irregularities as against the purchaser under such execution, (Henry v. Ferguson, 1 Bail., 512; Jackson v. Bartlett, 8 Johns. R. 361,) much less can the defendant in the execution who has such a direct remedy avail himself of such irregularities in a collateral proceeding and against the purchaser.

It remains to be considered, then, whether the objections made by the plaintiff to the execution, allowing them their full force, tend to render the execution wholly void, or merely to show irregularities that are capable of being waived.

The objections to the execution under which the defendant purchased resolve themselves to the single proposition that such execution was not issued upon leave of the court obtained for that purpose, in accordance with the provisions of the code of procedure in force at the time of such issue. The validity of the execution in question, which was issued February 7th, 1875, must be tested by the provisions of the code as it stood under the amendatory act of 1873, (15 Stat.

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495,) that amendatory act *having been held valid by this court in Arnold v. McKellar, 9 S. C. 335.

Section 306 of the code was left standing by the amendatory act of 1873, and was only affected by that act to the extent of changing the period of five years mentioned therein to three years. That section clearly displaced the provisions of the act of 1827, (6 Stat. 324,) so far as it related to the time within which execution could be issued without leave of the court obtained therefor. It is in terms made applicable to judgments recovered at any time prior to the code or subsequent thereto. It assumes to modify writs of execution in conformity with the provisions of the code, and prescribes the time within which executions may be issued without leave of this court on all judgments then outstanding, as well as upon such as should be thereafter recovered. It must, therefore, be regarded as the proper rule of ascertaining the time within which an original execution may be issued, as, of course, on all judgments recovered before or after March 1st, 1870.

The act of 1873 does not, in express terms, amend Section 306, but it establishes a provision clearly conflicting with so much of that section as allows five years for the period of time after a judgment within which an execution can be issued without leave of the court first had. It provides (Section 15) "execution may issue upon any judgment or decree within three years from the entry thereof without any revival of the same." This provision must be regarded as amending Section 306 of the code by changing the period of five years into that of three years, for the following reasons: The act of 1873, Section 1, declares, "that the code of procedure, being Title V., Part III., of the General Statutes, be, and the same is hereby amended in the several sections thereof as is hereinafter provided." As the act goes on to name specific sections of the code for the purpose of amendment, the primary sense and understanding would be that only those sections named would be regarded as amended. But this sense may be enlarged in view of the fact that this act treats the code as a whole conformably to its real nature, which is that of a system of procedure. It is presumable that the legislature intended that the amend-

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ments should be construed, with the rest *of the code, so as to produce a harmonious construction of the whole. Such being the case, the declaration of the intent to amend "the several sections thereof" should be read as extending to all or any sections that contain any matter necessarily inconsistent with the amendments introduced by the act.

Section 307 of the code provides that after the lapse of five years leave to issue an execution must be obtained on motion, and prescribes the notice that must be given of such motion, and the evidence on which such leave may be granted. This section is not, in express terms, repealed or amended by the act of 1873; although, for the reasons already stated in respect of Section 306, it must be regarded as so far amended as to change the period of five years, stated in it, to three years.

The fifteenth section of the act of 1873 provides for the proper proceeding by which an execution that has lost its active energy may be renewed, but contains a provision conflicting with Section 307 of the code, which must be regarded as still prescribing the means of obtaining an original execution when more than three years have elapsed since the entry of judgment.

Neither the provisions of Sections 306 and 307 of the code, nor those of Section 15 of the act of 1873, prescribe any limit of time within which a motion for leave to issue an original execution, or to revive one whose active energy has expired, must be made; and it must be concluded that any party having a judgment at the adoption of the code or at any time since, can, on motion for leave, issue an execution, whatever might be the lapse of time since the entry of the judgment, provided it is not satisfied of record or by lapse of time. Whether the provisions of the act of 1827 did not interpose a limit beyond which such a motion could not be made need not be considered here, as its provisions were, in that respect, displaced by the unlimited provisions of the code. It follows, the judgment being regarded as unsatisfied, that the execution under which the defendant purchased was capable of being issued in 1875, in some form, either without application to

the court, or upon such application. Assuming that it could only be issued upon such application, and no application for that purpose was in fact made, was the execution, for that reason void, or only voidable for irregularity?

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*It is very clear that the provisions introduced by the code and the act of 1873, as a substitute for the writ of scire facias, as theretofore used, should be construed as giving to the remedy provided as such substitute the same force and effect, when not otherwise provided, as the proceedings by scire facias. There is nothing in the provisions of the code as it originally stood, or as it now stands under the amendment of 1873, that fixes the consequences that should result from the failure of a party to obtain the leave of the court where such leave is necessary. We must then recur to the former practice to ascertain whether the failure to bring a scire facias, when necessary, rendered the execution issued without such proceeding absolutely void, or merely voidable on the ground of irregularity. This proposition was decided in Ingram v. Belk, 2 Strob. 207 [47 Am. Dec. 591], where it is said that in such cases the execution is merely voidable and not void.

In Guignard v. Glover, Harp. 457, the want of a scire facias was supplied by proof that the defendant in the execution had assented to its issue. This conclusion does not exclude the idea that such consent could have been presumed from the mere fact that the defendant in the execution had taken no steps to set aside the execution, which is the principle that underlies the various cases that have been cited above. One of these cases, stating this doctrine broadly, is relied upon as authority in Guignard v. Glover, and that fact precludes the idea that the court in the last named case intended to limit the application of the rule to a case where there was proof of actual assent on the part of the defendant in the execution.

In the present case there is also proof of the actual assent, for it appears that after the sale of the land in suit a balance remained due upon the execution, which was paid in full by the present plaintiff, thus indicating his contentment with the execution as it stood.

The charge of the Circuit judge, in making the validity of the title of the defendant to depend upon the fact of the plaintiff's consent, was clearly erroneous. The charge was also erroneous in holding that failure to levy on personalty before selling the real estate, and defects in the advertisement of the land, could affect, prejudicially, the defendant's

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title. Turner v. Mc*Crea, 1 N. & McC. 12. Under the view that has been presented it cannot become material to consider the propositions involved in the requests to charge, as they concern only questions of regularity that cannot affect the defendant's title.

There must be a new trial.

McIVER, A. J., concurred.

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13 S. C. 128

(Case No. 823.)

BARRETT v. BATH PAPER COMPANY.

(November Term, 1879.)

[1. *Execution* ⟸249, 250.]

Certain parties, desiring to purchase property in which they had no interest, soon to be sold by the sheriff under executions, entered into an agreement with some of the judgment creditors, that if the property was sold to them for less than enough to satisfy such judgments, they would pay the balance due and take assignments of the judgments; and they afterwards purchased the property at an inadequate price. *Held*, that this agreement was an interference with full and free competition; and the sale was set aside.

[Ed. Note.—Cited in Ex parte Lancaster & Free, 46 S. C. 280, 24 S. E. 195; Fairy v. Kennedy, 68 S. C. 254, 47 S. E. 138.

For other cases, see Execution, Cent. Dig. §§ 698, 703; Dec. Dig. ⟸249, 250.]

[2. *Execution* ⟸249.]

If anything tending to prevent the sale from having its full efficacy for the benefit of the vendor is done by the purchaser, such conduct is a fraud on the rights of the vendor, and vitiates the sale. Cases cited.

[Ed. Note.—Cited in Reagan v. Bishop, 25 S. C. 590; Herndon v. Gibson, 38 S. C. 361, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765; Howlett v. Garner, 50 S. C. 12, 27 S. E. 533.

For other cases, see Execution, Cent. Dig. §§ 697–702; Dec. Dig. ⟸249.]

[3. *Execution* ⟸249.]

The intention to interfere with full competition constitutes the fraud that vitiates the sale; and such intention may be shown by express proof, or may be inferred from an agreement whose tendency is to produce that result.

[Ed. Note.—Cited in Ex parte Cooley, 69 S. C. 155, 48 S. E. 92.

For other cases, see Execution, Cent. Dig. §§ 697–702; Dec. Dig. ⟸249.]

[This case is also cited in Bath South Carolina Paper Co. v. Langley, 23 S. C. 129, as to facts.]

Before Kershaw, J., Aiken, April, 1879.

The case is fully presented in the Circuit decree, which is as follows:

This case came on to be heard at the February Term of the Court of Common Pleas of Aiken county, but there not being time to conclude the hearing, the same was concluded by consent of counsel in April, after the courts of the Second Circuit were over. The necessity of completing the business of that Circuit held under advisement, and the early

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commencement of the courts *of the Third Circuit having conspired to prevent an earlier decision at all comporting with the gravity of the issues involved, and the very protract-

ed and the exhaustive arguments presented by the counsel on either side.

The facts, as I find them, so far as necessary for this decision, are as follows:

The defendant, the Bath South Carolina Paper Mill Company, was duly incorporated in the year 1869, under the provision of the general act of incorporation, passed December 30th, 1866, (13 Stat. 403), and failed to make the annual reports in accordance with the requirements of said act.

On June 11th, 1877, J. Morton Poole & Co. obtained a judgment in Aiken county, against the Bath South Carolina Paper Company for $2292.37, founded upon two promissory notes, bearing date May 1st, 1876. This judgment was duly entered, and on July 9th, 1877, was assigned to James Barrett and James P. Boyce, defendants; the former being president, and the latter a director and stockholder of the Bath South Carolina Paper Company. On June 7th, 1878, execution was taken out on said judgment and levied the next day on all the property of the defendant company, real and personal.

On February 16th, 1878, Gilreath & Peoples obtained a judgment against said company for $762.55, founded on causes of action dated June 28th, 1877. This judgment was duly entered at Aiken, execution issued thereon February 18th, 1878, and a levy was endorsed July 8th, 1878, of all the property of said company. The same day, February 16th, 1878, N. F. Burgess & Co. obtained a judgment against said company for $778.36, on causes of action dated June 28th, 1877, duly entered the same at Aiken, took out execution thereon February 18th, 1878, and a levy was endorsed thereon July 8th, 1878, of all the property of said company.

On April 19th, 1878, the Goodyear Rubber Company obtained a judgment against said Bath South Carolina Paper Company for $162.23, on a cause of action originating September 10th, 1877. Judgment was duly entered, and execution issued thereon April 19th, 1878, on which a levy was endorsed July 8th, 1878, of all the property of the defendant company.

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*On April 10th, 1878, Poole & Hunt obtained a judgment against the said company for $2086.50, in a cause of action arising in part July 9th, 1877, and the remainder August 3d, 1877. Judgment was duly entered thereon, execution issued April 19th, 1877, and a levy was endorsed thereon July 8th, 1878, of all said company's property.

H. Waterbury & Co. obtained a judgment against said company June 8th, 1878, for $178.09, on a cause of action dated August 1st, 1877. The judgment was duly entered and execution issued thereon June 27th, 1877, and a levy was endorsed thereon July 8th, 1878, of all the property of said defendant company.

On the same day, June 8th, 1878, the same parties obtained a judgment against said company for $199.32, on a cause of action arising September 26th, 1877. Judgment was duly entered and execution issued thereon June 27th, 1878, upon which a levy was endorsed July 8th, 1878, of all of said company's property.

M. Goldsmith & Son filed in Aiken county, June 15th, 1878, a transcript of a judgment in their favor against said company, obtained at Charleston, for $576. Executions were issued thereon the same day, upon which a levy was endorsed July 8th, 1878, of all defendant's property, and the same was returned nulla bona.

M. Goldsmith & Son, on the same day, June 15th, 1878, filed another transcript of a judgment in their favor against said company, obtained at Charleston for $577.38. An execution was issued thereon the same day, and a levy endorsed July 8th, 1878, of all the said company's property, and the same was returned nulla bona.

All these judgments, except those of Waterbury & Co. and Goldsmith & Son, were obtained by D. S. Henderson, Esq., as attorney for the several plaintiffs therein. The first, that of J. Morton Poole & Co., having been assigned to James Barrett and James P. Boyce, passed out of the control of Mr. Henderson, as attorney.

About May, 1878, the said Henderson examined the affairs of the Bath South Carolina Paper Company, with a view to ascertain how the money could be made for his

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clients on their several *judgments. In doing so he discovered a condition of things indicated in the following facts:

The Bath South Carolina Paper Company had failed to make the returns required by the charter, and, as a consequence, Mr. Henderson regarded the officers and directors of the said company as individually liable for the debts of the same.

The board of directors of said company, on September 4th, 1871, adopted a resolution to the effect that the president be authorized to have prepared twenty coupon bonds of the denomination of $1000 each, bearing interest at the rate of ten per cent. per annum, payable semi-annually to bearer, at the National Bank of Augusta, and that he be authorized to dispose of said bonds at not less than par, and in such amounts and at such times as may be necessary to meet expenses of repairing the dam. The bonds to be made payable as follows: $4000 in three years, from September 1st, 1871, and the like amount in each year thereafter. The bonds and coupons to be signed by the president. October 30th, 1871, at a meeting of the board of directors of said company, the president was authorized to execute a first mortgage to W. H. Barrett and Robert A. Fleming, as trustees, for the sum of $20,000, to secure the payment of the bonds and interest authorized to be issued by the board of directors, at a meeting held September 4th, 1871.

The mortgage was read and ordered to be spread upon the minutes.

At a meeting of said board of directors, held January 5th, 1872, the president stated that some objection had been made to the mortgage, and the matter had been referred to the attorney to arrange with Mr. Miller, the attorney of the bank, and reported at an early day, and it was resolved that the president be authorized to sell the bonds at his discretion for such price as he may be able to get. Under this mortgage sixteen bonds were issued, of $1000 each, making a total of $16,000 of the first mortgage bonds. This mortgage was executed in the presence of two witnesses and recorded, but was never proved for record, as required by the statutes. This, together with the fact that the same was made by order of the directors, without any vote of the stockholders upon the subject, induced the belief upon

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the mind of *Mr. Henderson that the mortgage was not a valid lien on the property of the Bath South Carolina Paper Company.

At a meeting of the stockholders of said company, held at Augusta, Ga., May 19th, 1874, the president was authorized and instructed to prepare fifty coupon bonds of $500 each, dated February 24th, 1874, payable in ten years after date to bearer, and bearing interest at the rate of ten per cent. per annum, payable semi-annually, to be signed by the president and known as the second mortgage bonds. The president was instructed to execute a second mortgage to John M. Clark and John Craig, or to any other two stockholders, for the sum of $25,000, to secure the payment of the said second mortgage bonds. The president was authorized to dispose of said bonds at such times and at such amounts as he might deem best, but they were not to be sold for less than par, except by the advice and consent of a majority of the board of directors. It was declared the true intent and meaning of the resolution that the first mortgage bonds should be paid at maturity by the proceeds of the second mortgage bonds and other receipts of the company. The second mortgage was signed by the president, in the presence of only one attesting witness, bears date May 19th, 1874, and was promptly recorded in the proper office at Aiken, but does not appear to have been approved for record by the subscribing witness. Thirty-one bonds were issued under this mortgage, aggregating the sum of $15,500. Mr. Henderson was of the opinion that this mortgage constituted no valid lien on the property of the defendant company.

Messrs. Barrett and Boice, assignees of the first judgment against the company, having caused a levy to be made on all the property of the defendants on June 8th, 1878, and Mr. Henderson having satisfied himself that the company would or could not make arrangements for the payment of the judgments under his charge, as attorney determined to inform his clients of the condition of things, so far as known to him. He accordingly wrote all his clients as aforesaid, except the Goodyear Rubber Company, stating the fact that a levy had been made, and expressing his opinion that the first and second mortgages were not valid liens on the property, and proposing two alterna-

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tive courses *which could be pursued to secure the payment of their judgments, in these words: "First. The property, if free from encumbrances, is very valuable, and I am trying, and very hopeful, too, to get a parcel of moneyed gentlemen, upon my opinion, to risk the purchase of the equity of redemption, in July, at a price sufficient to pay up all our claims, and then to fight the mortgages. If this succeeds we will be all right; otherwise, we must act for ourselves. Second. And then I ask the authority of our clients to file a bill on the equity side of our court to set aside and declare void the mortgages, and restrain the selling until the case can be tried at the September Term. The other judgment creditors will aid us. You will immediately perceive the situation and the necessity for a prompt reply in order to enable me to get a temporary injunction before sale-day." To this he added: "I need not impress upon you the necessity of the secrecy of my views, especially from any one, agent or otherwise, in the interest of the Bath Company." He also stated in effect that the other judgment creditors would aid them in these proceedings, as will be seen.

On June 19th, 1878, Messrs. Hill & Hill, attorneys on behalf of Poole & Hunt, replied to this letter, giving Mr. Henderson authority to file the bill as suggested by him, but expressing the hope that he would succeed in getting the gentlemen referred to to purchase the equity of redemption, &c.

N. F. Burgess & Co., controlling their own judgment and that of Gilreath & Peoples, replied to Mr. Henderson: "We do not wish to incur much expense in the matter, but we are willing to join other creditors in the necessary steps to levy and make our money. So you may proceed with the temporary injunction, and we can await developments, and, of course, stop proceedings at any time we think best. We are decidedly in favor of taking the first step in the matter, and hope you will proceed to do so at once. We think by doing so the matter may be settled. Will write you more fully soon. Hope you will make our money if possible." There was some controversy as to the meaning of the expression in this letter, "the first step." Reading it in the light of surrounding circumstances, and with the letter of Mr. Henderson, to which it is a reply, I think the

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meaning is plain. That *letter proposed two courses, either of which might be pursued,

numbering them first and second. The first was the scheme to form a party to buy the equity of redemption. The second, to institute proceedings to procure an injunction, and asking authority to take that step if the first should not succeed. Replying to this, Burgess & Co. gave the authority asked for in the second proposition, but added: "We are decidedly in favor of taking the first step in the matter, and hope you will proceed to do so at once." It appears quite evident that the reference was to the first proposition made in the letter to which the writer was replying. This view is strengthened by the testimony of Mr. Gilreath, the writer, who says he told Mr. Henderson in a personal interview before the sale, "that he would much prefer to get a party to buy it." Mr. Henderson is, therefore, to be regarded as having the authority of his clients (except the Goodyear Rubber Company) to pursue that course in their behalf.

Mr. W. W. Williams represented, as attorney, the two judgments of Waterbury & Co. against the Bath South Carolina Paper Company. He consulted with Mr. Henderson about taking the judgments, and as to how the money could be made thereon for his clients. Subsequently Mr. Henderson communicated to him, under injunctions of secrecy, his discovery of the defects in the mortgages, and his plan for securing payment of the judgments which he represented, and promised Mr. Williams that if he succeeded in getting his money Williams should get his. Mr. Williams relied on this promise and Mr. Henderson's scheme, and made no further effort to secure the payment of the judgments in his charge.

Mr. Henderson continued his efforts to make up a company to buy the property, upon his opinion of the invalidity of mortgages. At the instance of Mr. Sibley, to whom he had proposed the scheme, C. Richardson Miles, Esq., of Charleston, attorney and counselor-at-law, was consulted, and gave an opinion concurring with that of Mr. Henderson on the subject.

On June 24th, 1878, Mr. Henderson discovered a third mortgage. Its history is as follows:

At an extra or called meeting of the Bath South Carolina Paper Company, held at

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Bath, South Carolina, February 18th, *1877, it was resolved that the president be empowered to issue a mortgage, to be known as the new first mortgage on the mill property of the company, to the amount of $60,000, with one hundred and twenty bonds, of $500 each, to H. H. Hickman and John M. Clark, as trustee. Said mortgage bonds to be issued as follows, to wit: Bonds No. 1 to 32 inclusive, in exchange or payment of the outstanding first mortgage bonds of the company, amounting to $16,000, and the remainder, from No. 33 to No. 82 inclusive, to be paid in exchange for or payment of the issue of $25,000 of second mortgage bonds, and the remainder, from No. 83 to No. 120, to be delivered by the trustees, at par, for the proportionate share of the assessment, to such stockholders as should accept the proposition made at that meeting to pay a further amount of fifteen per cent. upon their stock in the company in exchange for such bonds. Power was denied to the trustees and directors to use said bonds for any other purpose than as above, and the bonds were to bear interest at ten per cent. per annum, payable semi-annually, and the principal was to be payable April 1st, 1888, to the parties who had accepted or should accept, previous to March 15th, 1879, and agree to pay the assessment of twenty-five per cent. on the stock of the company made April 19th, 1876, to whom should be issued preferred stock. These should be delivered for all sums of such stock which should be presented in multiples of $500, or for all further payments on said assessment bonds at par of the $25,000 second mortgage bonds of the company, for which they should receive at par value the bonds of the new issue of first mortgage bonds authorized at that meeting as above.

A further assessment was made of fifteen per cent. on the par value of the stock, and to such of the stockholders as should agree to pay the same in cash, bonds of the new mortgage should in like manner be issued, as provided for the assessment of the twenty-five per cent. of April 19th, 1876. The stockholders who accepted the assessment of April 19th, 1876, should be called on to pay the same prior to April 1st, 1877, and should be charged interest from the time the assessments were due, and interest allowed on all

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assessments due. That the additional *fifteen per cent. required should be payable five per cent. May 1st, 1877; five per cent. June 1st, 1877; five per cent. July 1st, 1877. Due regard was to be paid to the interest on the assessments, and the exchange bonds, which were to be allowed at the rate of ten per cent. per annum. The parties agreeing to the several assessments were to have the right, if they desired it, to take preferred stock instead of the new bonds for their assessment. The trustees of the new bonds should have authority, by the joint concurrence of the stockholders and trustees, in the opinion that it was best for the interest of the company to sell the bonds from 83 to 120, or so much of them as should not be taken up by the fifteen per cent. assessment, provided such sale should not be below par, for cash, but they were not to have power, nor should the directors or stockholders have power to hypothecate the same.

The mortgage thus provided for was executed by the president of the company in the presence of two witnesses and acknowledged and subscribed before a trial justice

of Aiken county, June 29th, 1877, and so certified by the trial justice, without further probate, was recorded in the proper office in Aiken county. Seventy-two bonds of $500 each were issued under this mortgage.

As soon as discovered by Mr. Henderson this mortgage was also submitted by him to Mr. C. R. Miles, who pronounced it "no better than the other two."

Mr. Henderson then went to Augusta and had an interview with the parties with whom he had been negotiating for the purchase of the Bath Mill Company. He told them that his clients did not wish to buy the property. That he wished to secure their money first. That if they desired the property they could bid on it as they saw fit; but that if they purchased for a less sum than the judgments represented by him amounted to, they must pay said judgments in full, which it was agreed were to be assigned to them after such payment, in so far as they should not be satisfied by the sale. The judgments of Waterbury & Co., represented by Mr. Williams, as attorney, were not mentioned by name, but were included in the amount estimated to be required to pay said judgments. A calcula-

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tion was made *and it was ascertained that the enterprise would cost an outlay of money of $7000 or $8000.

Mr. Henderson, when asked what would be his charge, said he was willing that it should be contingent; said that he would charge one-ninth and in no case less than one-tenth. They then agreed to go into the matter. Mr. Langley took three shares, Mr. Sibley one, Mr. Bailie one, Mr. Schneider two, Mr. Foster one, Mr. Hack one. The money was provided for the purpose and Mr. Henderson was instructed to bid up to $10,000, but not to be restricted to that if he could get the property for $2000 or $3000 more.

A day or two before sale-day in July, Mr. Gilreath, of Gilreath & Peoples and Burgess & Co., visited Aiken and conferred with Mr. Henderson on the subject of the sale. He was informed confidentially of the arrangement that had been made to purchase the property and was assured that his debts would be paid in full. Gilreath asked Mr. Henderson if he had levied under his execution. Mr. Henderson replied that he had not. Mr. Gilreath expressed the wish that he should not so levy. Mr. Gilreath asked what would be done if the sale was put off in July. Henderson explained that in that case he could levy under the other executions. Gilreath said he did not want to levy, but he wanted his money. He did not wish Barrett to think he was the one pushing.

The sale was not made in July, Messrs. Barrett and Boyce having directed its postponement. Their attorney instructed the sheriff to advertise the property again under their execution, for sale-day in August. In order to be sure that the sale should go on at that time, Mr. Henderson directed the sheriff to levy under all his executions, which was accordingly done. The sheriff prepared the advertisement, submitted it to Mr. Henderson, and asked if that was sufficient. Henderson replied, "yes." The advertisement was in the usual form, headed as follows:

James Barrett and James P. Boyce, assignees of Morton Poole & Co., and others v. The Bath South Carolina Paper Company. Executions. It commences: "By virtue of the above executions now on file in this office, I will sell," &c., describing the property by metes and bounds. This advertisement was

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published *in the county newspaper, as required by law, but notice of the sale was not anywhere posted.

On Saturday, August 3d, the personal property of the Bath company was sold by the sheriff, and the proceeds credited upon the execution of Barrett and Boyce.

On sale-day in August, being Monday, 5th, Mr. Henderson received, before the sale, a telegram from Burgess & Co., instructing him to make the property bring enough to cover their debts, about $1400.

At the sale the sheriff read the advertisement to the assembled crowd. Mr. Croft, attorney for Barrett & Boyce, gave notice of the withdrawal of the authority to sell under their execution. Mr. Henderson instructed the sheriff to proceed to sell under the other executions. Mr. Boykin Wright, attorney for the mortgagees, in their behalf then gave notice of the three mortgages above described, by their amounts and dates, to the sum of $60,000, and also of a royalty claimed to be due of about $15,000, and gave notice that the sale would be made and the purchaser would take subject to the mortgages. The sheriff then got the junior executions and read the title of each. Mr. Henderson then said to the sheriff, "Proceed." Mr. James Aldrich, attorney, had been before consulted by the sheriff, and advised him that he must sell the equity of redemption. The sheriff had also received instructions from Mr. Smythe, the attorney for Goldsmith & Son, to proceed to levy and collect their executions, if he could find any property of the defendant. When instructed by Mr. Henderson to proceed, the sheriff gave notice that he would proceed to sell the equity of redemption, "whatever was left after satisfying the mortgages." The sale then proceeded.

The first bid was $20, by Mr. H. H. Hickman, bidding for Barrett & Boyce, Mr. Henderson acting as the agent of the company which he had organized to purchase; and Mr. Hahn, a merchant of Aiken, also bid, the latter stopping at $2800. Mr. Hickman's last bid was $4600. Mr. Henderson bid $4605, and the property was knocked down to him at that price. It was worth from $60,000 to $100,000. The sheriff was of opinion that if the terms were properly understood, it would

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bring *$75,000. By direction of Mr. Henderson the bid was put down to William C. Langley, D. B. Hack, James G. Bailie, William C. Sibley, M. F. Foster and E. R. Schneider. Mr. Henderson gave his check for the amount, and the sheriff thereupon duly executed a title deed to the purchasers for the entire property in fee, and the same was duly delivered on the day of sale. The money was applied to the executions in the order of their priority.

The executions of Barrett & Boyce, Gilreath & Peoples, Burgess & Co., and the Goodyear Rubber Company, were paid in full. That of Poole & Hunt was only partially paid. The balance of this judgment and those of Waterbury & Co., were afterwards paid in full by the purchasers, and were assigned to them.

As assignees they commenced an action against James P. Boyce, as the director of the Bath South Carolina Paper Company, to charge him personally with the amounts due in said judgments, on account of the liability created by the charter against the officers and directors of the company for failing to make the annual report required, and have attached the interest of Mr. Boyce in the stock of the Graniteville Manufacturing Company.

The first mortgage trustees, W. H. Barrett and Robert A. Fleming, have instituted this action, making parties the Bath South Carolina Paper Company and the judgment creditors, the trustees under the other mortgages, the purchasers of the real estate, (except Mr. D. S. Henderson, who is not a party) and some of the holders of the bonds issued under the several mortgages. The complainant alleges, inter alia, that all the said creditors of the Bath Paper Compay had actual and express notice of plaintiff's mortgage before giving credit to the company; that no other execution was levied on the said real estate; and that of Morton Poole & Co., assigned to Barrett & Boyce, and no other execution, was specified in the publication of notice of said sale. That authority to sell under the first-named execution was withdrawn, and the sheriff entered levies, and without change of notice in publication,

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proceeded to *sell the said property, the purchasers and the attorneys of the judgment creditors who participated in the benefits of said sale, having notice of said facts. Recites the combination of the purchasers, substantially as hereinbefore stated, and alleges that it was formed for the purpose of preventing said property from bringing its full value and being fairly bid in at said sale. Alleges that the property was reasonably worth $100,000. Recites the circumstances of the sale, the announcement of the liens by Mr. Wright on their behalf, the announcement of the sheriff that he would sell the property subject to the mortgages, and Mr. Henderson's silence thereupon; and alleges that all the bidders at the sale, except Mr. Henderson, bid with the understanding that only the equity of redemption was selling. That the purchasers now claim to hold the property free from any liens, and that the Bath South Carolina Paper Company owns no other property, and unless the said sale is set aside the mortgage bondholders would lose their entire debt.

The plaintiffs pray that the mortgages be foreclosed, and the equity of redemption be barred against all defendants; that the premises be sold and the proceeds applied to the payment of said mortgage debts, according to the rights of said bondholders, and execution awarded for the balance against the Bath South Carolina Paper Company; or, if the court finds the mortgages to be not valid, and existing liens on the property in the hands of the purchasers, it is alleged that the sale is irregular, void, and in fraud of the rights of the plaintiffs, the mortgagees, the bondholders and all their creditors, and pray that the sale be declared void and another sale decreed, and for further relief.

The answer of the purchasers denies the execution and validity of the mortgages; denies that the judgment creditors had notice of the mortgages, and claim as purchasers for valuable consideration without notice; they deny all illegal or improper motives or acts attributed to them, give their own version of the facts, affirm that the junior executions were duly levied on the property, and that the sale was duly and regularly made. They pray that the deeds set forth in the complaint be adjudged invalid, null and void, and that they be delivered up and canceled, and for further relief.

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*The judgment creditors, whose debts are paid, answering, state that fact, and claim that they are not necessary or proper parties, and adopt the answer of the purchasers. The others, whose judgments were assigned, claim that they are not necessary or proper parties, and adopt the answer of the purchasers.

Goldsmith & Son deny the validity of the mortgages, and deny notice of them. They admit the purchase at sheriff's sale; say that the price is grossly inadequate; that the bidding was chilled; that there were unlawful combinations affecting the sale, and the conduct of Henderson, Williams and the purchasers, operated as a fraud against said Goldsmith & Son. They aver that the property sold constitutes the entire property of the Bath South Carolina Paper Company. They pray that the complaint be dismissed, so far as it seeks for a judgment of foreclosure, that the sheriff's sale be rescinded, that the purchasers render up their title deed to be canceled, and that the premises be re-sold, and for further relief.

Messrs. Barrett and Boyce admit the allegations of the complaint in respect to the mortgages; admit that they had notice of them, and that all the judgment creditors had notice, as alleged in the complaint. They allege that the transactions of Mr. Henderson, the judgment creditors and the purchasers, had the effect of depreciating the property and forcing the sale at a grossly inadequate price. They ask that the sale be set aside as fraudulent, null and void, tendering back the money received by them, praying a sale for foreclosure of the mortgages, and for further relief.

The answer of John M. Clark, trustee of the second mortgage, is accompanied by a renunciation of the trusteeship of his cotrustee, John Craig, dated September 2d, 1878. The answer admits the allegations of the complaint, and prays for such relief as may be proper. The answer of the trustees of the third mortgage is to the like effect.

The answers of the bondholders admit the allegations of the complaint, set up their bonds as held by them bona fide and for value, and pray for a foreclosure of the mortgages and a general judgment against the company, and for further relief.

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*The evidence does not satisfy me that any of the judgment creditors were affected with notice of the mortgages.

There are other facts in evidence, but the foregoing statement contains all that I deem necessary or material to the determination of the issues involved.

Upon these facts I conclude as matter of law—

First. That neither of the said mortgages constitutes a legal and valid lien on the property described therein.

Second. That they are valid and binding agreements for mortgages, which will be enforced as such against the defendant company.

Third. That the sale made by the sheriff of Aiken county of the real estate of the Bath South Carolina Paper Company on August 5th, 1878, is rendered null and void by the circumstances attending it.

Fourth. That the Bath South Carolina Paper Company, the stockholders thereof, the bondholders, and the unpaid creditors, are entitled to be relieved against said sale and to a re-sale of the property, and a distribution of the proceeds thereof, according to their several priorities and equities.

The invalidity of the liens of the mortgages having been conceded by all parties at the hearing, as well as conclusively established by the argument of the counsel representing the purchasers, it is unnecessary that I should sustain the conclusion of law on that point.

The other conclusions arrived at are forced upon me after a protracted and careful review of the facts and the arguments of counsel, and an examination of most of the numerous authorities cited, as well as others not cited at the hearing, and I proceed to give some of the reasons for the judgment I have formed.

The grounds upon which a public sale may be set aside are those of fraud, mistake or public policy. Nothing will be permitted to interfere with the fair competition, which is the life of such a sale; and especially of a sheriff's sale, which is compulsory, under the authority and protection of the court, and in regard to which all parties are held to deal at arm's length. It has been well said that in every public sale, as there are but two leading interests, so there are but

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two parties—those engaged in *vending and those proposing to purchase the property. These are necessarily antagonistic, because their interests are directly contrary, the one to the other. It is the interest and well-understood intention of the vending party to sell as high, and of the purchasing party to buy as low, as possible. Neither party expects, nor has any right to expect, that his opponent shall make any provision to advance his interest or forego any bona fide arrangement calculated to promote his own interest, for the sake of enhancing his antagonist's, nor in any way to sacrifice any rights which he has in favor of an opposing right, which is neither more just nor more sacred in the eyes of the law than his own. It is the function of the public policy to secure either of these classes. It simply requires that each, in the prosecution of his own interest and in the exercise of his own rights, shall act fairly. A fair competition will be enforced for the benefit of vendors. No trick, no circumvention will be allowed to prevent it. On the other hand, the bidder will be secured against all imposition. All this public policy requires, but no more. Per Johnston, Chancellor, in Carson v. Law, 2 Rich. Eq. 307.

In the language of the learned judge in Smith v. Greenlee, 2 Dev. 128: "A sale at auction is a sale to the best bidder. Its object, a fair price; it means, competition. * * * If this be the rule with regard to auctions instituted by private individuals, a fortiori should it be as to those public auctions, instituted by law for great purposes, such as execution sales, where the object is to secure the creditor, if possible, the satisfaction of his debt, and, at the same time, to obtain for the debtor a fair price for his property." Any act done, therefore, by the purchaser, or to any other party to the sale, which has the effect to prevent competition, chill the bidding, sacrifice the property, or impose upon the purchaser, is against the policy of the law, and will avoid the sale affected by such conduct. Hamilton v. Hamilton, 2 Rich. Eq. 355 [46 Am. Dec. 58]; Dudley v. Odom, 5 S. C. 131 [22 Am. Rep.

61; Thompson v. Davies, 13 Johns. 114; Troup v. Wood, 4 Johns. Ch. 254; Carson v. Law, 2 Rich. Eq. 311.

Among other objectionable circumstances attending the sale, any agreement or combination among bidders, having its foundation in a purpose to impair competition and

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to obtain the prop*erty at an under value, has been held fatal to such sale. Bidders, however, may combine, if the purpose be to promote the sale, not to prevent competition. Any combination between a number of persons to unite their bids and to purchase property at sheriff's sale jointly, to that extent diminishes the possible number of bidders, since every member of the combination was at liberty to bid at the sale before he became bound by his agreement not to do so. Certainly this does impair, to some extent, the chances of competition at the sale. As said by Judge Spencer, "a public auction is open to every one." Therefore it must be closed to none, or, as he expresses it, "there must be no combination among persons competent to bid, silencing such bidders, for the tendency to sacrifice the debtor's property is inevitable." It is not material that the bidders so silenced should or should not intend to bid. If being at liberty to bid, they are bought off in a way which might prevent a fair competition, the principle applies.

Hence, such combinations are regarded as unlawful and against public policy, and sufficient to avoid a sale where the price is inadequate, the only exception being where the object really was to promote competition, by increasing rather than diminishing the possible number of bidders. This occurs where two or more persons unite in bidding, and are thus enabled to become purchasers, when neither of them could otherwise have participated in the bidding.

An examination of the cases upon this subject will fail to disclose any other principle upon which a purchase at sheriff's sale at an inadequate price, which results from such a combination of bidders, can be sustained. The rule which avoids such contracts is said, in Phippin v. Stickney, 3 Metc. 385, "to apply to all combinations having for their object to stifle fair competition at the bidding, with the design of becoming the purchasers at a price less than the fair value of the property." As already said, every such combination does have the effect of diminishing the number of persons capable of bidding at the sale, and thus may be said to stifle fair competition at the bidding; and the design of the combination in this case was, unquestionably, to secure the purchase of the property at a price less than its

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fair value. Yet that *inadequacy of price was not in any way caused by the combination, simply as such; but the fact known to the parties that the property, under the circumstances, would sell for an inadequate price, was the real inducement to the combination. A very different case from that where the price is unfavorably affected by such combination.

It does not appear that the object of the combination was to neutralize, as bidders, any of the persons composing it, but rather to avail themselves of circumstances which presented the opportunity of a great speculation, which, perhaps, none of them separately would have undertaken. I am not, therefore, prepared to say that the validity of the sale in this case would be destroyed by the simple fact that there was a combination of persons to bid, followed by a purchase by them at an inadequate price.

There is, however, another view to be taken of the circumstances affecting this combination, which plainly brings it within the inhibitions of the rule. Mr. Henderson, as a condition of the agreement, required the combination to agree that no matter how little the property might sell for, if they became the purchasers they would pay the balance that might remain due on the judgments represented by him and Mr. Williams; undertaking, on his part, that in that case he would secure to them assignments of the judgments so paid.

The judgment creditors, at the time when this combination was formed, were well aware of all the defects in the supposed encumbrances, and knew that the property was worth, under the circumstances, more than would pay all their debts. It is not to be doubted that their interest would have prompted them to intervene at the sale for the purpose of protecting themselves, either by bidding on the property so as to cover their judgments, or by denouncing the mortgages as worthless, secure such competition as would have resulted in a fair and open sale at an adequate price. They were only restrained from such intervention by the assurance of Mr. Henderson that their judgments would be paid through the arrangements which he proposed to make.

There could have been but one motive for the undertaking on the part of the combined purchasers to pay more than the amount at which the property might chance to be knock-

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ed down to them, *and that was to neutralize the judgment creditors—to prevent their competition as bidders at the sale, or such other interference on their part as would have removed the cloud which appeared to rest upon the title to the property in question; to prevent their disclosing their secret and thus defeating their intended speculation. In either aspect it was sufficient, under the authorities cited, to avoid the sale.

There is yet another view which, in my opinion, is sufficient to authorize the interference of the court. It is a principle of law that while the purchaser is not bound to

communicate any latent facts affecting the value of the property sold, yet he must carefully abstain from any act tending to mislead the vendor or to prevent his discovery of the facts. In this case such efforts were made in order that a purchase might be secured at an under value. In Turner v. Harvey, 1 Jac. 178, it is said that the purchaser must do absolutely nothing to prevent the possible discovery of such secret by the vendor. And it may here be remarked that the term vendor, at a sheriff's sale, includes all those whose interest it is that the property should bring its full value. A single word (it is said in the case cited) having that tendency, is sufficient to avoid a sale under such circumstances. The rule is the same as applied to encumbrances and defects in the title to an estate, as to defects in the estate itself.

Mr. Henderson was one of the purchasers, a party to the agreement, and his associates are involved in all the consequences of his acts. He did take measures to prevent the discovery of the defects in the mortgages from being known to any of the parties interested, and especially any one interested in the Bath South Carolina Paper Company. See his letter to Hill & Hill, his injunction of secrecy upon Mr. Williams, and all other parties to whom he confided his secret; and all the parties taken into the combination were by him required to assume an obligation of secrecy. These were acts intended to prevent the discovery of the real condition of the property, which the law considers unconscientious and sufficient to avoid a sale which has resulted in a great sacrifice.

Again: it was prima facie the interest of the judgment creditors that the property

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should bring its full value. They were *chiefly represented by Mr. Henderson, their attorney, at this sale; one of them by Mr. Williams. In the presence and hearing of both of these gentlemen an announcement was made at the sale, before the bidding opened, that encumbrances existed affecting the value of the property to the extent of $60,000 and more. This announcement was in direct antagonism to the interests which they appeared to represent. They knew, as matter of fact, that these encumbrances did not exist. They failed to deny the statement to the contrary of the truth as known to them, made in their presence and hearing, which they knew would injuriously affect the price at which the property would sell. Thus challenged to declare the truth, they were bound in all fairness to speak. Their silence contributed to deceive all other parties at the sale, and they and their clients are estopped to deny the facts of the statements made, and with which, by their reticence, they have impressed the transaction.

Mr. Henderson was the known attorney of the plaintiffs in the executions. He was conducting the sale as such; in the eyes of the bidders he was representing parties whose interest it was to have the property bring its full value. He was ostensibly the party of the vendors at the sale. A statement known to him to be false, most injuriously affecting the price of the property, was made in his hearing to all the bidders. He knew that it was believed to be true by all present, except the party for whom he was acting. The interest which he ostensibly represented demanded that he should deny the statement. His failure to do so was equivalent to its adoption as true. Cox v. Buck, 3 Strob. 367; 2 Whart., § 1136, et seq. and notes.

The property was announced to be sold by the sheriff, under and subject to this misstatement of facts, thus corroborated by the silence of the vendors; the parties bidding acted upon it; the property was sold at a great sacrifice in consequence, and Mr. Henderson became the purchaser for the benefit of himself and his associates. This cannot, under the circumstances, be considered a fair sale.

There is yet another view of the case which, in my opinion, would authorize the interference of the court. It seems to me that when a statement is made at a sheriff's sale

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which is, in fact, *not true, but which remains uncontradicted, and the property is, in consequence, sold at a grossly inadequate price, such a sale ought to be set aside in favor of innocent parties. In this case the statement of Mr. Wright, as to the amount of encumbrances claimed, was largely in excess of the real amount due, even had they been valid liens, and, in point of fact, they did not really exist as liens. This statement, though made in perfectly good faith, was an interference with the bona fides of the sale. It depreciated the property and impaired competition at the sale. Had it been made with fraudulent intent it would have certainly vitiated the sale. Minter v. Dent, 3 Rich. 207. It had all the effect it could have had, if fraudulently made. It was a misrepresentation of fact, however unintentional, and wrought a great wrong upon those interested in the property. It was intended to affect the sale injuriously, though with no conscious purpose of wrong. The parties at the sale acted upon it. It was, in law, a fraud upon the sale, and innocent parties should not be allowed to suffer. The inadequacy of price, considered with reference to this erroneous announcement, is such as to shock the moral sense and outrage the conscience, and the sale ought not to stand. Rorer on Jud. Sales, § 855, note 5. It is not consistent with the public policy that a sale, whose fairness is so vitally impaired by a mistaken announcement, should stand, whether the intent be fraudulent or not. It was urged at the hearing that there is a difference between the cases when the contract is executed and when it is merely executory; that in cases of the former sort the courts

will not interfere, unless they be tainted with actual fraud. While this is admitted to have some appearance of authority in the decided cases, yet there are many others in which the principles which have been made the ground of a refusal on the part of the courts to aid in the execution of an executory contract, or confirm a judicial sale when submitted to them for confirmation, have been evoked to set aside a sale made under process. In Hamilton v. Hamilton, the contract was complete, because, as was well said by Chancellor Harper, with us, "on the falling of the hammer and entry of the sale, the purchaser has a right to demand title, as a matter of

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course," and *the case was expressly decided as on an executed contract. 2 Rich. Eq. 361 [46 Am. Dec. 58].

There are other grounds urged as affecting the validity of the sale which I have not discussed. One, however, I will briefly advert to. It was said that Mr. Henderson, being attorney for the judgment creditors, under whose executions the property was sold, having a duty to perform in respect of the sale, could not become the purchaser. McCelvey v. Thomson, 7 S. C. 185. The whole subject is fully discussed under the head of Fox v. Mackreath, Lead. Cas. Eq., (vol. I.) 172. Mr. Henderson seems to have acted with the knowledge and approval of his clients, and it is only to them that he owes any duty in this respect. They are fully satisfied with his conduct, and none others have a right to complain on this ground.

It would be a fruitless consumption of time and labor, and unnecessarily encumber this decree, to follow the learned counsel on both sides in their able and exhaustive examination of the authorities. The leading cases are those of Hamilton v. Hamilton, and Martin and Walters v. Evans. Upon the principles laid down in these cases and their corollaries, this judgment may well be rested.

The foregoing decision is placed upon the ground of fraud and public policy. I think also the sale should be set aside on the ground of mistake. Certainly all the parties affected by the sale, except the purchasers, were laboring under a delusion, the effect of which was that the property was sold at a grossly inadequate price. The sheriff, the agent of all parties, announced under this mistake that he sold the land subject to the mortgages. All the parties, save one, acted under the same mistake. The purchasers knowing this, did not correct it, but suffered the property to be sacrificed for their benefit. In Lowndes v. Chisolm, 2 McC. Ch. 455 [16 Am. Dec. 667], the mortgagee had obtained judgment on a certain bond secured by a mortgage of the property. The sheriff levied on and sold the property, and it was bid off by the mortgagee, who supposed he was acquiring the unincumbered fee. The sale was set aside in favor of the purchaser, on the ground of mistake. In that case there was a simple mistake, without fraud or interference of any one. All parties were honest-

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ly mistaken. It was *regarded as a mistake in law, yet the party was relieved. The present is an infinitely stronger case, and there can be no doubt that, under all the circumstances, the injured parties here are entitled to relief.

In conclusion, it is due to the fact that Mr. Henderson, the chief actor in this unfortunate transaction, is a respected and honorable member of the bar, that some opinion should be expressed in regard to his conduct therein. It is a pleasure to the court to declare that the purpose of Mr. Henderson appears to have been free from any consciousness of wrong. The circumstances by which he was impelled to the course pursued, were well calculated to awaken all his zeal in behalf of his clients, and to put him to the employment of all his enterprise, energy and abilities to secure their money. This, throughout, seems to have been his leading, primary and controlling object. The conduct of Messrs. Barrett and Boyce, in relation to the execution held by them, and the publication made in the Chronicle & Constitutionalist, a newspaper of Augusta, of April 28th, 1878, in reference to the proceedings of the annual meeting, and the condition of the affairs of the Bath company, were quite sufficient to arouse the greatest suspicions, and to justify his resort to any lawful methods of securing the interests of his clients, with which he was entrusted. They indicated a general wreck of the affairs of the company, and a disposition of those controlling it to take care of themselves, and no creditor is to be censured or captiously criticised for catching at any plank floating within his reach to save himself. It is due further to say that while no doubt rests on my mind as to the correctness of the conclusions at which I have arrived, yet that condition of assurance has only been reached after some months of patient thought and an earnest investigation of the case, with all the lights afforded by the exhaustive researches and able arguments of eminent counsel. In his zeal, thus inspired by the circumstance, Mr. Henderson might very well have fallen into the mistake he has unintentionally made.

It is ordered, adjudged and decreed—

First. That the sale of the real estate of the Bath South Carolina Paper Company, described in the pleadings, made by the sheriff of Aiken county, on August 5th, 1878, be

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and the same *is hereby set aside and declared null and void, and that the conveyance for the same, made by the said sheriff, be delivered up by the holders thereof to the clerk of this court, and that the same be by him canceled and filed with the records

in this case, and that such cancellation be noted in the registry where the said conveyance is recorded.

Second. That the said property be re-sold by the sheriff of Aiken county at public auction, after first duly advertising the same for at least twenty-one days, on the first Monday of October next, or on some convenient sale-day thereafter—if circumstances should prevent a sale on that day—for cash, and that he make title to the purchaser or purchasers for the same, and that the purchaser or purchasers be let into possession of the property on the payment of the purchase money.

Third. That the sheriff pay from the purchase money the costs and expenses of said sale in the first place; and next, that he pay therefrom the costs and disbursements of the plaintiffs, and M. Goldsmith & Sons, defendants, herein to be adjusted by the clerk of the court.

Fourth. That he next pay therefrom to William C. Langley, D. B. Hack, James G. Bailie, William C. Sibley, M. F. Foster and E. R. Schneider, or their attorney, the sum of $4605, that being the sum paid by them as purchasers at the former sale, and applied to the cost of said sale and the satisfaction of the judgments of J. Morton Poole & Co., Gilreath & Peoples, N. F. Burgess & Co., and the Goodyear Rubber Company, and in part of the judgments of Poole & Hunt against the said Bath South Carolina Paper Company, which said judgments are hereby adjudged satisfied to the extent of such application and payment.

Fifth. That he pay from the remainder of the purchase money the balance due on the judgment of Poole & Hunt, also the judgments of H. Waterbury & Co. and M. Goldsmith & Son, according to their order and priority.

Sixth. That he pay all other subsisting judgments against the Bath South Carolina Paper Company, if any there be, according to their order and priority.

Seventh. That after making all the payments hereinbefore directed, he retain the balance of the purchase money, if any, sub-

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*ject to the further order of the court, and any party interested therein may make application at the foot of this judgment for such further order.

Eighth. That the said sheriff report the performance of the duties required of him herein, to the next ensuing term of the court after said sale.

Exceptions by Defendants. Please to take notice that the defendants, W. C. Langley, D. B. Hack, James G. Barrett, W. C. Sibley, M. F. Foster and E. B. Schneider, do except to the decree of his Honor, Judge Kershaw, filed herein, on August 6th, 1879, and do appeal therefrom, and from the judgment based thereon, to the Supreme Court of this state, and ask the reversal of said decree in so far as it orders the sale made by Sheriff Holley, mentioned in the complaint, to be set aside, and the deed of the purchasers to be delivered up and canceled, on the following grounds:

[Here follow sixteen specifications of error in the findings of fact by the Circuit decree.]

The defendants aforesaid further except to the decree of his Honor, the Circuit judge, because he concludes as matter of law upon the facts as follows:

"Third. That the sale made by the sheriff of Aiken county of the real estate of Bath South Carolina Paper Company on August 5th, 1878, is rendered null and void by the circumstances attending it.

"Fourth. That the Bath South Carolina Paper Company, the stockholders thereof, the bondholders, and the unpaid creditors, are entitled to be relieved against the said sale, and to a re-sale of the property and a distribution of the proceeds thereof, according to their several priorities and equities."

Whereas, he should have held as matters of law:

1. That the sale cannot be impeached by the Bath company for any irregularities or omissions, because they are estopped by the sheriff's deed.

2. That the sale cannot be impeached by the plaintiffs or the mortgagees; for having been made subject to their mortgages, if their mortgages are valid, they have nothing

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of which to com*plain; and if their mortgages are invalid, they have no right to object.

3. That the sale can be impeached only by the creditors of the Bath company, and upon grounds which constitute fraud; there having been only two grounds taken in the complaint, viz.: The alleged agreement between the purchasers and the attorney for the judgment creditors; and, the concealment by the purchasers of the defects in the mortgages.

That such an agreement to constitute a fraud must have had the purpose and effect to prevent bidding, or to stifle competition and destroy the fairness of the sale; and his Honor having found "that it does not appear that the object of the combination was to neutralize, as bidders, any persons comprising it;" and "that to secure his clients' money was the leading primary and controlling object of Mr. Henderson, the attorney of the judgment creditors and agent of the purchasers," he should have found that the purpose of the agreement was the protection of the interests of the creditors, and its effect was to procure and induce bidders who would not otherwise have competed.

He should have held as law, it is respectfully submitted, that to constitute a sufficient

ground to set aside a sale, even as between vendor and vendee, concealment by the purchaser must have been of facts which were known to him, and which the other parties did not know, and did not have the means of knowing, and facts which it was the duty of the purchaser to disclose.

That in this case the invalidity of the mortgages was, on the part of Mr. Henderson, a matter of legal opinion, based upon information derived from copies of papers, the originals of which were in the possession of the trustees, and their attorney; while, it is respectfully submitted, his Honor erroneously holds that the invalidity of the mortgages was a fact, known to Mr. Henderson, and not known to the other parties.

4. It is respectfully submitted that his Honor erred, in holding, that in this case, Mr. Henderson occupied a position which made it his duty to disclose the opinion which he had formed, and that his failure to make such disclosure vitiates the sale; while it is respectfully submitted that neither the credi-

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tors nor *Mr. Henderson occupied any relations of trust or confidence to any of the parties now seeking to avoid the sale, which required the disclosure of such opinion.

5. It is respectfully submitted that his Honor erred in holding that Mr. Henderson's efforts to prevent the opinion which he had formed as to the mortgages from being known to others than those to whom he thought fit to communicate it, amounted to an act "tending to mislead the vendors, or to prevent the discovery of the facts," and that such act was sufficient to avoid the sale; whereas, it is submitted that the utmost limit of the rule in such cases is that nothing must be actually done or said, intended or calculated to mislead or deceive.

6. It is respectfully submitted that his Honor erred in holding that in consequence of the announcement made at the sale by Mr. Wright, in behalf of the mortgagees, there was such a mistake as constitutes sufficient ground for setting aside the sale; whereas, it is respectfully submitted that the testimony proves that there was no such mistake as constitutes a legal ground for relief, but that the parties now seeking to avoid the sale were guilty of gross negligence and laches, from the consequence of which they seek to relieve themselves at the expense of those who, having purchased under executions of creditors, without notice of the mortgages, are entitled to have their titles and possession protected by the court.

7. That the decree is, in other respects, erroneous in law and contrary to the testimony.

Mr. D. S. Henderson, for appellants.

If, upon a review of the whole testimony, the findings of fact by the Circuit judge are against the weight of the testimony, they should be set aside. 4 S. C. 10; 12 S. C. 154. And his deductions as to motives and intentions are matters of argument only. The Circuit judge vacates the sale on "ground of fraud and public policy," and rests his decree here on 2 Rich. Eq. 296, 355, 368. We accept the rule laid down at page 360. This is also recognized in 5 S. C. 135. Both object and effect must be to stifle competition, and the object must be fraudulent. 3 Rich. Eq. 65; 4 Strob. Eq. 156; 6 Wall. 94. The

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creditors did not *expect to be bidders; they sought the purchasers—were not sought by them. Mr. Henderson was authorized to bid up to $10,000, if necessary; and he it was who demanded, in return for his information, that his clients should be protected; while, by taking the assignments, the purchasers could re-imburse themselves by suit against the directors. The decree says that the effect was to produce inadequacy of price. What was being sold? Only the equity of redemption at a full valuation, if the mortgages were held to be good. Caveat emptor must be reciprocal. Broom's Leg. Max. 608–9. What the sheriff said at the sale could not affect the interest sold. 13 Geo. 443. The testimony shows that the combination made the property bring a better price. The judgment creditors were forced by the actions of the company to look to themselves alone for protection. All the cases cited by respondents are where the agreement was not to bid.

Again, the Circuit judge, says, that the purchaser must carefully abstain from any act tending to mislead the vendee, or to prevent his discovery of these facts. He says such efforts were made here, but he fails to find any facts to support him, and there are none. The sole authority relied upon does not support him. 1 Jacobs 169. The law of concealment is stated in 2 Kent *484: Kerr on F. & M. 95–97; 1 Story's Eq. Jur., § 149; 1 Rich. 105; Story on Sales, § 174. If equally open to both parties, no relief will be granted. 37 Ind. 1; 10 Am. 70. There was no fiduciary relations between the parties to this transaction. It should be noticed that the mortgages were in the hands of the mortgagees, while the judgment creditors derived their information from the recorded copies. The Circuit judge says: "And it may here be remarked the term vendor, at a sheriff's sale, includes all those whose interest it is that the property should bring its full value."

No authority is quoted to support this dictum. We differ with the learned judge. The sheriff is the only vendor at such a sale. He is certainly the agent of the parties to an execution, but this is an agency imposed and created by law, and not a voluntary agency; an agency for persons having several and opposing, not joint interests. Any

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misrepresentations or other *acts of parties

to the execution, except the legal vendor, the sheriff, cannot vitiate the sale. 3 Hill 180; 2 Strob. 112; Frem. on Void Jud. Sales 14. From Mr. Henderson's reticence, when statements were made at the sale, the Circuit judge holds him and his clients estopped. If so, it would only be to the claim that $60,000 were due on the mortgages. 3 Strob. But as it was only matter of opinion, the doctrine of estoppel does not apply. Big. on Estop. 431; 1 Story's Eq. Jur., § 191; 51 Mo. 449; 3 Washb. on R. Prop. 79; 21 Penna. 334. Again, the Circuit judge thinks that a sale at an inadequate price ought to be set aside in favor of innocent parties, when misstatements at a sale remain uncontradicted. The mortgagees were not innocent but grossly negligent parties. 2 Sm. Lead. Cas. 147. But the doctrine is not sound. Kerr on F. & M. 61; 15 Minn. 26; 7 Barb. 64; 3 Hill 180. The remaining ground of the decree is mistake. If mistake applies at all to sheriff's sales, mutual mistake does not. 8 S. C. 2. The decree rests on 2 McC. Ch. 455; but see remarks upon that case in 2 Bail. 635, and see 2 S. C. 112; 12 S. C. 488. The facts were equally open to both parties. 2 Bail. 418; 12 S. C. 130; 1 Story's Eq. Jur., § 146; 2 McC. Ch. 158; 11 R. I. 565; 23 Am. R. 525; 50 Cal. 337; 19 Am. R. 655. It has been asked why Mr. Henderson did not file a bill to have the whole question settled. The answer is because it was not to his clients' interests to do so, the matter not being settled law, (1 Hill Ch. 106; 7 Rich. 509;) and the litigation ensuing would have been at their expense. His clients are satisfied with his course.

Messrs. James Aldrich, Joseph Ganahl, Boykin Wright, G. W. Croft and J. P. Carroll, for respondents.

Their able arguments are omitted as the ground is substantially covered by the Circuit decree, and the opinion of this court.

Mr. C. R. Miles, in reply.

March 3d, 1880. The opinion of the court was delivered by

WILLARD, C. J. Certain creditors of the defendant corporation seek, with such defendant, to set aside a sale of the property

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*of such defendant made by the sheriff under execution, on the ground of alleged misconduct of the purchaser, both before and at the time of the sale, tending to depress the selling price by a combination among bidders to prevent bidding, and by other devices alleged and relied upon, whereby the property sold for a sum grossly inadequate as compared with its actual value. The facts of the case are very fully stated in the Circuit decree and need not be repeated. The leading question grows out of the fact, that, previous to the sale, the defendant corporation was largely indebted. Many judgments had been recovered against such defendant, and debts to a large amount not covered by judgments were outstanding. Prior to the sale, an agreement was made between certain parties, who afterwards became the purchasers, but who at that time had no interest in the property of the defendant corporation, but desired to become bidders at the sheriff's sale of such property, and the owners of several judgments recovered against the defendant corporation, by which it was agreed that such intended purchasers should purchase the property if it did not go beyond a certain sum, and if the sum bid for the property was not sufficient to pay off all the judgments held by the creditors who were parties to the agreement, that the purchaser would purchase said judgments from such creditors, paying the amounts due thereon and taking assignments of the same. This arrangement was carried out. The owners of the judgments provided for in the agreement did not bid at the sale, and the property was struck off to the persons thus agreeing to purchase at a sum much below its actual value.

The leading question in the case is whether this contract tended to, and did, in fact, directly interfere with the competition at the sale in such manner as to diminish the biddings and reduce the sum which, it may be assumed, would have been realized on a free and fair competition.

Nothing is more important to a complete administration of justice than that auction sales should be conducted in a manner likely to secure the fair market value of property disposed of at such sales. In the last resort, such sales become the means of carrying into effect the judgments of the courts, in the great majority of cases, and the administra-

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tion of justice is as *much concerned in the manner of executing judgments as in the methods by which they are obtained. Competition is the life of auction sales, and if the influence of competition is destroyed or impaired, the auction sale ceases to be a fair test of value. It cannot be pretended that competition at an auction sale is a perfect means of ensuring the sale of property at its value, but it can be affirmed with certainty that anything that impairs the fullness and freedom of that competition tends to impair or destroy the usefulness of such sales and to impair the legal rights of the persons whose property is subjected to such sales. The result of successful bidding is a contract to which the vendor and vendee are parties, the auctioneer being their mutual agent, by whom the contract is evidenced. If then anything is done of a secret nature by the purchaser tending to prevent the sale from having its full efficacy for the benefit of the vendor, it is clear, upon the plainest principles of equality applicable to contracts generally, that such conduct is a fraud on the rights of the vendor, and vitiates the sale.

These principles have been so clearly and firmly settled by the cases in this state and elsewhere, that it is only necessary to make a general reference to them. Carson v. Law, 2 Rich. Eq. 296; Hamilton v. Hamilton, 2 Rich. Eq. 355 [46 Am. Dec. 58]; Martin v. Evans, 2 Rich. Eq. 368; Thrower v. Cureton, 4 Strob. Eq. 155 [53 Am. Dec. 660]; Johnston v. La Motte, 6 Rich. Eq. 347; Jones v. Caswell, 3 Johns. Cas. 29; Thompson v. Davies, 13 Johns. 112; Doolin v. Ward, 6 Johns. 194; Wilbur v. How, 8 Johns. 444; Bexwell v. Christie, 1 Cowp. 395; Howard v. Castle, 6 Term R. 642; Brawley v. Alt, 3 Ves. 620; Smith v. Clarke, 12 Ves. 477; Crowther v. Austin, 2 Car. & P. 208.

It is definitely settled that if two or more persons in a position to become purchasers at such auction sale combine together for the purpose of preventing the property from realizing at such sale the full sum that, upon fair competition, it would be likely to realize at such sale, and one of them becomes the purchaser, the sale is fraudulent and void. Hamilton v. Hamilton, 2 Rich. Eq. 355 [46 Am. Dec. 58]; Martin v. Evans, 2 Rich. Eq. 368; Dudley v. Odom, 5 S. C. 131 [22 Am. Rep. 6]; Jones v. Caswell, 3 Johns. Cas. 329; Thompson v. Davies, 13 Johns. 112; Doolin v. Ward, 6 Johns. 194; Wilbur

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*v. How, 8 Johns. 444. Phippin v. Stickney, 5 Metc. 384, does not deny the rule as above laid down, but places the effect of such combination in vitiating the sale upon the ground of fraud, and only denies that proof of such fraud existed in the case there presented. Piatt v. Oliver, 1 McLean 295 [Fed. Cas. No. 11,114], turned on a question of pleading that did not involve the present question. There is entire harmony on this question among all the decisions having authoritative weight, and it must be regarded as settled law.

The intention to interfere with full competition is that which constitutes the fraud that vitiates the sale. When this intention appears by express proof, no question of doubt can arise. It is equally clear that if the tendency of the agreement, in legal estimation, is to produce that result, the law will infer a fraudulent intent in the absence of counter evidence. The tendency of a contract and its motive are identical in legal consideration, and the law determines the one from the other, and when nothing is shown tending to intercept or destroy that tendency, it will be assumed to have affected the sale injuriously.

One feature of the agreement before us furnishes indisputable evidence of an intent to prevent full and natural competition at the sale, and this feature has been pointed out by the Circuit decree, and is the principal ground on which it rests. It cannot be denied that parties holding judgments against the defendant corporation, by becoming parties to an agreement by which they would receive the full amount of their judgment without any effort on their part to compete at the sale, lost their motive for competing at such sale. The question whether they would or would not have competed at the sale independently of the agreement in question, is one purely speculative. It has not been shown that it was out of their power to do so if they had chosen to become bidders, leaving the question of the state of their minds on the subject to the merest speculation, that cannot, in its nature, be investigated upon evidence with any legal certainty. We are left to the conclusion that the agreement canceled their interest in bidding, and that in itself, if intended, is a wrong to the vendor. If it had appeared that the purchasers had agreed to pay off and discharge the judgments, it might be said that the defendant corporation was benefited rather than in-

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jured by an *agreement that provided for the payment of their judgments, independently of the sum that the property brought, whatever effect that might have in other respects; but as the agreement was that the purchasers should become the owners of the judgments with power to enforce them against any other property of the defendant corporation, the defendant lost the benefit of the competition that might have arisen between the owners of the judgments and the purchaser, without any corresponding advantage whatever. The purchaser cannot be assumed to have had any other interest in the contract than that of purchasing the property at the lowest rate. They do not appear to have been otherwise connected with the sale than through the motive to become the owners of the property sold, and such must be assumed to be the case. In this view their sole interest was to reduce the purchase money, and in making the agreement with the judgment creditors, the natural tendency of which was to neutralize their interest in the biddings, and thus get rid of competition, they must be deemed to have had that object in view. This is conclusive of the correctness of the Circuit decree in holding the sale invalid. It will be unnecessary to consider the other exceptions, involving, as they do, merely additional grounds for supporting the Circuit decree, as the ground already examined is sufficient for that purpose.

The decree must be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

13 S. C. 160

(Case No. 824.)

GARVIN v. GARVIN.

(November Term, 1879.)

[*Judges* ⇐24.]

Under Chapter CV., Section 2, of the General Statutes, the presiding judge of the Circuit in which a judgment has been rendered, has jurisdiction to hear and determine a motion made before him within two years thereafter to set aside such judgment as erroneous, and to grant a new trial.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 93; Dec. Dig. ⇐24.]

Before Hudson, J., Aiken, June, 1879.

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*This was a motion noticed by Robert Garvin, May 26th, 1879, to set aside as erroneous a judgment rendered by Judge Reed, at Aiken, in September, 1877, in favor of defendant in an action between Robert Garvin and John Garvin. The motion was based upon affidavits. The motion was heard June 6th, 1879, during term, and refused, upon the ground stated in the opinion of this court. The plaintiff appealed.

[For subsequent opinions, see 14 S. C. 630; 21 S. C. 83; 40 S. C. 435, 19 S. E. 79.]

Mr. P. A. Emanuel, for appellant, contended that the court did have jurisdiction, and cited Gen. Stat., ch. CV., § 2; 1 S. C. 139; 5 S. C. 350; 1 Mill's Const. R. 133; 1 Hill 210; 3 McC. 19; 6 Rich. 492; 2 Bay 333; 2 Rich. 327; 1 Hill 262; 1 McM. 292.

Mr. G. W. Croft and D. S. Henderson, contra, cited 10 S. C. 277, and contended that relief could be granted only by appeal or under Section 197 of the code of procedure.

March 8th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was a motion to vacate or set aside a judgment previously rendered by Judge Reed in this case, and to grant a new trial, upon the ground that such judgment was "erroneous and ought to be set aside." It appears from the "case," as submitted here, that the Circuit judge stated "that before hearing argument upon the motion, he would hear counsel upon the question of the jurisdiction of the court to hear the motion." Such argument having been heard, he held that "it appearing that over one year had elapsed, the period fixed by the code for motions of this character, the court had no jurisdiction; that if the judgment of Judge Reed was erroneous the plaintiff should have appealed to the Supreme Court; that this court has no jurisdiction to correct an error (if any has been made) in the manner and form presented by the plaintiff; that to entertain the plaintiff's motion would, in effect, be assuming an appellate jurisdiction over the judgment of a court of co-ordinate jurisdiction; that the only ground for relief that he recognized was in the case of newly-discovered testimony, and, therefore, was compelled to refuse the hearing of argument upon the motion, and ordered that the motion be dismissed, with costs."

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*In Section 2 of Chapter CV., (Gen. Stat. 497,) it is provided as follows: "In case a judgment or decree has been or hereafter shall be rendered by a Court of Common Pleas, it shall be lawful for either party, plaintiff or defendant, to move before the presiding judge of the Circuit in which said judgment was obtained, to vacate or set aside said judgment, upon satisfactory proof being made to said judge that said judgment is erroneous and ought to be set aside; and upon said proof being made, the presiding judge is hereby authorized to vacate and set aside such judgment and to order a trial de novo." This, we think, invested the judge below with jurisdiction to hear and determine the motion, and his refusal to do so was, in our judgment, error. It seems to be supposed that the provisions of the section above quoted were superseded by Section 197 of the code of procedure, in which provision is made for relieving a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, provided such relief be applied for within one year after notice of such judgment, &c., and by those provisions of the code relating to appeals. We are not at liberty so to regard them. The general assembly, after these various provisions were originally enacted, has seen fit to re-enact them all in the general statutes, and unless there is an irreconcilable inconsistency we are not at liberty to regard one of these provisions as a repeal of, or a substitute for, the other. We do not think there is such inconsistency. The provisions of Section 197 of the code are intended to provide relief only in cases where a judgment has been taken against a party through his own mistake, inadvertence, surprise or excusable neglect, and must be confined to such cases; those provisions of the code in relation to appeals must be regarded as applying only to those cases in which a party seeks from a superior tribunal relief from, or correction of, error committed by an inferior tribunal, while the provisions of Section 2 of Chapter CV., General Statutes, apply only to those cases where relief is sought in the same tribunal from a judgment rendered by such tribunal, which, "upon satisfactory proof," can be shown to be erroneous. It might be difficult, perhaps impossible, to lay down clearly the grounds upon which such relief should be granted, but that is not the

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*question before us. It is sufficient to say that the section does not confine the relief to cases in which the ground is after-discovered evidence, but authorizes such relief whenever

"satisfactory proof" is made that the judgment is erroneous. We are not called upon to consider, and we do not wish it understood that we have undertaken to consider the merits of the application in the case now before the court. The only question before us is, whether the Circuit judge had jurisdiction of the motion, and all that we determine is that he did have such jurisdiction. He was bound to hear the motion and determine whether there was "satisfactory proof" that the judgment, against which relief was sought, was erroneous and ought to be set aside.

The order appealed from is set aside and the case remanded for such further proceedings as may be necessary and proper.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 163

(Case No. 825.)

VILLALONGA v. HICKS.

(November Term, 1879.)

[1. *Guardian and Ward* ⟸43.]

The judge of probate, holding several bonds payable to himself, secured by mortgages, belonging to an estate in which an infant had an interest, under an arrangement made by all parties concerned, delivered one of the bonds and the mortgage securing it, to the guardian of such infant as a part of his ward's estate, and at the same time, wrote upon the mortgage an assignment of bond and mortgage. Subsequently, the guardian transferred this bond by delivery as collateral security for the payment of a debt due by himself. The ward having afterwards claimed the bond—*Held*, that it was her property.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 190; Dec. Dig. ⟸43.]

[2. *Guardian and Ward* ⟸72.]

The guardian having died, and a surety upon his guardianship bond having become guardian in his stead—*Held*, that this did not, by operation of law, effect a payment to the second guardian of the amount due upon this bond.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 318–321; Dec. Dig. ⟸72.]

Before Kershaw, J., Barnwell, February, 1879.

This was an action instituted in June, 1876, by John L. Villalonga against Sarah A. Hicks,

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J. C. Miller and W. H. Kennedy, *upon a bond for the payment of money. Isabella M. Hickson, upon her own petition, was made a party defendant, and claimed the bond as her property.

The estate of John Hickson, deceased, was sold by the judge of probate for Barnwell county, and a portion thereof, called tract No. 1, was purchased by Sarah A. Hicks, who gave her bond with the two sureties, who are defendants here, and a mortgage of the premises, both payable to I. N. Teague, Probate judge. When this bond fell due, the principal obligor, together with the three guardians of the three infant children (the heirs-at-law) of John Hickson, met and agreed that J. W. Wilson, guardian of Isabella M. Hickson, should receive the Hicks bond and mortgage as a part of Isabella's distributive share. The bond and mortgage were then delivered by the Probate judge to J. W. Wilson, the former without any written assignment, but the latter with the endorsement following, to wit: "I having received satisfaction in full of this mortgage and the bond it was intended to secure, of J. W. Wilson, do hereby transfer the same to said J. W. Wilson, guardian. Witness my hand and seal this 27th December, 1870." Signed by the judge of probate. Afterwards, J. W. Wilson transferred, by delivery, this bond to the plaintiff as collateral security for a debt. It was a matter of dispute here, whether or not this debt was contracted upon the faith of this collateral. The referee found that it was not, but that the bond was delivered to secure indebtedness already existing; and his findings were confirmed by the Circuit judge. Villalonga had no actual knowledge of the mortgage, or of the assignment, and did not know that J. W. Wilson was guardian of Miss Hickson, or that the bond belonged to her estate. The mortgage remained in the possession of J. W. Wilson until his death. Le Roy Wilson, who had been a surety on J. W. Wilson's guardianship bond, became sole qualified executor of J. W. Wilson's estate, which he fully administered under the order of the court, in an action instituted by himself, to marshal the assets and settle the estate. Thereafter, Le Roy Wilson became the guardian of Isabella M. Hickson.

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*The plaintiff demanded judgment upon the bond. Isabella Hickson, in her answer, by her guardian ad litem, Le Roy Wilson, claimed the bond as her property. The other defendants expressed their readiness to pay the bond to the party entitled to recover upon it. The other facts of the case have no bearing upon the points decided here.

All the issues in the case were referred to Andrew C. Dibble, Esq., as special referee, to hear and determine. His conclusions of law were, inter alia, that the bond in suit and the mortgage securing it, were duly assigned to J. W. Wilson, as guardian of I. M. Hickson, and that they then became the property of the ward, and could not be dealt with except for the benefit of the ward; that the subsequent transfer of the bond was a breach of trust by the guardian; that plaintiff was put upon the inquiry by the terms of the bond—that is, by its being payable to the judge of probate, and was, therefore, chargeable with notice that it belonged to the estate of I. M. Hickson; that Le Roy

Wilson, not having become guardian until after the settlement of the estate of J. W. Wilson, he, as guardian, had not been paid, by operation of law, the amount due by his testator, the former guardian; that plaintiff was not entitled to relief against Sarah A. Hicks and her sureties; that I. M. Hickson was entitled to no affirmative relief, having demanded none. The report recommended a dismissal of the complaint with costs.

To all these conclusions, exceptions were taken by the plaintiff, and upon them the Circuit judge rendered his decree as follows:

The issues, both of law and fact, arising in this case, were referred to the referee, and by him decided in favor of the defendants. The plaintiff filed exceptions to the report, which were heard before me at the present term. The report must stand as to facts, unless without evidence to sustain it. Perry v. Sullivan, 6 S. C. 310. In this case, however, it is due to the referee to say that there were circumstances upon which he based his opinion, which appear to the court to furnish reasonable grounds for his findings. The distinction he makes as to the character of the notice is not material,

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since it manifestly appears *what he means by the terms actual or constructive notice. The questions of law involved, and they were chiefly discussed by the counsel at the beginning, are—

First. Was there sufficient notice brought home to the plaintiff in this case, to have the effect of subordinating his rights in the premises, to those of the defendant, Isabella M. Hickson? Second. Is said defendant precluded from the defence set up on her behalf, on the grounds that the amount due her by her deceased guardian was paid by operation of law, in consequence of the fact that Le Roy Wilson united, in his own person, the office of executor of the deceased guardian, and also the guardianship of said defendant after the death of his testator?

The action here is upon a bond, brought by the plaintiff as assignee. There was no assignment in writing, and plaintiff claimed as transferee by delivery of the bond for value. This would be sufficient to vest in him the beneficial interest and the right of action under the code, if there were no other circumstances to invalidate his claims. The bond, however, was, on its face, payable to the Probate judge of Barnwell county by name. In order to prove his own title, as beneficiary of the bond, plaintiff must derive it from the obligee, mediately or immediately. He must show that it passed from the Probate judge, to whom it was payable, to Wilson, from whom he received it, either by assignment or delivery. In doing this he must necessarily set up, as a part of the proofs of his title, the assignment from the Probate judge to Wilson. That discloses the fact that the bond was the property of Hickson, the infant defendant. The guardian had no right to transfer it in consideration of his own debt, or for his own benefit. The transfer was void upon this ground. Plaintiff is held to have notice of the title under which he claims, and upon which he must stand, in order to entitle himself to the character in which he sues. Furthermore, while a purchaser of a legal estate is protected when he acquires it bona fide, without notice, there is no such protection to one who has only acquired an equitable title. The transferee, by delivery, has only an equitable title. He takes the bond subject to all prior equities, and want of notice will not protect him.

This disposes of the first question involved.

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*Second. The estate of the deceased guardian was administered by the court, under the bill to marshal assets, and that suit had been determined by the final judgment therein before Le Roy Wilson succeeded to the guardianship of the infant defendant. He had fully accounted in that action for the estate of his testator, which came into his hands, and his administration had closed before he assumed the guardianship. Therefore, the law invoked does not apply, and cannot avail the plaintiff. If, however, that were out of the case, the doctrine would not apply. The new guardian might have been chargeable prima facie, had he retained the executorship, and the estate had remained unsettled; but he could have discharged himself by setting up the bond as an investment of his ward's money, and pursuing the same in the hands of the plaintiff, wrongfully withheld from him as guardian. The bond would have remained an asset of his ward, to which he would have been entitled to relieve himself from the liability thrown upon him by the operation of the law insisted upon. His ward would have been entitled to it as a portion of her estate; and the sureties to the guardianship bond would have had the right to have it collected and applied in extinguishment of their liability. The case (Rhame v. Lewis, 13 Rich. Eq. 330,) is conclusive authority that the plaintiff took the bond in question subject to the equities affecting it at the time of the transfer, if he had notice of their existence, or of such circumstances as should have put him on inquiry. That he had such notice appears from the circumstance that the title of assignor, which he acquired, cannot be established without leading necessarily to the knowledge of the prior equities.

In general, it will be presumed that every purchaser has investigated the title of his vendor before completing his purchase; and if the title cannot be made out but through a deed, which gives or leads up to notice of a trust, he will be assumed to have notice of that trust, unless it be shown that in-

quiry was made, and a reasonable excuse given for the non-delivery of the deeds.

But the court will impute fraud, or gross or willful negligence to the purchaser who omits all inquiry into the title of his vendor. Hewitt v. Loosemore, S. L. & E. Rep. 40.

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*If, under such circumstances, he choose to remain in indolent ignorance or indifference to the title, it was a voluntary ignorance and indifference, which ought not to be permitted to serve him against the right of the cestui que trust. Oliver v. Piatt, 3 How. 410 [11 L. Ed. 622]. To sustain a plea of purchaser for valuable consideration without notice, it must appear that the legal title was purchased, (Brown v. Wood, 6 Rich. Eq. 155,) or, at least, it must appear that the purchaser has the best right to demand a conveyance of the legal title. Medlicott v. O'Donel, 1 Ball & Beat. 171. The plaintiff does not stand in any such position.

It is ordered and adjudged that the exceptions be overruled; that the report be confirmed and be made the judgment of the court; that the complaint be dismissed, and the plaintiff pay the defendants their costs and disbursements—to be adjusted by the clerk.

From this decree plaintiff appealed to this court.

Mr. Robt. Aldrich, for appellant.

The position relied upon is, that the assignee of a bond for full value, has the undisputed right to collect it; and the fact that the assignor was the guardian of an infant at the time of the assignment, and the bond constituted a part of his ward's estate, makes no difference, provided the assignee had no knowledge of these facts and believed the bond to be the property of the assignor, and there was nothing apparent in the transaction inconsistent with this belief, and to advertise the assignee of the true facts of the case. 13 Rich. Eq. 330. Appellant had no knowledge of the facts here. He is charged with knowledge because the bond was payable to the judge of probate. But he did not see the bond until long after the time when he advanced the money, and it was agreed that it should be delivered. He is charged with notice, however, it is alleged, because it was a part of his title, and reliance is placed upon Adams' Eq. 151, note 1; Story's Eq. Jur., § 400, and 13 Rich. Eq. 330, and 6 S. C. 159. But these authorities do not sustain the conclusion that a bond payable to a judge of probate is notice that the bond has been transferred to a guardian for the use of his ward. Pomeroy on Rem., § 124; 4 Desaus. 87. A purchaser

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of a bond is not charged *with inquiry into a chain of title, as the decree says. That is good land law, but inapplicable here. Oliver v. Piatt, cited by the Circuit judge, shows this distinction. The facts in this case show that the appellant, by the most diligent inquiry, could not have learned, except from J. W. Wilson, that this bond belonged to Wilson as guardian. To sustain our position, we rely upon Story's Eq. Jur., §§ 410, 410a; 4 Desaus. 474; 1 McC. Ch. 119; 1 Story's Eq. Jur., § 580; 13 Rich. Eq. 296; 7 Johns. Ch. 150; 96 U. S. 57-8. Fraud, and knowledge of fraud, are never presumed, and cannot here be imputed to the plaintiff. There are marked differences between the case at bar and 11 S. C. 396, 551, relied upon by respondents. Particular attention is directed to case of Hill v. McIntyre, 39 N. H. The testimony clearly shows that the debt intended to be secured by the assignment was not an antecedent debt.

Mr. I. M. Hutson, same side.

It is not claimed that the debt represented by the bond in suit was paid to Le Roy Wilson, as guardian of I. M. Hickson, because he was the executor of J. W. Wilson, but because he was the surety on the guardianship bond. That this relationship, whereby the present guardian became indebted to himself as such because of his suretyship on the defaulting guardian's bond, extinguished the indebtedness of the former guardian, is conclusively established by the authorities. 2 Hill's Ch. 277; McM. Eq. 495; 4 Rich. Eq. 14; 2 Strob. Eq. 206; 6 S. C. 490; 7 S. C. 153. As to the position that Le Roy Wilson, as surety, would be entitled to set up the bond against his principal's estate, and follow it as trust property, it is enough to say that he is not a party to this cause, except as a guardian ad litem; and that no judgment rendered would bind him, and, therefore, none can be given in his favor.

Mr. H. M. Thompson, for respondent.

A guardian has no legal title to the personal or other property of his ward, and consequently can convey none to his transferee; and a sale or transfer by him is voidable at the option of the infant. 3 Rich. Eq. 156;

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9 Rich. Eq. 311; 11 S. C. 551. If *more advantageous to the ward to follow the specific property, she has the right to do so. Rich. Eq. Cas. 172. There being no assignment in writing, nor any legal title acquired, the plaintiff took, notice or no notice, subject to the ward's equities. 6 Rich. Eq. 155; 11 S. C. 551. A guardian cannot change the character of a ward's estate without the leave of the court. 1 Hill's Ch. 409. If he does, it must be only when the court would have sanctioned it. 11 S. C. 551. The guardianship bond is merely subsidiary security for the investments required. 9 Rich. Eq. 184. There was enough on the bond to put him upon inquiry, and, therefore, he is chargeable with constructive notice. 13 Rich. Eq. 312; 1 White & Tudor's Lead. Cas. in Eq. 92; Adams' Eq. 151, note 1, 158; 1 Story's Eq. Jur., § 400. To one who omits inquiring,

the court will impute fraud or willful negligence. S. L. & E. Rep. 40; 3 How. 410. There must not only be absence of notice, but it must be bona fide and for a present consideration. 13 Rich Eq. 328; 6 S. C. 159. The character of executor and guardian never merged in Le Roy Wilson. And, as surety, he would be subrogated to all the rights of the ward. Rich. Eq. Cas. 172; 7 Rich. 112; 13 Rich. 312.

March 12th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The action was, in its original form, in the nature of an action at law upon a money bond. But Isabella M. Hickson was, subsequently to the commencement of the action, made a party, and she interposed a defence, alleging, in substance, that the bond in suit is her individual property, improperly transferred by her guardian to the plaintiff. The propriety of making Isabella M. Hickson a party, and the character of her answer, are not questioned before us. The case has, therefore, assumed the character of one in the nature of interpleader between the plaintiff and the defendant Isabella, the other defendants, the obligors on the bond, making no objection to pay the party found entitled to the bond. Although not in form a strict interpleader, the case is such in substance, and the issues

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*must be disposed of on the principles of interpleader. It is, therefore, an equitable proceeding.

The court is satisfied with the conclusions of fact found by the referee, so far as the same are material to the view of the law of the case here presented. The facts are as follows: The bond in suit was the property of the defendant Isabella, held by J. W. Wilson, her guardian, secured by a mortgage. The bond and mortgage were originally made to the Probate judge officially, by whom the bond was delivered without assignment to the guardian as of the estate of his ward, and at the same time the mortgage was duly assigned to such guardian. Subsequently the guardian transferred the bond without assignment to the plaintiff, Villalonga, as security for a personal indebtedness of the guardian to the said plaintiff. The mortgage was never transferred to the plaintiff.

The transfer of the bond to the guardian passed the beneficial interest in the bond, not to the guardian, but to the ward. Had the bond been assigned in form to the guardian, he would have, no doubt, taken the legal title as trustee for his ward. But as there was no assignment effectual to pass the title directly, it could only pass by operation of law; that is to say, the ward having the beneficial interest would be regarded as clothed with the right of property in the bond, both at law and in equity; prior to the code, in the name of the obligee to her use, and in equity to her own use; and since the code, both at law and in equity, in her own name. It is not material to inquire whether the guardian had authority, as such, to transfer the legal title to the bond to the plaintiff, for he has not done so.

The deposit of the bond as collateral security for his individual debt, could only transfer the title to the bond as by operation of law, but the law will not operate such a transfer of interest as against the clear legal and equitable rights of the party having the best right to the property. Assuming that she had merely an equitable interest in the bond, such as she would have had in case the legal title had been transferred to her guardian, but impressed with a trust in her favor; in that case the only way in which the plaintiff could defeat that equity would be by showing that he had become a bona fide

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purchaser for value without *notice. But he does not occupy that position, for he has not succeeded in clothing himself with the legal title, and that is of the essence of the equitable defence of purchaser for a valuable consideration. All that he has is an equity as between himself and the guardian, individually. That equity is clearly subordinate to that of the defendant, Isabella, both as it regards its character and the time of its origin. If the legal title was in the guardian as trustee, the equity of the cestui que trust must have been preferred to any that might be created through any act of misconduct on the part of the trustee, for it was impressed upon the legal title from the moment of its creation, and could only be displaced by an equity to which the cestui que trust was, in some respect, subject. An equity claimed through the misconduct of the trustee could not occupy such a position.

But the case is stronger than that supposed, for the defendant Isabella had more than equity. She had the beneficial interest in the bond without any vesting of the legal title in the guardian so as to reduce that beneficial interest to a mere equity. As there was no legal title standing in the way of her beneficial, it was entitled to legal as well as equitable consideration, and, consequently, the defendant Isabella has the legal as well as the best equitable right to the bond and was entitled to recover.

It is contended by the plaintiff that as between the estate of the deceased guardian and the ward there have been transactions that amount, in law, to the payment of the amount covered by this bond in suit. If it had appeared that these transactions, alleged to amount to payment, had taken place prior to the transfer of the bond in suit, from the deceased guardian to the plaintiff, there might be more reason to inquire whether the legal effect of such transactions is such as is claimed for them, for in that case it might

well be said that the equity of the ward was extinguished at the time of the transfer of the bond, and that of the plaintiff would remain as the controlling equity; but the fact appears otherwise. The argument in behalf of the plaintiff must rest on one of two assumptions, either that the deceased guardian or his executor had the right to elect to take the bond and become a debtor to the ward for its amount, or that the ward had, in effect, made such an election through the ef-

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fect of her *appearance in the suit to marshal the assets of the estate of the deceased guardian, brought by his executor and by the decree therein. It is clear that a guardian cannot appropriate the property of his ward by making himself a debtor for the value of such property, so as to invest himself with the title of such property, either in law or in equity. If the ward is bound by transactions amounting to an assent that the guardian shall have the property and become a debtor, then such a transfer of interest may be brought about.

It is contended that under the bill to marshal the assets of the estate of J. W. Wilson, the deceased guardian, brought by Le Roy Wilson, the executor of J. W. Wilson, the account of the deceased guardian with his ward was adjusted on the principle of charging such estate with the amount of the bond assigned to plaintiff, and that the ward being a party to the suit is bound to such mode of statement. It is claimed as a deduction from this that when the transaction assumed the form of a mere indebtedness between the deceased guardian's estate and the ward, in view of the fact that Le Roy Wilson, the present guardian, was surety for J. W. Wilson on his guardian's bond, that the debt became paid by the operation of law. It will not be necessary to examine the soundness of this view, as it does not appear to rest on an adequate basis of fact. It does not appear, from what is disclosed of the accounting in the suit to marshal assets, that this particular bond was brought into the account. The duty of a guardian is to turn over to his ward, specifically, all the property of his ward in his hands and to account for all his pecuniary transactions. It is true that where he has committed waste of his ward's estate, he is bound to account for that; but it does not appear that the accounting established any such devastavit as the basis of the accounting on the part of the deceased guardian's estate. Such fact cannot be presumed; and as the question is one of estoppel upon a record, we are not at liberty to speculate as to what matters may have been affected by such record, but must take it at what appears by it. Under such circumstances we cannot say, from the evidence before us, that the deceased guardian's estate has ever accounted for the value of

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the bond in *suit, and, consequently, no such effect upon the rights of the ward has been accomplished as that contended for.

The decree of the Circuit Court must be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 174

(Case No. 826.)

TRENHOLM v. WILSON.

(November Term, 1879.)

[1. *Mortgages* ⇐542, 544.]

A tract of land was sold after the death of the mortgagor, under a decree of foreclosure rendered against him during his lifetime; after confirmation of sale, the purchaser demanded possession from the widow of the mortgagor, but she refused to vacate, claiming that the sale was invalid, and that she was entitled to dower. *Held*, under proceedings by rule, that the purchaser was entitled to be let into possession. McIver, A. J., dissenting.

[Ed. Note.—Cited in Ex parte Winkler, 31 S. C. 179, 9 S. E. 792; Ex parte Qualls, 71 S. C. 92, 50 S. E. 646.

For other cases, see Mortgages, Cent. Dig. §§ 1561, 1575; Dec. Dig. ⇐542, 544.]

[2. *Equity* ⇐441.]

A decree of foreclosure is in the nature of a proceeding in rem, and is capable of being enforced after the death of the mortgagor. Per Willard, C. J.

[Ed. Note.—Cited in Ex parte Winkler, 31 S. C. 181, 9 S. E. 792.

For other cases, see Equity, Cent. Dig. § 1062; Dec. Dig. ⇐441.]

[3. *Mortgages* ⇐542.]

Even if the equity of redemption was not barred under the terms of the decree until actual sale, the only effect would be that parties having the legal title could, in the meantime, redeem. Per Willard, C. J.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1561; Dec. Dig. ⇐542.]

[4. *Dower* ⇐56.]

If the widow was entitled to dower, her possession after forty days was, nevertheless, a trespass. Per Willard, C. J.

[Ed. Note.—Cited in Cave v. Anderson, 50 S. C. 300, 27 S. E. 693.

For other cases, see Dower, Cent. Dig. §§ 178–188, 197, 198, 206; Dec. Dig. ⇐56.]

[This case is also cited in Ex parte Jenkins, 48 S. C. 325, 26 S. E. 686, and distinguished therefrom, and in Murchison, Executrix v. Miller, 64 S. C. 428, 42 S. E. 177, as an example of the custom of proceeding by rule to show cause in an action for possession.]

Before Hudson, J., Charleston, February, 1879.

In an action by W. L. Trenholm, executor, against John R. Wilson and others, his judgment and mortgage creditors, to foreclose a mortgage, a decree of foreclosure was rendered and the lands were ordered to be sold. Afterwards John R. Wilson died, and after his death the lands were sold under this

decree to F. Schaffer, who complied with the terms of sale and received a deed from the sheriff. The sale was afterwards confirmed by order of court. Schaffer then demanded possession of the widow of John R. Wilson, but she refused to surrender the premises.

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*He then filed his petition and obtained an order requiring Mrs. Wilson to show cause why the petitioner should not be put into immediate possession. Mrs. Wilson, answering the rule, contended that the sale was invalid, as no proceedings had been taken after the death of John R. Wilson to revive the action or decree, and no notice of the sale had been given to the heirs-at-law, and that she was not a party to the original action; that she had a valid claim of dower in the premises, and that such claim could not be determined under proceedings by rule; and that she had instituted an action for the adjudication of all those questions.

The original action was commenced November 18th, 1876, and notice of pendency of action was filed November 21st, 1876. Decree of foreclosure bore date March 21st, 1878.

The Circuit judge discharged the rule. Schaffer appealed.

Mr. H. A. M. Smith, for appellant.

The proceeding by rule is proper. The court will give possession to the purchaser as against parties to the suit, and their privies and all persons claiming under them. 2 Jones on Mort., §§ 1663, 1664; 19 How. Pr. 491. And the proper method is by petition and order in the cause. 4 Johns. Ch. 609; 21 How. Pr. 34; 8 How. Pr. 35. The death of the mortgagor could not prevent the execution of the decree, and the sale was valid. 2 Jones on Mort., § 1584; 3 Edw. Ch. 394; 56 N. Y. 521. If widow is entitled to dower, that gives her no claim against the purchaser. 2 Bail. 103; 4 Rich. 517. The act of 1791 applies only to foreclosures in law court. The heirs-at-law only took what mortgagor had at the date of his death.

Mr. L. De B. McCrady, contra.

Under act of 1791, title is not divested until actual sale. Riley's Eq. 111. At death of mortgagor title passed to his heirs-at-law, who have not been made parties, and whose equity of redemption has not been barred. They alone can object to the widow's possession. They had no constructive notice, for filing of lis pendens was not followed by service of summons. Code, § 155. The heirs are, therefore, rightfully in possession, and

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some *of them being minors, the mother is there having the charge of them. At any rate, the proceedings by rule are within the discretion of the court, and the rule has been refused. 1 Rich. Eq. 70. The heirs were entitled to notice to enable them to redeem, and the widow to enable her to require the personal estate to be applied to the debt. 2 Story's Eq. Jur. 21, and 6 Rich. Eq. 210, were also cited for respondent.

March 12th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This was an application by a purchaser at a sale under a decree for foreclosure to be let into possession, and was resisted by the tenant in possession.

The mortgagor died after decree of foreclosure, and his widow has retained possession of the mortgaged premises since his death. The widow claims that she is entitled to dower in the premises and that she cannot be ousted until her dower is assigned. She also objects that there has been no revival of the suit since the decree, and for that reason the sale was invalid and the purchaser not entitled to be let into possession. The Circuit judge refused the motion and the purchaser appeals.

The decree of foreclosure, rendered during the lifetime of the mortgagor, binds all parties to the suit and all others who have acquired an interest in the mortgaged lands since the notice of lis pendens. The widow claims the title in herself. Her possession of the mortgaged premises appears to have been obtained since decree and by the death of her husband. So far as the execution of the decree involved only the sale of the mortgaged premises, it was capable of being enforced after the death of the mortgagor, and without reviver, being in the nature of a proceeding in rem. Hays v. Thomas, 56 N. Y. 521; Harrison v. Simons, 3 Edw. Ch. 394.

A question has been made as to the effect of the death of the mortgagor upon the capacity of the decree for enforcement without reviver, in view of the fact claimed that by the terms of the decree the equity of redemption is not barred until actual sale of the mortgaged premises under it. Assuming this to be the proper construction of the decree, the only effect would be that the persons entitled to take the mortgaged lands at the

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death of the *mortgagor would be entitled to redeem at any time prior to the actual sale. It is not alleged that any such right of redemption has been exercised or asserted by the parties who succeeded the mortgagor, as it regards the land in suit, nor do such parties resist the appellant's motion to be let into possession as detrimental to such right of redemption. It is not, therefore, necessary to consider the effect of the sale upon the rights of parties occupying that position. The widow of the mortgagor, the only party resisting the appellant, does not assert the possession of an equity of redemption. If she had released her dower to the mortgagee she would be entitled to an equity of redemption. 2 Jones on Mort., § 1067. Her position is, that she is entitled to dower as against the mortgage. Her rights, as claimed, not being subject to the mortgage, she is not

compelled to prosecute them through a mere equity of redemption. As to her, the question of the effect of the outstanding right of redemption upon the validity of the sale has no relevancy.

But the question whether the equities of redemption of certain parties remain unbarred, concerns the operation of the decree for a purpose entirely distinct and different from that of giving efficacy to the sale. A sale for foreclosure may be valid and yet subject to unextinguished equities of redemption. The only question here is, was the decree authority for a sale? It is clear upon reason and the authorities that it was.

Assuming the right of the respondent to dower, still she was a mere trespasser on the land of her husband after the expiration of her quarantine. McCully v. Smith, 2 Bail. 103; Lamar v. Scott, 4 Rich. 516. She could not retain the land as against the heirs of her husband until the admeasurement of her dower, much less as against the alienee of her husband. The appellant having title under the husband's mortgage occupies the place of his alienee.

The refusal of the Circuit judge to grant the motion of the appellant was erroneous, and the order dismissing the petition must be set aside and the case remanded for an order conformable to the prayer of the petitioner.

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*McGOWAN, A. J. I concur. The widow's possession came through her husband, and she is as much bound by the decree as he would be. This does not touch the question of her dower.

McIVER, A. J. I dissent. According to my view, a purchaser at a judicial sale of land cannot resort to the summary proceeding by rule to eject any persons whom he may find in possession, unless such persons are parties to the action under which the land was sold, or their privies; and, as in this case, it does not appear that Mrs. Wilson was either a party or privy to the action, I think the Circuit judge was right in discharging the rule, and that his order should be affirmed.

Motion granted.

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13 S. C. 178

(Case No. 827.)

LEE v. BUCK & CO.

(November Term, 1879.)

[1. *Appeal and Error* ⟸15.]

Where two causes affecting, in part, the same property, were heard together, but not consolidated, the failure to appeal from the judgment in one case is no ground for a dismissal of an appeal in the other.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 60; Dec. Dig. ⟸15.]

[2. *Chattel Mortgages* ⟸265.]

Certain personal property, including a mule, Kit, was mortgaged to A, and the same property was subsequently mortgaged to B, except Kit, which had been, meantime, sold by the mortgagor to C. Upon default, A and B, in concert, seized the property, including Kit, and sold it for more than enough to satisfy A's mortgage, and A paid the balance to B. *Held*, that A was liable to account to C out of such balance for the value of Kit.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 546; Dec. Dig. ⟸265.]

Before Townsend, J, Horry, June, 1877.

Action commenced November 16th, 1875, by Ethel Lee against William L. Buck, B. L. Beaty, Joseph Todd and others, to recover the value of two mules, Kit and Jack. The claim for the value of Jack was abandoned before the hearing of the appeal.

On December 31st, 1872, W. F. Hardee gave to Joseph Todd, to secure a debt, a mortgage upon four mules, Kit, Jake, Pete

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*and Jack. On March 10th, 1873, Hardee sold Kit to Ethel Lee for $200, paid by a credit on a past-due note. May 14th, 1873, Hardee mortgaged the mules Jake, Pete and Jack, and also mule Lucy, and one other, and also some other property, to W. L. Buck & Co., to secure a debt. About the last of May, 1873, plaintiff purchased Jack from Hardee for balance due him by Hardee on his note. Hardee died intestate July 21st, 1873, and four days afterwards, Todd and Buck & Co., in concert, seized all of the above property included in either mortgage, except the unnamed mule, and disposed of them as follows: Todd sold Pete and Jake for $200 each, and kept Lucy at $200; W. L. Buck & Co. sold Kit for $200, and kept Jack at $150. Todd being overpaid, turned balance over to Buck & Co.

Joanna R. Hardee administered upon estate of W. F. Hardee, and as administratrix brought her two actions, one against Todd, and the other against Buck & Co., for an account of the proceeds of these sales. While these actions were pending the plaintiff here brought this action. The three cases were referred to the same referee, and it was ordered that Ethel Lee's case should be heard in connection with Joanna Hardee's cases, on the coming in of the referee's reports. Separate judgments were rendered by the Circuit Court. In this case, he confirmed the report of the referee and gave judgment for the defendants. The defendants appealed upon the following grounds, to wit:

1. That the judge erred in holding that Joseph Todd and W. L. Buck & Co., acting in concert, had not only the right to seize and sell the mouse-colored mule Pete, the black mule Jake, the gray mule Jack, and the wagon and harness, which were covered by both mortgages, and which were taken as being worth $615—over $200 more than sufficient to pay the mortgage of Todd—but

also the black mule Kit, which was not covered by the mortgage to W. L. Buck & Co., having been sold to plaintiff before the last-named mortgage was given.

2. That the judge erred in holding that the proceeds arising from the mule Kit, made by W. L. Buck & Co., were properly applied to the payment of their debt against the estate of W. F. Hardee, though the mule

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was not covered by their *mortgage, but had been sold before its execution to the plaintiff.

3. That the judge erred in holding that even Joseph Todd had the right to seize and sell the mule Kit, under his mortgage, until he had seized and sold the other property secured by his mortgage. And it is submitted, that even then he could only do it upon the other property being insufficient to satisfy the debt secured by the same.

The respondents moved to dismiss the appeal because that appellant could not appeal from the judgment in this case, without also appealing from the judgment in the Hardee cases, as both of said judgments must be taken as one.

Mr. W. D. Johnson, for appellant.

Mr. Joseph Walsh, contra.

March 12th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The respondent moves to dismiss the appeal on the ground that, by an order of the Circuit Court, this cause was consolidated with two others of such a nature that the result of a judgment for the plaintiff in this case would be required to be harmonized with the conclusions of the court in the two other cases, in order to afford the full measure of justice as between the various parties to the consolidated action. The order in question does not assume to consolidate the cases. Its propriety is not put in issue by the present appeal, and we have only to consider its effect. It directs a reference to the same referee who was acting upon the two other causes, and "that on the coming in of said referee's report that the case shall then be heard in connection with the cases of the aforesaid Joanna Hardee against the above defendants." This was not an order for consolidation, but merely for a common hearing of the three cases. There is, therefore, no ground, in fact, for the objection to the appeal of E. Lee. But even if the causes had been consolidated to the extent of giving a single judgment in the three causes, that would not prevent Lee from appealing from so

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much and no more of such judg*ment as, in his opinion, was material to the protection of his rights. He was under no obligation to extend his appeal to embrace matters of interest only to the other parties as involving the proper adjustment of their relative rights among themselves in the contingency of the success of Lee upon his appeal. If the result of his appeal might be such as to disturb the rights of the other parties, as among themselves, it was for them to protect themselves against this contingency by such cross-appeals as the nature of the case might require; but it is no part of the duty of an appellant to furnish to the respondents the means of adjusting, as among themselves, such rights as might be disturbed should he succeed in getting judgment on such appeal. The motion to dismiss the appeal must, therefore, be denied.

The facts, so far as they are necessary to an understanding of the question brought up by the appeal, are these: Hardee mortgaged certain personal property, including the mule Kit, to Todd, and subsequently sold the mule Kit, to the plaintiff, Lee. After the sale to plaintiff, Hardee made a mortgage to Buck & Co. of the same property that he had mortgaged to Todd, except the mule Kit, which had, in the meantime, been sold to the plaintiff. Todd and Buck & Co., on the maturity of the mortgages, seized the mortgaged property, including Kit, and sold it, acting in concert for that purpose. The property brought more than enough to satisfy Todd's mortgage debt, and the balance was paid over by Todd to Buck & Co., on account of their mortgage debt. It is contended by the plaintiff that Todd should have exhausted the other mortgaged property before selling the mule Kit, which had been alienated by the mortgagor to the plaintiff, and that as the sale was made in gross, and the whole fund was more than sufficient to pay Todd's mortgage, the balance should be regarded as representing the value of Kit to the extent that might be proper for that purpose. The referee took a different view, and held that "the concert of action of Buck & Co. and Todd, when three of the mules of Hardee, were in both of their respective mortgages, seems to be proper, their valuation of the property sold and claimed fair, and the distribution equitable," and he accordingly recommends judgment for the defendants in

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the present suit. This conclusion *was sustained by the judgment of the Circuit Court, and that judgment is questioned by the present appeal.

The plaintiff had the right to require that the property mortgaged other than that purchased by him should be sold, and the proceeds applied to the extinguishment of the mortgage before the property he had purchased should be sold. Norton v. Lewis, 3 S. C. 25. No equity that might exist between Todd and Buck & Co., growing out of the fact that Todd's mortgage covered property that could not be reached under Buck & Co's. mortgage, could override the plaintiff's equity, arising from the fact that he was a bona fide purchaser of part of the mort-

gaged property prior to Buck & Co.'s mortgage. So at law, if Todd had seized the whole mortgaged property and sold it for a sum greater than was necessary to satisfy the mortgage debt, and held a balance, the plaintiff, as purchaser of part of the mortgaged property, could have maintained his action against Todd for so much of such balance as properly represented the value of the property purchased by him subject to the mortgage. If Todd could not have paid over that balance to the mortgagor in disregard of plaintiff's title, of which he had notice, then, for the same reason, he could not pay that amount to Buck & Co., who were mere unsecured creditors of the mortgagor, as it regarded the proceeds of the sale of Kit. It must, therefore, be concluded that the balance remaining in the hands of Todd, after satisfying his mortgage to the extent necessary for that purpose, must be regarded as representing the proceeds of the sale of Kit, and Todd must account therefor to the plaintiff.

The fact that the seizure and sale were the joint act of Todd and Buck & Co., does not affect this conclusion. Each of them must be regarded as acting as the agent of the other as well as in his own right. Buck & Co. could not seize and sell Kit in their own right, and must, therefore, be regarded as acting in that regard as the agents of Todd. Such being the case, Todd would stand in the same relation to the matter as if he had acted in his own behalf. The judgment must be set aside, and the cause remanded to the Circuit Court for proceedings in conformity with the foregoing conclusions.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. *183

*(Case No. 828.)

ADRIAN & VOLLERS v. LANE.

(November Term, 1879.)

[1. *Principal and Agent* ⇐119.]

That one acted as agent in selling a tract of land, raises no presumption that he has power, after the contract is executed, to rescind the sale, or to materially modify its terms.

[Ed. Note.—Cited in Knight v. Jackson, 36 S. C. 15, 14 S. E. 982; Guess v. South Bound Ry. Co., 40 S. C. 456, 19 S. E. 68.

For other cases, see Principal and Agent, Cent. Dig. §§ 293, 391–401; Dec. Dig. ⇐119.]

[2. *Exchange of Property* ⇐4.]

A covenanted with B to deliver seven bales of cotton, in installments, the consideration of which was a parol promise by B to give to A, after the delivery of the cotton, a warranty title to a tract of land. *Held*, that the covenant to deliver was not dependent upon the promise to convey.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 4; Dec. Dig. ⇐4; Contracts, Cent. Dig. § 1209.]

[This case is also cited in Knight v. Jackson, 36 S. C. 10, 14 S. E. 982, and distinguished therefrom.]

Before Kershaw, J., Darlington, October, 1879.

Action by Adrian & Vollers v. Stephen Lane, commenced December 31st, 1878. The case is fully stated in the judgment of the Circuit Court, which is as follows:

This action was for recovery of $500 damages for the non-performance of two contracts, under seal, dated February 16th, 1876, whereby defendant covenanted with plaintiffs (of Wilmington, N. C.,) to deliver to them, at Cartersville, S. C., four bales of cotton, of four hundred and fifty pounds each, by November 1st, 1876, and three bales of like weight by November 1st, 1877. The defendant admitted the contracts as set forth, and their non-performance, but set up as a defence thereto, that the consideration was a parol undertaking to sell to the defendant six hundred acres of land, and make warranty title when the price should be paid; that defendant was soon warned not to take possession of said land, by a party claiming title, whereupon he went to the agent of the plaintiffs, who first negotiated the contract, and, being informed by said agent that the plaintiffs would not give the warranty title first agreed upon, notified him that he would no longer recognize his obligation to the plaintiffs.

The case, by consent of parties, was heard by the court.

The defendant was permitted to open and close.

The defence proved that the obligations were given for the purchase of six hundred

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acres of land from the plaintiffs, who *were to give defendant good title when the obligation was paid; that the negotiations were with an agent of plaintiffs; that very soon, and before defendant had taken possession, he was warned by one claiming title, not to take possession; that bringing the matters to the notice of the said agent, he informed defendant that plaintiffs would not give the warranty title first agreed upon, and defendant then gave notice that he would not fulfill his obligations, or have anything more to do with the matter; that defendant never took possession, and plaintiffs have not proposed to make titles upon receipt of the amount stipulated. The defence also proved outstanding paramount title to the land which was the subject of this contract, in another party. The plaintiffs offered no testimony, but insisted, as a matter of law, that the defendant was bound to fulfil his obligations before he could claim the performance of the plaintiffs; that the covenants of the parties were distinct and independent of each other.

Finding the facts in accordance with the above-recited proofs, it is my judgment, as a matter of fact, that the obligations of the parties were mutual and dependent on each other; that the plaintiffs, subsequent to the

making of the contract, distinctly disclaimed their purpose to perform their part of the contract, that defendant was not put in possession under his purchase, and never had possession; and that there was paramount outstanding title. And, as matter of law, upon this state of facts, I am of the opinion that the defendant may plead outstanding paramount title in another as a successful defence to the plaintiffs' action upon these obligations for the purchase money.

It is therefore ordered that the defendant have judgment for his costs and disbursements to be entered by the clerk of this court.

Plaintiffs appealed.

Mr. G. W. Dargan, for appellant.

First. The declarations of Andrews, subsequent to the execution of the contracts, were admitted in evidence. There is no presumption that an agent to sell has power to rescind. Unless the contrary appears, the presumption is that an agent to sell has no power to rescind. 1 Bail. 648. See, also, 2 Rich.

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470; 4 *Strob. 100; 4 Strob. 427; 6 Rich. 221; 7 Rich. 528; 10 Rich. 332, as illustrating the indisposition of our courts to enlarge the implied powers of agents even where the interests of third parties are involved. See, also, 1 Pars. on Cont., *58, et seq., and notes; 5 Wheat. 326. Assuming that the agency of Andrews had not terminated at the time the alleged declarations were made, it does not follow that every declaration made by him in regard to the subject matter in controversy, is binding upon his principal. The declarations of an agent are binding upon the principal only when made as agent, viz., in the discharge of the functions devolved upon him by his agency. In order to bind, declarations must form a part of the res gestæ. 1 Mills' Const. R. 409; 1 Greenl. on Ev., §§ 113, 114, 115, and notes.

From aught that appears to the contrary in this case, Andrews may have spoken simply as an individual, unofficially, and have expressed only his own opinion.

Second. Assuming that the defendant is not discharged, the next inquiry is as to the nature of said contracts.

The promise of the plaintiff to make title after the payment of the obligations of the defendant, cannot fail until the defendant has first performed his duty. The defendant's liability is to be measured by the terms of his agreement. And the pleadings and evidence showing that the plaintiffs were not to perform their said promise until after the defendant had discharged his said obligations, it is respectfully submitted that there was error in holding that the obligation of the defendant was mutual and dependent, and not independent. 2 Pars. on Cont. *527, et seq., and notes; 1 Bail. 217; 2 Mills' Const. R. 56; 42 Miss. 405; 2 Am. R. 601; Id. 671; 42 Miss. 797.

Third. Assuming that the evidence at the trial showed paramount outstanding title in a third party, the defendant is not absolved from his obligations. According to his own evidence, the plaintiffs did not claim to have title when they contracted with him. He made no inquiry in regard to their title, but executed said obligations, relying upon the promise of plaintiffs to make titles when the notes were paid.

Fourth. Its terms being ascertained, the construction of a contract is a question of law. 2 Pars. on Cont. *492, et seq., and notes.

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*Mr. B. W. Edwards, contra.

First. If the agent, who transacted the whole matter, acted by authority at any time, he so acted all the time. He stood between the defendant (who knew no one else in the matter) and his principals, and they are bound by all his acts and declarations. For aught we have of proof, his repudiation of the contract after it was made may have been by special instructions from them. This suggestion receives support from the fact that plaintiffs only bring suit after his mouth is closed, more than a year after the time fixed for the final discharge of defendant's obligations.

That the communication to the defendant of the plaintiffs' purpose not to comply with their contract, and his discovery of their inability to do so, justified him in treating the whole contract as broken—especially as he so notified them through their agent. This doctrine is strongly implied in 33 Ind. 54, (reported in 5 Am. R. 477.) And a similar principle underlies the doctrine of the entirety of a contract so abundant in our reports. See 37 Ind. 1, (reported in 10 Am. R. 62.) So the false representation of plaintiffs as to their right to convey, implied in their promise to convey with warranty, was sufficient to justify the defendant in denying his further liability, when the misrepresentation was discovered, and is a good defence to the action.

Second. The covenants between these parties were mutually dependent, and that the plaintiffs cannot recover without proving at least a tender of performance.

This is a question of intent and meaning; and, perhaps, more a question of fact than of law. If so, the presiding judge has found the fact, and this court will not disturb the finding. It is true that the defendant said "the notes were first to be paid, and then titles were to be made." But this was only a form of statement; that titles were not to be made before "the notes" were paid.

The testimony was, as stated by the judge, that the title was to be given when the obligation was paid. It is evident that this is the true construction, from the fact that the covenants of the contracting parties are evidenced by one instrument only, and the consideration of that agreement, which rests in

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parol, is the cove*nant of the plaintiffs. See 2 Mills' Const. R. 56, and particularly 42 Miss. 797, (reported in 2 Am. R. 671.)

March 12th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover damages for the breach of two contracts, under seal, executed on the same day, whereby the defendant promised, in one of the said contracts, to deliver to the plaintiffs, at a specified place, four bales of cotton, of a specified weight and quality, on November 1st, 1876, and the other promised to deliver to the plaintiffs, at the same place, three bales of cotton, of like weight and quality, on November 1st, 1877. The defendant, in his answer, admitted the execution of the said contracts, which are spoken of in the testimony as notes, and the nonperformance of the same, but set up as a defence the following: "That said contracts were negotiated with one Col. Andrews, who represented himself as acting for the plaintiffs, and that the consideration was a verbal promise or undertaking that plaintiffs would make titles to defendant of a tract of land in said county of six hundred acres, more or less, and warrant and defend the same unto defendant when payment was made; that soon after the making of said contracts, defendant was notified by another claimant that he had paramount titles to said land, and was warned not to take possession upon pain of being treated as a trespasser; that thereupon defendant declined to take possession of said land, and refused to pay the amount stipulated without better assurances, which plaintiffs declined to give, and the said Andrews, for the plaintiffs, notified defendant that the plaintiffs would not give title with the guaranties first stipulated; that the refusal and inability of plaintiffs to make good and sufficient titles to said land absolved defendant from his obligation —never having been in possession; that defendant is willing, and has ever been, to pay the price stipulated for said land, provided the same can be confirmed to him by unshadowed titles, which plaintiffs have never tendered and which defendant denies they are able to give, and defendant challenges title in plaintiffs at all." It will be observed that there is no allegation and there was no proof that the plaintiffs undertook to deliver possession of the land to the defendant. For

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*aught that appears it may be that the defendant bought at a risk and knew that he was so buying. Indeed, if we may be allowed to conjecture upon the subject, it would seem from the price agreed to be paid that the land must either have been of a very inferior quality, or that the uncertainty as to the title and the difficulty of obtaining possession very materially reduced its market value. Be that as it may, however, as in the absence of any proof upon the subject, we have no means of determining which would be the correct inference, there is one thing very certain, and that is that all the plaintiffs covenanted on their part to do was to give warranty titles for the land after the notes (so called) were paid; the language of defendant, in his own testimony, being: "The consideration of the said contracts was a verbal promise to convey, with warranty as to title, a certain tract of wood and swamp land when the notes were paid; that the notes were first to be paid, and then titles were to be made." Now, there is no evidence whatever to show that the plaintiffs have ever refused, or declared their purpose to refuse, to give the warranty titles agreed upon, except that which is supposed to be derived from the declarations of Andrews, which will be presently considered; nor is there any evidence to show that the defendant has ever notified the plaintiffs of their inability to obtain possession of the land, or called upon them to make good their agreement to warrant the title. But defendant relies solely upon proof of certain declarations of Andrews, who was dead at the time of the trial, alleged to have been made a short time after the execution of said contracts, to the effect "that the plaintiffs would not make warranty title as originally promised." This testimony was objected to by the plaintiffs, upon the ground that no declaration of Andrews made subsequent to the execution of the contracts sued upon, would be competent until it was shown that, at the time such declarations were made, Andrews was acting as the agent of the plaintiffs and speaking by their authority. The Circuit judge ruled "that, inasmuch as Andrews had negotiated the original contract, the presumption was that his authority as to the matter continued until the contract was executed or consummated, and therefore his declarations were admissible." To this ruling the plaintiffs excepted, and

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this raises the first ques*tion for our consideration. We think the exception was well taken. The rule that there is no presumption that an agent to sell has power to rescind the sale or materially modify its terms, after it has become an executed contract, is well settled, and is fully sustained by the authorities cited in appellant's brief. Indeed, it does not appear that the declarations here in question even purported to come from Andrews, as agent of the plaintiffs, and may, therefore, have been nothing more than an expression of his individual opinion as to what the plaintiffs would do. Such, indeed, would seem to be the legitimate inference from the testimony of the defendant himself, for, in speaking of this matter, he uses this language: "That Col. Andrews informed him that the plaintiffs would not

make warranty title as promised originally: that he did not know whether or not Col. Andrews spoke by authority from plaintiffs, but presumed he did, as he was their agent." He does not even say that Andrews represented himself as speaking for the plaintiffs, or that he inquired whether such was the fact. But it is manifest that he relied upon the presumption which, as we have seen, is not well founded, that because Andrews was the agent of the plaintiffs in making the original contract of the sale, his agency not only continued, but invested him with the power to rescind the sale or materially modify its terms.

The next question to be considered is, whether the covenants of the parties were mutual and dependent or independent. The first rule laid down by Mr. Sergeant Williams, in his elaborate note to the case of Pordage v. Cole, 1 Wms. Saund. 310, as a test by which to determine whether the covenants of the several parties to a contract are mutual and dependent or independent, is as follows: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act to be performed, an action may be brought for the money, or for not doing such other act before performance, for it appears that the party relied upon his remedy and did not intend to make the performance a condition precedent." This doctrine is recognized and applied in Carter v. Carter, 1 Bail. 217. Now, in the case under consideration, the money

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*was to be paid in installments—that is to say, the cotton, which constituted the consideration of the plaintiffs' promise to convey, was to be delivered in installments—a part of it long before the plaintiffs could be called upon to perform their part of the contract, and, according to the evidence of the defendant himself, all of it was to be delivered before the plaintiffs were bound to perform their covenant, for he says "the notes were first to be paid and then titles were to be made." The fact, if indeed such be the fact, that the plaintiffs had no title, or no valid title, to the land at the time the contract was made, or even at the time this action was commenced, cannot alter the case. Their contract was to convey with warranty, and, for aught that appears, (the declarations of Andrews being incompetent evidence,) this they were ready and willing to do upon the payment of the notes, as they are called. For, though having no title when the action was commenced, they might, for the purpose of enabling them to perform their covenant, have acquired title in time to enable them to do so, as in the case of Davis v. Woodward, 2 Mills' Const. R. 56.

Under the view which we have taken of the case, it becomes unimportant to consider the sufficiency of the proof of the outstanding paramount title. The judgment of the Circuit Court is set aside, and a new trial is ordered.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 190

(Case No. 829.)

CONGDON, HAZARD & CO. v. MORGAN.

(November Term, 1879.)

[1. *Partnership* ⇐160.]

A purchased from B his patronage and good will in the towage business, B agreeing further not to engage, directly or indirectly, in such business. Subsequently B entered into a mercantile partnership with C, and C acted as agent for another in procuring towage business for his tug. *Held*, that B was responsible for all acts of C done under the authority of the firm, or within the scope of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 190; Dec. Dig. ⇐160.]

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[2. *Partnership* ⇐160.]

Held further, that if the firm gave their patronage in the towage business to any other than A, or if C, under the authority he possessed as a member of the firm, acted as agent for another tug, it would be a breach of B's covenant, whether he knew of such employment and agency or not.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 190–300; Dec. Dig. ⇐160.]

[3. *Good Will* ⇐6.]

All acts of the firm in procuring or employing a tug, were breaches of B's covenant.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2–5; Dec. Dig. ⇐6.]

[4. *Trial* ⇐256.]

A general charge, within the limits of which the jury may properly find a verdict, but which fails to define accurately the application of the law to the evidence, is not error, there being no prayer for more specific instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. ⇐256.]

Before Hudson, J., Georgetown, November, 1879.

This action was commenced in May, 1878. The case is fully stated in the opinion of the court. The charge of the judge to the jury was as follows:

Whatever A. J. McQuaid, as a member of the firm of Morgan & McQuaid, did to procure towage for the "Thomas Morgan," would make Arthur Morgan responsible. If the firm of Morgan & McQuaid gave their patronage in the towage business to any than the plaintiffs, whether Morgan knew of it or not, it would be a breach of Morgan's covenant to give his patronage to the plaintiff. McQuaid, acting as the agent of the "Thomas Morgan," (without regard to who was her owner), would be an indirect engagement in the towage business by the firm of Morgan & McQuaid, and hence by Morgan, for Morgan's

capital was in the firm, whether he gave the business his personal attention or not. So that if you believe, from the testimony, that the "Thomas Morgan" was brought here and put into the towage business by the firm of Morgan & McQuaid, or, that while here, that firm gave her their patronage in that business, either would be a breach of his covenant by Morgan not to engage directly or indirectly in the towage business, but to give his patronage to the plaintiffs.

If you find that there has been a breach of the contract by the defendant, the next inquiry will be what damages the plaintiffs are entitled to in consequence of such breach. The only actual damage of which they have given any evidence, is the towage price of three vessels, towed by the "Morgan," one for $42, another for $65, and another, if

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loaded with lumber, for $120, *making $227. But plaintiffs contend that they are certainly entitled to the consideration paid by them, of $4000, with interest thereon from the time of payment. I do not think so. The plaintiffs testified that they are engaged in a general mercantile business, buying rice, distilling turpentine, chartering and loading vessels, and the towage business; and that their business of towage is so interwoven and involved with their general business, that the breach of this contract has inflicted injury on them outside of the towage business, and in respect to their general business, but that they are unable to state the amount of such loss. This is about all the testimony on the subject of damages. In estimating damages, you will first take the sums in evidence, as the price of the towage of the three vessels, and allow such further sum short of $10,000, as, in your view, the plaintiffs may have suffered in their business generally, on account of the breach of this bond. Damages is a question for your consideration entirely.

To this charge, the defendants excepted. Verdict for plaintiff for $6951.34.

Defendants appealed.

Mr. R. Dozier, for appellants.

McQuaid was partner of Morgan, and, as such, was general agent of Morgan within the scope of the partnership. Story on Part., § 101; 3 Kent 40–42. A partner dealing outside of the partnership business is presumed to be acting for himself; and so he must be regarded by all who deal with him. 3 Kent 41–44; Story on Agency, § 125; Sm. Merc. Law 70. Morgan's covenant did not prohibit him from entering into a partnership to carry on a mercantile business; if it did not prevent him, it could not prevent McQuaid. McQuaid, notwithstanding the partnership, could engage in the towage business; and his acts, as such, were not the acts of Morgan. As a partner, he had no right to make towage engagements binding upon the firm. And if such engagements do not bind the firm, they cannot bind an ignorant partner. Story on Part., § 126. But the judge's charge makes Morgan responsible for acts done outside of the partnership, without his consent or

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knowledge. *Id., §§ 168, 168a, 177. And if McQuaid could act for himself, without prejudice to Morgan, he certainly could act as agent for another.

As to the measure of damages, the learned counsel cited Sedg. on Meas. of Dam, *200, *210, *229; 2 Greenl. on Ev., §§ 254, 256, 261; 1 McM. 115; Sedg. Lead. Cas. 332, 127, 136, 543, 159, 271, 247; 2 Speers 550; 1 Pet. C. C. 86; Dud. 182; 8 Reporter 123, 300, 670; 35 N. Y. 210; 62 Penna. St. 353; 27 Geo. 481; 15 M. & W. 117; 10 S. C. 450; 14 Rich. 186.

Messrs. Simonton & Barker, contra.

March 12th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This action was upon a money bond, with a condition in the nature of a covenant by which the obligor agreed to withdraw from the towage business in the port of Georgetown, and he would not, "directly or indirectly, engage therein again for and during the period of twenty years;" that a certain tug therein named belonging to the obligor should not be used for that purpose by any person to whom the same might be sold for two years, and should not be used for that purpose by the obligor for twenty years; and the obligor further covenanted to "give his own patronage in the towing business" to the plaintiffs, or the survivor of them, and to "give them his good will in their said business of towage in and for the port, harbor and waters of the said town, for and during the said period."

The complaint alleges a breach and damages resulting therefrom, and demands judgment for the penalty of the bond. The facts of the case, so far as they are necessary to the understanding of the questions of law brought up by the appeal, are as follows: The obligor had, previous to the giving of the bond, been engaged in the towage business, using the tug named in the bond for that purpose, and the plaintiffs, being desirous of carrying on such business, paid a large sum as the actual consideration of the obligation assumed by the defendant, by which it was agreed in substance that the obligor should

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retire from competi*tion with the plaintiffs in said business, and would give them his good will and patronage. The defendant subsequently became a member of the mercantile firm of Morgan & McQuaid. The son of the obligor undertook to carry on the business of towage at that port during the time to which the covenant related, and McQuaid, the partner of defendant, acted as his agent. The question at issue was whether the defendant was, in law or in fact, implicated

directly or indirectly in the conduct of this competition with the business of the plaintiffs, and whether he is answerable for withholding his good will and patronage, contrary to his covenant, from the plaintiffs in the conduct of said business.

The Circuit judge charged "that whatever A. J. McQuaid did, as a member of the firm of Morgan & McQuaid, to procure towage for the Thomas Morgan, would make Arthur Morgan responsible." The Thomas Morgan was the vessel that was introduced in the business subsequently to the bond in competition with the plaintiffs. We must understand this as in effect charging that what McQuaid did with the authority of the firm of Morgan & McQuaid, must be regarded as having the same effect, as it regards the covenant, as if done by the obligor himself, who was a member of said firm.

When a partner acts within the scope of the partnership business, and in the due exercise of the partnership authority, he is the agent of each member of the firm individually, and of all the partners collectively. Such being the case, the act of McQuaid was the act of Arthur Morgan, his partner, when done within the scope of his partnership authority; and if the conduct of the competing business, or the interference with the good will of the business transferred, or the withholding of patronage under the control of the defendant was accomplished through the authority which McQuaid derived from defendant as his partner in any respect, the liability of the defendant is the same as if such acts had been done by him personally.

The ground of the next exception is the charge that "if the firm of Morgan & McQuaid gave their patronage to the towage business to any other than the plaintiffs, whether Morgan knew it or not, that would be a breach of Morgan's covenant to give his patronage to the plaintiffs." The knowledge

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of Morgan was *immaterial. As his covenant, in this respect, was to perform a positive act, namely, to give his patronage to the plaintiffs, the only material inquiry is whether such act was performed. Ignorance on the part of Morgan of what was done by those acting by his authority cannot be alleged, for he was bound to activity in performing his covenant, and that would involve the duty of informing himself as to the reasonable and proper means of performing his agreement.

The court further charged that "McQuaid, acting as the agent of the Thomas Morgan, (without regard to who was her owner,) would be an indirect engagement in the business by the firm of Morgan & McQuaid, and hence by Morgan, for Morgan's capital was in the firm, whether he gave the business his personal attention or not."

Clearly, the agent, through whom a business is conducted, may, with propriety, be said to be engaged in the business, whether compensated by an interest in the profits of the business or in some other way.

Reading this part of the charge in connection with what preceded it, it is clear that it was intended by the judge, and understood by the jury, that the agency of McQuaid must be under the authority that he possessed as a partner of the firm of Morgan & McQuaid, to have such effect upon Morgan. The point of this part of the charge was that Morgan's personal knowledge was immaterial to the question of the effect of the interest that Morgan & McQuaid had in the agency, conducted by McQuaid. It cannot be assumed that it was either intended or understood that McQuaid's agency, independent of the interest that the firm had in such agency, could produce the effect pointed out by the charge. In this view, this part of the charge is free from error.

Again, the court charged: "If you believe that the Thomas Morgan was brought here and put into the towage business by the firm of Morgan & McQuaid, or that while here, that firm gave her their patronage in that business, either would be a breach of the covenant by Morgan not to engage, directly or indirectly, in the towage business, but to give his patronage to the plaintiffs." This charge was entirely free from error. After making the covenant, the obligor had no right

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to place himself in such a *position as to be unable to perform his engagements therein contracted; so that even if he had been unable, as a partner of the firm of Morgan & McQuaid, to control the conduct of the business of such firm in harmony with his obligations towards the plaintiffs, that fact would not excuse him. But the ability of Morgan to control the conduct of the partnership has not been put in question, and it must be assumed, that had an effort been made for that purpose, he would have succeeded in so doing.

We find no error in the charge as to the measure of damages. The important part of the charge on this subject, is as follows: "In estimating damages, you will first take the sums in evidence as the price of the towage of three vessels, and allow such further sum short of $10,000, as, in your view, the plaintiffs have suffered in their business generally, on account of the breach of this bond." This charge is viewed by the appellant as violating the rule that confines damages to that which results as the natural consequence of every act complained of, and excludes remote and contingent damages. It does not appear to us that such is the effect of the charge. The inquiry which the charge pointed out to the jury, did not relate to the connection that must exist between the act of wrong and the damages entailed by it in order to satisfy the rules of law, but solely to the character of the subject of damage—that is, the nature of the business, which, under the covenant,

could be alleged to have sustained damage. The defendant appears to have contended that only the immediate profits of the business of towage could be made the subject of damage, while the plaintiffs contended, that, through the relations of the towage business to the general mercantile business of the plaintiffs, damage to their general business could be considered. It was for the jury to say whether the towage business, from its nature, and from the mode in which it was conducted in the port of Georgetown, was an accessory of a general mercantile business, or a separate and distinct business by itself. If, in the view and contemplation of the parties, apparent from applying the terms of the covenant to the character of the business to which it related, the business of towage was a valuable feature of a grand mercantile business, then damage to such mercantile

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*business would be within the intention of the parties, and the jury could have found, where such damage was direct and immediate, that the plaintiffs have "suffered in their business generally, on account of the breach of the bond." It was competent for either of the parties to have obtained the necessary instructions to direct the jury in making such an inquiry, but no such instructions appear to have been sought, and no charge on that point given, so that it must be assumed that the jury had in view the proper understanding of the nature of the inquiry submitted to them in this part of the charge, and the limits under which it was possible for them to say that the plaintiffs had sustained damage in their general business through the breach of the bond. They were instructed to inquire whether the plaintiffs may have "suffered in their business generally, on account of the breach of the bond." Admitting that they could not suffer damages in their business generally, on account of the breach of the bond, unless there was such a connection between their general business and the particular business of towage, according to the intention of the agreement, construed with reference to the nature and customary mode of conducting such business, that an act of wrong committed in violation of the terms of the covenant would naturally and directly inflict damage upon such general business as would be the case where the business of towage was understood and intended as a mere auxiliary to the general business of the firm, still, if the jury properly applied all the legal rules pertinent to such an inquiry, which, it must be assumed, they did, no ground exists to assume that their verdict was improperly influenced by the charge, though exceedingly general in its nature. When a charge is general, as it is in the power of the parties to cause it to be made specific through the medium of proper prayers for instructions; if this is neglected, the charge will be sustained if any reasonable view can be taken of it that will harmonize it with the rules of law. The parties having the right, by properly directing the attention of the Circuit judge to what they deem material propositions of law, to secure an exact and particular application of the rules of law to this evidence, if they do not employ these means, they should not be at liberty to complain

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*of the indefiniteness of the charge. A general charge is not expected to distinguish accurately the line that separates matters of fact and law. If, then, the charge leaves it to the jury to define for themselves the nature of that damage which the law contemplates as the natural result of the breach of the bond, and the parties are prejudiced thereby, such prejudice must be ascribed to the want of specific instructions, and the want of such instructions in the present case to the absence of prayers for such instructions.

The exceptions must be overruled, and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 198

(Case No. 830.)

STATE, ex rel. McCALL, v. COHEN.

(November Term, 1879.)

[1. *Certiorari* ⇐28.]

A judgment rendered by an inferior court against a party not brought within its jurisdiction by proper service of process, may be set aside under proceedings by certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 33, 41; Dec. Dig. ⇐28.]

[2. *Justices of the Peace* ⇐197.]

A motion made before a trial justice to vacate, upon jurisdictional grounds, a judgment rendered by him, does not preclude proceedings by certiorari in the Circuit Court for the same purpose, where the want of jurisdiction appears upon the face of the record.

[Ed. Note.—Cited in State ex rel. Nesbitt v. Marshall, 24 S. C. 508, 509, 510; State ex rel. Sawyer v. Fort, Id., 519; Benson v. Carrier, 28 S. C. 121, 5 S. E. 272; State v. Wyse, 33 S. C. 594, 12 S. E. 556.

For other cases, see Justices of the Peace, Cent. Dig. § 770; Dec. Dig. ⇐197.]

[3. *Process* ⇐51.]

A service by one styling himself a constable would not be sufficient service, in the absence of a duly authorized appointment in writing for such purpose, there being no regular constables in this state elected as required by the constitution.

[Ed. Note.—Cited in Tinsley v. Kirby, 17 S. C. 6; Prince v. Dickson, 39 S. C. 483, 18 S. E. 33.

For other cases, see Process, Cent. Dig. §§ 57, 58; Dec. Dig. ⇐51.]

[4. *Process* ⇐127.]

Proof of service by a constable can be made to appear only by his affidavit.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 155, 157; Dec. Dig. ⇐127.]

[5. *Appearance* ⟸26; *Process* ⟸67.]

A voluntary appearance, to be binding upon the defendant, under Section 162 of the code of procedure, as the equivalent of personal service, must be made before judgment.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 156; Dec. Dig. ⟸26; Process, Cent. Dig. § 54; Dec. Dig. ⟸67.]

[6. *Justices of the Peace* ⟸82.]

[Where the record of a case decided by a trial justice showed that the following indorsement had been made on the original summons: "Served in person by Calvin Josey, May 7, 1877. Distance, eighteen miles for each"—*held*, that it failed to show that the defendant had been served with process.]

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 263; Dec. Dig. ⟸82.]

[7. *Judgment* ⟸497.]

[Cited in Barron v. Dent, 17 S. C. 80; Cothran v. Knight, 47 S. C. 243, 25 S. E. 142; State of South Carolina ex rel. J. Fraser Lyon, Attorney General, v. State Dispensary Commission, 79 S. C. 321, 60 S. E. 928; State ex rel. People's Bank of Greenville v. Goodwin, County Supervisor, 81 S. C. 428, 62 S. E. 1100; State ex rel. People's Bank of Greenville v. Goodwin, 59 S. E. 37, to the point that if the jurisdictional facts do not appear on the record the judgment is a nullity, wherever and however encountered.]

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. ⟸497.]

Before Wallace, J., Darlington, March, 1879.

This was an application to the Circuit Court, in June, 1878, for a writ of certiorari, commanding a trial justice to certify the record of a judgment rendered by him in fa-

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vor of the defendants *here against the relator, and setting forth several matters upon which it was claimed that the judgment was erroneous, and that the trial justice was without jurisdiction of the case. The judgment was entered May 28th, 1877. In August, 1877, the relator here moved before the trial justice to set aside the judgment upon the ground, inter alia, that no action was ever commenced in the manner required by law. This motion was refused and no appeal was taken. On July 14th, 1877, McCall had written to the trial justice, saying: "The last of April I was handed by one clerk, in Kuker's store, a demand from you to pay, in twenty days, the amount of $14.57, or you would give judgment against me for that amount; never legally served. But the next day, rather than appear at your court, I sent, per express, the amount," &c. The defects in the service of the summons by the constable are fully set forth in the opinion of the court.

The Circuit judge ordered the judgment and executions to be set aside and annulled, with costs; and the defendant appealed.

[For subsequent opinion, see 16 S. C. 445, 42 Am. Rep. 641.]

Mr. R. K. Charles, for appellants.

The writ of certiorari is not a writ of right, and should not be granted when the allegations of error do not appear to be well founded. Such error must be an error of law of a jurisdictional character. 12 S. C. 111. There was another adequate remedy. 16 Stat. 60; 1 Bail. 457; Powell on App. Proc. 349, § 4. The return to the writ exhibits no error of jurisdiction on the face of the proceedings, and this is conclusive in certiorari. Id. 353, § 5. The only alleged jurisdictional error is want of service, but that was cured by his voluntary appearance and motion to set aside the judgment; and appeal was his only remedy. 1 Bail. 294.

Mr. B. O. Townsend, contra.

Trial justices are an inferior court, (2 S. C. 404) and can exercise no jurisdiction not expressly authorized by statute. 5 Cr. 184. When jurisdiction is exceeded, certiorari is the proper remedy. 2 Hill 369; 9 Rich. 292; 12 Rich. 44; 9 S. C. 303; 1 El., B. & E. 100; Hill on New Trials, 692-696; 22 Ill. 333. The trial justice was guilty of usurpation of

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jurisdiction, appa*rent on the record, in this: that as no constables are elected in Darlington, and no special appointment of constable appears in writing on the record (Gen. Stat. 205, § 2,) for reasons founded on Sections 122 and 161 of the code, the action was not known to have been commenced when the judgment was rendered. The relief granted in this case was proper. Hill on New Trials, ch. XX.

March 15th, 1880. The opinion of the court was delivered by

McIVER, A. J. The object of this proceeding was to review, by certiorari, a judgment rendered by a trial justice. Such a writ cannot be demanded as a substitute for an appeal, (State v. Steuart, 5 Strob. 29,) and, therefore, if the grounds upon which it was demanded were such as could have been presented by appeal, the writ should not have been granted. But if it appears from the return that the inferior tribunal to which it was directed has undertaken to render judgment in a case of which it had no jurisdiction, or against parties who have not, by proper process, been brought within its jurisdiction, then the writ was properly granted. In this case the allegation is that the trial justice proceeded to render judgment against parties who had not been served with process or otherwise legally been made parties to the action in which the judgment was rendered. It also appears that this question was submitted to the decision of the trial justice by a motion to set aside the judgment; and it is contended that by so doing the respondent, under the rule laid down in State v. Scott, 1 Bail. 294, has precluded himself from raising the question of jurisdiction in this form, and can only do so by appeal from the decision of the trial jus-

tice on the motion to set aside the judgment. It is very true that the rule laid down in that case is that where a party submits a question of jurisdiction to the inferior court, its decision of such question has the same binding force as its decision of any other question submitted to it, and that any error in this respect must be corrected in the same manner as any other errors are corrected, viz., by appeal. But the exception to the rule is recognized by the same case; and that is, where the want of jurisdiction is apparent upon the face of the proceedings

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themselves. So that if the proceedings *before the trial justice in this case fail to show upon their face that the parties against whom the judgment in question was rendered were ever brought within the jurisdiction of the trial justice before the judgment was rendered, then there was such a jurisdictional defect as was reviewable by the Court of Common Pleas under the writ of certiorari, notwithstanding the fact that the party seeking the writ did submit the question of jurisdiction to the trial justice by his motion to set aside the judgment. For the rule in regard to inferior courts is, that "nothing shall be intended to be within the jurisdiction that is not expressly averred so to be." So that if the proceedings show upon their face a want of jurisdiction, or fail to show that which was necessary to confer jurisdiction, the whole is an absolute nullity, and "it is of no consequence in what way the defect is brought to the view of the court." Devall v. Taylor, Cheves 5.

Upon looking into the proceedings it appears that the original summons contains the following endorsement: "Served in person by Calvin Josey, 7th May, 1877. Distance eighteen miles for each." Giving to this very informal return the construction most favorable for the appellants, it only amounts to a return that Calvin Josey, styling himself a constable, personally served each of the defendants on the day stated with a copy of the summons. This, however, is not sufficient. An action cannot be commenced except by the service of a summons, or by delivering it to the sheriff or other officers of the county, with the intent that it shall be actually served, (Code, § 122,) and the only evidence of service is either by certificate of the sheriff, if served by him, or, if by another person, the affidavit of such person, or the written admission of the defendant, (not to mention service by publication, which is wholly inapplicable to the present case.) Code, § 161. The court is bound to take judicial cognizance of the fact that there is no such officer in the state as a regular constable, inasmuch as the constitution provides that such officer "shall be chosen in each county by the qualified electors thereof, in such manner as the general assembly may direct," (Const., Art. IV., § 21,) and the statute book fails to show that any such direction has ever been given. Hence the only authority which Calvin Josey could have

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for styling himself constable, would be *an appointment, in writing, by a judge, trial justice or coroner, for a particular occasion, (Gen. Stat., ch. XXVI., § 2, 205, as amended by the act of 1873, 15 Stat. 512,) and no such authority appears or is alluded to anywhere in the proceedings. The action, therefore, could not be commenced by the delivery of the summons to Calvin Josey, inasmuch as he does not appear to have been either "the sheriff or other officers of the county," and there is no legal evidence that it was ever served upon any one; for, even if served by Calvin Josey, who, as we have seen, was not an officer, that fact could only be made to appear by his affidavit, which is wanting, as is likewise any evidence of a written admission of service by the defendants, or either of them.

But when we look further into the return to the writ of certiorari and examine the affidavits offered on the hearing of the motion to set aside the judgment, it appears, fully, not only that Calvin Josey did not serve the summons himself, but that he did not know whether it was served by any one else. It seems to us, therefore, that it appears upon the face of the proceedings themselves that the trial justice never acquired jurisdiction in the case against the defendants, and that his judgment against them was, therefore, a nullity, and may be so declared in proceedings by certiorari.

What is termed the voluntary appearance of the defendant on the motion to set aside the judgment, cannot be regarded as equivalent to personal service of the summons, (Code, § 162,) for that, manifestly, has reference to an appearance before judgment is rendered, while here what is called the appearance was after judgment. So, too, the letter written by L. A. McCall to the trial justice, which is treated by that officer as an acknowledgment, in writing, of the service of the summons, is insufficient for that purpose, for that also was written long after the judgment was rendered, and the question is as to whether the trial justice had acquired jurisdiction as against the defendants at the time he rendered judgment against them.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

13 S. C. *203

*(Case No. 831.)

MITCHELL v. PINCKNEY.

(November Term, 1879.)

[1. *Judicial Sales* ⇐53.]

In sales of land, particularly by public officers, a warranty cannot be implied; and, therefore, to an action for the purchase money, the defence of failure of consideration growing out of a breach of the contract, cannot be sustained. Cases cited.

[Ed. Note.—Cited in City of Charleston v. Blohme, 15 S. C. 125, 40 Am. Rep. 690; Latimer v. Wharton, 41 S. C. 508, 511, 19 S. E. 855, 44 Am. St. Rep. 739.

For other cases, see Judicial Sales, Cent. Dig. §§ 104–107; Dec. Dig. ⇐53.]

[2. *Judicial Sales* ⇐53.]

But where there is a misrepresentation as to quantity which misleads a purchaser exercising proper diligence, he is entitled, in an action for the purchase money, to an abatement for the value of the deficiency.

[Ed. Note.—Cited in Thompson v. Wofford, 13 S. C. 219; City of Charleston v. Blohme, 15 S. C. 126, 40 Am. Rep. 690; Lessly v. Bowie, 27 S. C. 197, 3 S. E. 199; Lyles v. Haskell, 35 S. C. 405, 14 S. E. 829; Godfrey v. E. P. Burton Lumber Co., 88 S. C. 136, 70 S. E. 396.

For other cases, see Judicial Sales, Cent. Dig. §§ 104–107; Dec. Dig. ⇐53.]

[3. *Judicial Sales* ⇐53.]

Where, however, the purchaser, after his bid, becomes informed of the deficiency, and then complies with the terms of sale by giving his bond and mortgage and accepting title deeds, he thereby waives such defect.

[Ed. Note.—Cited in Latimer v. Wharton, 41 S. C. 515, 19 S. E. 855, 44 Am. St. Rep. 739; People's Bank of Greenville v. Bramlett, 58 S. C. 482, 36 S. E. 912, 79 Am. St. Rep. 855; Coleman v. Whittle, 79 S. C. 216, 60 S. E. 523, 128 Am. St. Rep. 841; Virginia-Carolina Chemical Co. v. McLucas, 87 S. C. 357, 69 S. E. 670.

For other cases, see Judicial Sales, Cent. Dig. §§ 104–107; Dec. Dig. ⇐53.]

[4. *Mortgages* ⇐415; *Partition* ⇐109.]

Having taken possession, the expenditure meanwhile of large sums upon the property, and a notification to the officer who made the sale that an abatement would be claimed on account of the deficiency, does not affect the waiver.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1220; Dec. Dig. ⇐415; Partition, Cent. Dig. § 388; Dec. Dig. ⇐109.]

Before Hudson, J., Charleston, March, 1879.

Nothing need be added to the statement of the case contained in the opinion of the court, except the Circuit decree, which is as follows:

This cause was heard upon the pleadings and the testimony taken before the referee.

The action is for the foreclosure of a mortgage, given for the purchase money of certain lots of land, with machinery, buildings and structure thereon, known as the Tyler Cotton Press. The defence is a partial failure of consideration.

It appears that on March 19th, A. D. 1874, under certain proceedings had in this court, in a cause entitled Gibbes v. Gourdin and others, several lots of land, with machinery, buildings and structures thereon, known as the Tyler Cotton Press, exhibited upon a plat, were sold at public auction in the city of Charleston, R. Q. Pinckney, a defendant herein, became the purchaser, and went immediately into possession of the property. There was some question whether this was with the consent of the parties. But it does not affect the case.

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*Before complying with the terms of sale, which were part cash and a part credit, he placed the muniments of title in the hands of his attorneys for examination.

During the examination it was discovered by the attorneys employed by him that the title of one of the lots, supposed to be a part of the Tyler Cotton Press, was in a third person.

This discovery was communicated to the defendant Pinckney, but was made known to no one of the parties in the suit or their attorneys, who, it is clear from the testimony, knew nothing of it. Notwithstanding this discovery, Pinckney, under the advice of his counsel, complied with the terms of sale, paid in the cash portion of the purchase money, and executed the bonds and mortgage to the full amount of his bid. These are the bonds and mortgage now in suit. The next day he gave notice of the deficiency.

It is the law of this state, that a purchaser, even at public sale for partition, by an officer of the court, may protect himself from any deficiency in the quantity or defect in the title of land, as well as personalty sold, in an action for the recovery of a bond or note for the purchase money. He can avail himself of this defence, if he purchased innocently, without notice of this defect.

As matters of fact, I find in this case that Pinckney had a general knowledge of the Tyler Cotton Press property before the sale, and of the purpose for which it was intended and used. That the plat referred to in the advertisement of sale, and which was a part of the title, in itself contained enough to put him upon the inquiry. That he completed purchase with full knowledge of the alleged defect in the title, after full notice thereof, and notwithstanding such notice, and that he cannot avail himself of such defect in this suit. It is ordered, &c.

From this decree defendant appealed.

Mr. G. R. Walker, for appellant.

The equitable rule is in favor of the purchaser; "that although he can not have a partial interest forced upon him, yet if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, and chooses afterwards to take as much as he can get," he has a right "to insist on that

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with compensa*tion for the defect." Adams'

Eq. *91, and cases cited in note. This doctrine is the law in this state. 1 Bay 276; 2 Id. 11, 558; 1 McC. 121; 1 N. & McC. 78; 2 Id. 76; 9 Rich. 515; 9 S. C. 287; 17 Ves. 395; Harp. 441. Misrepresentation, when coupled with failure of consideration, is even stronger ground for such recoupment. 1 Bay 277; 2 Bay 17; 4 Reporter 238, 271.

The purchaser having gone into possession in March, having begun repairs, and incurred heavy obligations prior to the discovery of the misrepresentation and deficiency, he could only comply with the terms of sale and ask recoupment. Kerr on F. & M. 338–9.

And courts of equity will certainly relieve from the effects of misrepresentation. Id. 53–4; 1 N. & McC. 81; Waterman on Set-off 570, 571; Rice 325; 1 McC. 121. And such misrepresentation, though unintentional, is, nevertheless, a fraud perpetrated upon the purchaser. Kerr on F. & M. 53–4, 56–68. But the plaintiff knew that she had already sold lot No. 1. The doctrine of caveat emptor does not apply to judicial sales where there is mistake, fraud or failure. In partition proceedings the sheriff is the agent of the parties. Cases above cited. See, too, 10 S. C. 164. And the facts clearly show that there has been no waiver by the defendant.

Mr. H. E. Young, contra.

There was no deficiency in the quantity of the land sold. Defendant and his partners bought the Tyler Cotton Press and have got it. 2 Mills' Const. R. 100; Harp. 290; 1 Rich. 491; 2 Id. 485; 2 Strob. 374; 3 Id. 127; Rice's Eq. 55; 1 Rich. Eq. 427; 2 Johns. 37; 6 Binn. 102. If there was deficiency, defendant is entitled to no abatement of price, as the contract was executed with full knowledge of the deficiency. Story's Eq. Jur., § 202; 2 Kent 473; 4 Id. 554; Sudg. on V. & P. 399, 403, 506, 680, 685; 4 N. H. 397; 4 Wall. 232; 2 Wheat. 15; 9 Id. 616; 1 Bay 276; 2 Bay 11; 1 McC. 121; 2 Spears 9; 2 Strob. Eq. 154; 1 Rich. Eq. 409; 6 Rich. 361; 9 Id. 516. Taking possession, as Pinckney did, was a waiver of all objections to the title. Sudg. on V. & P. 168, 398, 506, 682;

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L. R., 9 Eq. 51; *2 Exch. 783; 1 Jac. & W. 221; McC. Ch. 405; McM. Eq. 59; 4 Desaus. 134; 3 Strob. Eq. 171; 1 Rich. Eq. 407; 4 Rich. 114, 9 S. C. 35.

Messrs. C. H. Simonton and W. H. Brawley, on same side.

Mr. J. B. Campbell, in reply.

March, 15th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. A. R. Mitchell, Robert Mure, S. Gourdin and James S. Gibbes, as A. R. Mitchell & Co., were the owners of the property in the city of Charleston known as "The Tyler Cotton Press," which consisted of the cotton press proper and several small lots adjacent. All the parties died except J. S. Gibbes, who, as survivor, in order to partition the property, instituted proceedings against the heirs and representatives of his deceased partners, entitled James S. Gibbes v. Anna J. Gourdin and others.

In this case an order was made for the sale of the partnership property, including the cotton press and the lots attached to it. On March 19th, 1874, the referee in the case, A. M. Huger, for the sheriff, C. C. Bowen, had the premises sold at public auction, upon the terms of one-fourth cash and the remainder in three equal annual installments. The sale was made under published advertisement, prepared by the referee "from the best sources in his possession," which was read at the sale, and which, so far as this property is concerned, is as follows: "All that lot, piece or parcel of land, known as the Tyler Cotton Press, with the buildings, tenements, hereditaments, machinery, steam engines, fixtures, presses and appurtenances thereunto belonging, situate, lying and being on East Bay street, Longitude lane and Church street, in the city of Charleston, which said lot of land is made up of several lots of land, and is generally described as follows: Butting and bounding to the east partly on East Bay street, and partly on land belonging to Godard Bailey; to the south, on lands now or late of estate Heilbron and estate Kirkpatrick; to the north, on Longitude lane, on land formerly of Miss Copdeville, and on land formerly of Godard

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Bailey; and west, on *Church street, and land formerly of estate of Miss Copdeville, measuring and containing on the east line, seventy feet eight inches, on the south line, four hundred and forty-one feet eleven inches, west, on Church street twenty-five feet, on the north line on lot of Miss Copdeville, one hundred and twenty-seven feet eleven inches, then north to Longitude lane, one hundred and forty-six feet six inches, then south twenty-five feet, then easterly again, two hundred and thirty-nine feet three inches; all of which is particularly and accurately described in a plat of five lots situated in Ward 1, belonging to the Tyler Steam Cotton Press Company, made by R. Q. Pinckney in June, 1853, and recorded in Plat Book A No. 1, page 89."

At the sale, the appellant, R. Q. Pinckney, † for himself and others, including James S. Gibbes, the plaintiff, bid off the property, and he now makes defence, insisting on an abatement of the purchase money to the extent of the value of one of the lots connected with the cotton press, and known as lot No. 1, which, he alleges, was embraced in the sale, but as to which the consideration has failed. It is not easy to make the facts clear, as the plat cannot accompany this judgment, but

†The surveyor and the purchaser bear the same name, but are different persons.—REPORTER.

we will endeavor to make them intelligible. The plat referred to was exhibited. It represented the cotton press proper, which was a well-known property, and adjacent thereto other small lots marked Nos. 1 and 2. The lots marked Nos. 3, 4 and 5, as we understand it, were parts of the cotton press proper. The lot No. 1, about which this controversy has arisen, lies in the southeast corner of the premises covered by the plat, is shaded blue, all the other parcels being yellow, and in reference to it, the plat has on its face this memorandum: "Note—Since the above survey was made, the parties interested in the purchase of the lots Nos. 1 and 2 have consented to make the south side of the passage the north boundary of the lot No. 1, which is now shaded blue. Done this day of June 28th, 1853, and signed R. Q. Pinckney."

Immediately after the sale, the appellant employed his attorney to look into the titles,

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and, pending the examination, *took possession of the press and received the proceeds of its business. After controversy, as to who should make the title and several orders on the subject, finally the sheriff executed a deed of the premises, usual in such cases, without warranty, but describing the property in the terms of the advertisement, and left it in the hands of the referee as an escrow, pending the delay incident to the examination of titles. April 14th, the attorney of appellant wrote to the referee, saying: "Our clients have instructed us to pay over to you the first installments of the purchase money on receiving proper deeds of conveyance." A few days after—certainly not later than May 1st—the attorney of appellant discovered that lot No. 1, at the time of the sale, was not the property of the vendors, but, some time before the filing of the proceedings in partition of James S. Gibbes, had been sold to another, whose tenant was in possession. Correspondence was afterwards had as to who should make the title, but no reference was made to the alleged deficiency until June 3d, when notice of it was given to the sheriff by letter, left at his office, which he did not receive until the next day, and possession of lot No. 1, or abatement for its value demanded, which was declined. The next day, June 4th, the appellant, through his attorney—without saying anything about the deficiency—paid to the referee the cash installment with interest from the day of sale and executed for the whole credit portion of the purchase money, four bonds, amounting in the aggregate to $9750, and "mortgage of the premises to secure the same, in compliance with the terms of sale." June 5th, he demanded from the referee possession of lot No. 1, "as we have complied with our part of the terms of sale," and notified him in writing not to assign bonds or distribute the cash which he had paid him the day before. Under this notice, the referee refused to deliver title deed, which had been retained to make endorsements, and offered to return money, bonds and mortgage. Appellant made some application to Judge Graham (it is not before us) to compel the referee to deliver title deed and for abatement, which was dismissed without prejudice, and does not further affect the case. The notice which the appellant had given to the referee not to pay out was "annulled without prejudice," and demand for title deed to

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the *"Tyler Cotton Press" renewed, which was delivered to him July 2d. The four bonds executed to C. C. Bowen, sheriff, were divided among the parties in interest. One of them was assigned to Miss Anna R. Mitchell, as executrix of A. R. Mitchell, deceased, and upon that she instituted these proceedings to foreclose the mortgage. The appellant, in his answer, renews his claim for "an abatement as a recoupment on the face of the bonds," to the extent of the value of lot No. 1. The Circuit judge refused to allow the defence, and decreed a foreclosure for the whole amount of the unpaid purchase money, and from that decree the appeal comes to this court.

Some of our cases have gone very far in allowing such defences. The grounds upon which they have been placed are not always clear, and sometimes apparently inconsistent. But the view which underlies them all seems to be this: That an action for the price of property is in some sort a proceeding to enforce a contract, and the equitable principle applies of refusing aid to enforce it except in such way as to do justice between the parties. It may be that this tendency has been increased by a desire to prevent multiplicity of suits, and by not always keeping in view the difference between real and personal property. But by whatever cause produced, we are satisfied that these discrepancies are more apparent than real, and that the rulings, as distinguished from the dicta of the cases, can be vindicated upon well-settled principles. The law requires that all contracts concerning the transfer of land shall be in writing. A purchaser must protect himself by covenants. It follows that where there is no express warranty none can be implied. Omission to warrant disproves intention to warrant, and if that could be contradicted by implication it would be not only creating a contract against the intention but proving it by parol. As to land, there can be no such thing as failure of consideration growing out of a breach of contract, or, as it is sometimes expressed, the equitable condition of sale; otherwise there would be, so far as that defence is concerned, no difference between a quit claim and a warranty. We are of opinion that the proper principle is, that in cases without warranty the purchaser, when sued for the purchase money, may set up any defence which is in-

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dependent of *contract and constitutes a de-

mand against the vendor in the nature of a cross-action, such as fraud or misrepresentation, and that this is the extent to which such defence can go. All the cases can be harmonized upon this principle. A careful examination of them as to real estate in which abatement has been allowed, will show either that there was warranty, or, if no warranty, that there was fraud or misrepresentation. We will not encumber this opinion by citing and commenting upon the cases separately, but adopt the statement of Judge Evans in the case of Evans v. Dendy: "It is now more than half a century since the case of Gray v. Handkinson was decided, and during all that time I do not find a case where the mere failure of consideration without warranty has been set up by way of defence or any action brought to recover back the money—a circumstance from which it may be fairly inferred that it has never been supposed such defence could be made or such action maintained." Means v. Brickell, 2 Hill 657; Evans v. Dendy, 2 Speers 10 [42 Am. Dec. 356] Rogers v. Horn, 6 Rich. 361.

These principles apply with increased force to sales made by public officers. In sheriff's sales under execution, the rule of caveat emptor is absolute, and that is the general doctrine as to judicial sales made under order of court. It is true that in such sales in this state the officer of the court is, in some sense, the agent of the parties, and, while the absolute rule of caveat emptor may not apply as in forced sales, yet it is well settled that in judicial sales of real estate there is no implied warranty. Commissioner v. Thompson, 4 McC. 434; Rorer on Jud. Sales 177, where the authorities are collected. The rule is not so well established where the sale is of personal property, as to which we have adopted the civil law doctrine, "that sound price demands sound property," both in respect to condition and title. The following cases, sometimes relied on to establish the principle of mere failure of consideration as a defence, are in relation to personal property. Com'r of Roads v. Macon & Foot, 2 Brev. 105; Eastland v. Longshorn, 1 N. & McC. 194; Com'r v. Smith, 9 Rich. 520; Parker v. Partlow, 12 Rich. 679; Trimmier v. Thomson, 10 S. C. 189.

Was there in this case such fraud or mis-

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representation as will *constitute a good defence? All the cases agree that the proof of such misrepresentations, whether they are fraudulent or unintentional, must "be full, clear and explicit, that they were calculated to influence the party in concluding the contract, and that he acted upon them without examining for himself and exercising his own judgment. The indiscriminate application of the principle without the most satisfactory evidence, would have a tendency to set afloat and derange all contracts." Nothing was said at the sale about title. It is not claimed that there were any misrepresentations unless they were made by the advertisement and plat referred to. These contained no statement as to number of acres, and did not, in express terms, affirm that lot No. 1 then belonged to the parties selling, but the advertisement described the outline by metes and bounds, giving the east line at seventy feet and eight inches, and referred to the plat in these words: "All of which is particularly and accurately described in a plat of five lots, situated in Ward 1, belonging to the Tyler Steam Cotton Press Company." It is not perfectly clear that lot No. 1 was represented as included in the property offered for sale as the cotton press, but it was on the old platt referred to as one of the five mentioned, and the respondent might have so understood it. The mistake was produced by the old plat, still representing lot No. 1, after it had been sold, and to that extent may be regarded as an unintentional misrepresentation.

Did the appellant rely upon that statement in the advertisement, and was he misled and induced by it to make the purchase? The property was to be sold under order of the court. Lot No. 1 was divided from the other property, and was in possession of another. It was marked out by being shaded blue, and was specially referred to by a note on the face of the plat. Under these circumstances it is difficult to resist the impression that the appellant did not exercise ordinary diligence in obtaining the information which the facts suggested and which was at hand—especially as Gibbes, who was to have an interest in the purchase, and who must have known all about the property, was present. But the appellant swears positively that he was ignorant of the facts; that he relied exclusively upon the advertisement, and was deceived by it into the purchase of the property.

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*"The Tyler Cotton Press" was the property advertised, and, doubtless, was the principal inducement to the purchase; but if it were represented that lot No. 1 was a part of it, when it was not, we cannot say that the appellant got the property he purchased. He did purchase the cotton press, and he got it; but he purchased it as it was described; and although he might have done so with or without that lot, yet we think it cannot be regarded as nothing more than a part of the description of "the cotton press."

Assuming that there was a mistake in the advertisement, and that the appellant was in ignorance of it at the time he bid off the property, and that he used proper diligence in informing himself, is he now entitled to have an abatement for the value of that lot? We think not. While it may be that he was ignorant at the time of the sale, it is admit-

ted that he had full knowledge of the alleged deficiency on June 4th, when he voluntarily closed the purchase by paying the cash installment and executing bonds and mortgage for the credit portion of the purchase and taking titles. Up to that time the purchase was incomplete. The court confirms judicial sales, and in doing so exercises large powers in correcting errors. Reasonable time is always given for the examination of titles, and, if necessary, a reference will be ordered. From the day of sale up to the day on which he gave his bonds and mortgage and accepted title, the appellant might have refused to comply with his bid, and, if misrepresentation could have been shown, the court would not have decreed against him specific performance.

It seems that he was not willing to relinquish his purchase even after all the facts were known. He said nothing about the deficiency until he complied with the terms of sale and demanded title on June 4th, which was the same, in effect, as if he had bid off the property that day with a full knowledge of the deficiency. He chose to stand to his bargain, indeed insisted upon it, after he had full knowledge, and he cannot be heard to impeach his own bonds, in whole or in part, or to say that he is damaged by misrepresentations when he knew the truth of the matter so represented: "If a vendee becomes acquainted with the fraud before completing his bargain and chooses to go on, a

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a court of *equity will not help him." Adams' Eq. 177, citing Pratt v. Philbrook, 33 Me. 17; Knuckolls v. Lea, 10 Humph. 577; Scott v. Gamble, 1 Stockt. 218; Whitworth v. Stuckey, 1 Rich. Eq. 409; Murrell v. Murrell, 2 Strob. Eq. 154 [49 Am. Dec. 664]; Maner v. Washington, 3 Strob. Eq. 171; Story's Eq., § 202. Chancellor Caldwell, as the organ of the court in Maner v. Washington, says: "Where neither payment has been made of the purchase money by the one party, nor possession given by the other, a defect in the title of the land bargained and sold has always been held a good ground to resist the specific performance of the contract or to entitle the purchaser to an abatement of the price pro tanto, or to a rescission of the contract. The warranty of a deed conveying the land would often be an insufficient indemnity for the purchase money if the vendee complied with his contract, and was afterwards compelled to give possession to an outstanding paramount title. But if a party, notwithstanding his being informed of the defect, should persist in the completion of his contract, pay the purchase money, accept a deed and take possession of the land, he will be left to his legal remedy on the covenants of his deed, and equity will not relieve him. Even in executory contracts, a purchaser may do acts that amount to a waiver of his right to raise objections to the title, and may be compelled to take such title as the vendor can make without inquiry as to its validity."

But it is urged for the appellant that the compliance with the terms of sale after knowledge, should not operate as a waiver in this case, for the reason that while he was ignorant he had gone into possession and made such expenditures in repairs, that it was too late to recede without a sacrifice: that his condition then left him no other alternative but to carry out the purchase. There is no force in this. It was premature in him to take possession before the title was examined. He knew that in doing so he took the risk, for, in his answer, he says, that he took possession "having full confidence in the integrity of the parties." Taking possession itself, under certain circumstances, amounts to a waiver of the defence here made, and, if so, that could hardly destroy the effect of closing the bargain. One incautious act cannot justify another. Sug.

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on V. & P. 398, lays it down that "a *purchaser, by entering into possession, is generally held by that act to have waived the objections to title." The appellant only took possession of the cotton press proper. The lots were not sold separately, but as an entirety—"all that lot, piece or parcel," &c. It is said that he did not take possession under his bid, but by the agreement of the parties. That does not seem to be the proof. Some of the parties were minors, and no one had the right to make any such arrangement for the others. No such waiver was made by any of them.

But it is still further urged for the appellant that at the time he closed the agreement, or rather the day before, he gave notice to the sheriff of the deficiency, and of his determination to insist upon the abatement. Notice cannot alter the case. The waiver does not rest upon the intention of purchaser, as to whether he will or will not make the defence, or whether such intention is known or unknown, but upon the single fact of doing the act with knowledge. It is not suggested that the appellant expressly waived or intended to waive any right which he might suppose that he possessed, for the exact contrary is true; but the waiver was the effect of executing bonds, according to the contract, against any defence to these same bonds, upon grounds then known to him.

Giving the bonds for the whole amount was inconsistent with paying them only in part. Ex parte notice of such intention could not make a new contract. The only contract was the old one, and the appellant could not close it, according to its terms, either with mental reservation or public notice that he intended to pay only according to the

facts as he knew them to exist at the time.

The Circuit decree is affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. *215

*(Case No. 832.)

MINNICK v. FORT.

(November Term, 1879.)

[*Justices of the Peace* ⟸150.]

A party may appeal to the Circuit Court from a judgment rendered against him by a trial justice, without making a motion before the trial justice for a new trial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 515; Dec. Dig. ⟸150.]

Before Mackey, J., Lexington, September, 1879.

Action by John Minnick against H. A. Fort, administrator, in a trial justice's court. Judgment for defendant, and plaintiff, without making motion before the trial justice for a new trial, appealed to the Circuit Court. Because of the failure to make such motion, the Circuit judge dismissed the appeal. Plaintiff then appealed to this court from the order of dismissal.

Mr. W. S. Monteith, for appellant, cited Code, §§ 351, 353, 371; 15 Stat. 874; 16 Stat. 60; Sedg. on Stat. & Const. L. 123–127.

No counsel appeared for respondent.

March 15th, 1880. The opinion of the court was delivered by

McIVER, A. J. The sole question raised by this appeal is, whether a party can appeal from a judgment rendered by a trial justice without first making a motion before the trial justice for a new trial. The solution of this question depends upon the inquiry whether the act of February 24th, 1876, (16 Stat. 60), which was passed for the purpose of authorizing trial justices to grant new trials, operates as a repeal of the provisions of the code of procedure regulating appeals from an inferior court to the Circuit Court, or so modifies those provisions as to require, as a condition precedent to an appeal, the making of a motion for a new trial. The act in question certainly does not, in express terms, repeal any of such provisions, and there is nothing that we can discover in the terms

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of the act which would operate as a *repeal by implication—a mode of repeal not favored in law. The only modification of the provisions of the code in reference to such appeals contained in the act, is that found in Section 3, which simply extends the time within which an appeal must be taken from the judgment of a trial justice to five days from the refusal of the motion for a new trial.

Again: the right to grant new trials is conferred upon trial justices in very much the same language as was employed in conferring a similar right upon the Circuit Courts, (Gen. Stat., ch. CV., § 4, 497,) and while there are cases in which a motion for a new trial is the only appropriate remedy, as, for example, in cases where relief is sought against a verdict upon the ground of excessive damages, we do not know that it has ever been held that a motion for a new trial was a necessary condition precedent to the right of appeal from a judgment of the Circuit Court to the Supreme Court.

The judgment of the Circuit Court is reversed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 216

(Case No. 833.)

THOMPSON v. WOFFORD.

(November Term, 1879.)

[*Evidence* ⟸386; *Partition* ⟸109.]

In an action upon a bond given for the purchase money of a tract of land, sold under proceedings in partition, and described in the order of sale, advertisement and deed, as containing one hundred and seventy-five acres, more or less, testimony was offered of verbal declarations made by the sheriff at the time of sale as to the quantity of land in the tract—*Held*, that the testimony was incompetent.

[Ed. Note.—Cited in Lyles v. Haskell, 35 S. C. 405, 14 S. E. 829.

For other cases, see Evidence, Cent. Dig. § 1696; Dec. Dig. ⟸386; Partition, Cent. Dig. § 383; Dec. Dig. ⟸109.]

Before Pressley, J., Spartanburg, June, 1879.

This was an action commenced on February 12th, 1879, by W. W. Thompson, as sheriff, against C. P. Wofford and J. K. Jennings, for the foreclosure of a mortgage given to secure the payment of the purchase

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money of a tract of land sold by the *sheriff under a decree of the court in an action for partition. Defence was failure of consideration to the extent of the balance claimed. The defendant, Wofford, a witness in his own behalf, began to testify as to certain verbal representations made by the sheriff at the time of sale, in reference to the quantity of land, but upon objection made the presiding judge ruled that the testimony was incompetent; and defendants' counsel excepted. The Circuit decree is as follows:

This action was to recover a small balance, claimed to be due, on bond and mortgage, and the defendant resisted payment on the ground of deficiency in the quantity of land, which he had purchased.

Both the advertisement and the sheriff's deed seem to me to state the number of acres in the tract sold as merely part of the description, and I do not, under our statute, which requires the sheriff to make sale in such cases, regard him as having any authority or agency whatever to vary the terms of the decree or of the advertisement. He could not, therefore, affect the rights of the owners of the land by any opinion he may have published, if any, at the sale, as to the number of acres in the tract.

The defendant testified before me that he had previous knowledge of the land he purchased, had lived in that neighborhood and partially surveyed it several years ago; that it was not sold at a price per acre, but the bids were for the tract as a whole. The deed is without warranty, and defendant complied with his bid and took possession without asking any survey to fix the quantity of the land. The late decisions in this state, especially Jones v. Bauskett, 2 Speers 71, and Rogers v. Horn, 6 Rich. 361, settle conclusively that in such case the purchaser must pay the purchase money without abatement for any deficiency of the quantity of land bought by him. It is therefore adjudged and decreed that plaintiff have judgment against the defendant for the amount claimed in his complaint; with leave to apply at chambers for a decree of foreclosure, if that be necessary.

From which decree defendants gave due notice of appeal to the Supreme Court for a new trial, upon the following grounds:

1. Because, as it is respectfully submitted,

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the presiding judge *erred in refusing to admit testimony in regard to sheriff's representations made at the time of the sale.

2. In holding that the parties to the suit of Julia Levister v. James Levister and others, were not bound by the representations made by the sheriff at the time of the sale.

3. In holding that the defendants, under the circumstances of the case, were not entitled to an abatement in the amount bid by reason of the deficiency in the land.

Mr. E. H. Bobo, for appellants.

The rule of caveat emptor does not apply to sales by the sheriff under a decree for partition, and his representations are admissible as though they were made by the parties themselves. Harp. 441; 1 McC. 121; 9 Rich. 515; 9 S. C. 287. When a certain number of acres are sold, with a description only to fix its locality, it will be considered as a sale of so many acres, and not more or less. 2 McC. 440. There were no metes and bounds here, only boundaries to be fixed by actual survey; and in this differs from 2 Spears 71 and 1 McC. 584. If misrepresentation was intentional or not, defendants are entitled to abatement. 2 Hill 657, and cases therein reviewed. In Harp. 290, 4 McC. 434, 2 Spears 71, and 6 Rich. 361, there was no misrepresentation; and they have been modified by 9 Rich. 515. See, too, 9 S. C. 287.

Mr. J. S. R. Thomson, contra.

The verbal declarations of the sheriff cannot vary the terms of this deed. 1 Greenl. on Ev., § 275; 1 Best. on Ev., § 226; 1 McC. 209. A purchaser can assert failure of consideration only when title is defective. 9 S. C. 287; 6 Rich. 361; 9 Rich. 515. Even if sheriff was agent, defendants cannot maintain their defence, because of the description of the land. Harp. 290; 2 Spears 72; Kerr on F. & M. 65, note; Rice's Eq. 55; 8 Rep. 647; 13 Wall. 383.

March 16th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action to recover a small balance appearing to be due upon a bond given for the purchase money of a tract of land sold by the plaintiff, at a

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judicial sale made by *him as sheriff. The defense was that the defendant had been induced to purchase by reason of a representation made on the day of sale, that the land contained a greater number of acres than was found to be the fact by a resurvey, and an abatement of the price to the extent of such deficiency was claimed.

It appeared that the land was sold under proceedings for partition, and the record of such proceedings, which was introduced in evidence, showed that the land was described in the complaint as a tract containing one hundred and seventy-five acres, more or less. It was also so described in the advertisement and in the sheriff's deed; and it furthermore appeared that the land was sold as a tract and not by the acre.

At the trial the defendants proposed to prove "certain verbal representations made by the sheriff at the time of the sale in reference to the quantity of the land," which the Circuit judge ruled to be incompetent. To this ruling exception was duly taken, and this constitutes the sole ground of appeal. We agree with the Circuit judge that the proposed testimony was incompetent.

As we have just held in the case of Mitchell v. Pinckney, ante page 203, the true ground upon which purchasers at judicial sales of land can claim an abatement of the price by way of defence to an action for the purchase money, is fraud or misrepresentation; but such misrepresentation must be of such a character as would be likely to mislead, and must, in fact, mislead the purchaser. As was said by Johnson, J., in Means v. Brickell, 2 Hill 665-6, in speaking of this doctrine: "Great care should be taken that in its application it should be confined to its legitimate objects, and that trivial circumstances should not be allowed to set aside or damage written contracts which have been solemnly entered into between the

parties, and some useful hints have been thrown out in Frazer v. Harvey, 2 Bail. 270. For example, when the misrepresentation complained of is as to the quality of lands sold, or the quantity, when it has not been ascertained by admeasurement or some other certain rule, or the relative quantities of the different description of highland and swamp and other matters founded merely on opinion; for a purchaser is not liable to be

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*imposed on by the opinions of the seller; and if he is, when he has the same means of forming an opinion for himself, it is his own folly, from which he cannot and ought not to be relieved."

Now, in this case the verbal representations of the sheriff in regard to the quantity of the land, must either have been a mere expression of his opinion as to the actual number of acres which the tract contained, which would not be competent, (Frazer v. Harvey, 2 Bail. 269,) there being no evidence that any plat was exhibited at the sale by which the land was sold, or such representations would amount to a contradiction of the terms of the sale, as written and published in the advertisement; for, as we have seen, both in the pleadings in the action under which the order of sale was made and in the published advertisement of such sale, the land was represented as containing an uncertain number of acres by the use of the terms "more or less," and certainly the sheriff could not, by any verbal declarations that he might make, contradict those terms. We think it clear, therefore, that, under the circumstances of this case, any verbal representations which the sheriff may have seen fit to make on the day of sale in regard to the quantity of land, were not such as were calculated to mislead a purchaser; and we may add, from the testimony in this case, it is difficult to understand how the purchaser could have been misled in regard to the quantity of the land he was buying by any such representations, as he seems not only to have been a surveyor himself, but to have actually made a partial survey of this very tract before the sale, and, as it is reasonable to suppose, was therefore much better qualified to form an opinion as to the number of acres contained in the tract than the sheriff.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., concurred.

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13 S. C. 220

(Case No. 834.)

TERRY v. CALNAN.

(November Term, 1879.)

[1. *Banks and Banking* ⟸47.]

The charter of a bank contained this section: "That in case of the failure of said bank, each stockholder * * * shall be liable and

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held bound *individually, for any sum not exceeding the amount of his shares." The bank suspended specie payments, but continued banking operations for more than four years longer. *Held*, that there was a failure within the meaning of the above-recited section when specie payments were suspended.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 66; Dec. Dig. ⟸47.]

[2. *Limitation of Actions* ⟸21.]

Held further, that an action against the stockholders for the additional liability imposed by this section, was barred by the statute of limitations in four years after the suspension.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 90–99; Dec. Dig. ⟸21.]

[3. *Limitation of Actions* ⟸21.]

This liability was a simple contract debt, and not a statute liability.

[Ed. Note.—Cited in Parker v. Carolina Savings Bank, 53 S. C. 590, 31 S. E. 673, 69 Am. St. Rep. 888.

For other cases, see Limitation of Actions, Cent. Dig. §§ 90–99; Dec. Dig. ⟸21.]

Before Thomson, J., Richland, April, 1879.

Action commenced November 12th, 1870, by Harvey Terry against M. J. Calnan, receiver, and the stockholders of the Commercial Bank of Columbia. For a proper understanding of the questions decided by this court, the case is sufficiently stated in the Circuit decree, which is as follows:

This complaint was filed by the billholders against the receiver and the stockholders, for the purpose of having the assets in the hands of the receiver applied, as far as the same would avail, to the payment of the bills held by the plaintiffs, and of recovering the balance due on said bills from the stockholders, by reason of their liability under Section 4 of the charter of the bank. 12 Stat. 212.

This cause, after a hearing before the Circuit Court, was appealed to the Supreme Court, and by that court remanded, with directions for certain issues of fact to be first inquired into before the Circuit Court should decide the case upon its merits. One of these issues was the ascertainment of the date of the failure of the bank. The defendants, who are stockholders, having set up the defence of statute of limitations, the efficacy of which depends upon the date of the failure of the bank, applied for and obtained at a previous term of this court, an order for the referee to report upon the issue of the date of failure. The plaintiffs appealed to the Supreme Court from this order, and the appeal was not sustained.

The defendants now submit their case upon this one issue of the defence of the statute of limitation as depending on the date of failure of the bank. This defence, if sus-

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tained, would render *unnecessary all other inquiries as to facts, and also unnecessary

the consideration of all other issues of law raised by the pleading. The referee reports "that the Commercial Bank of Columbia, S. C., suspended specie payments and failed on the 30th day of November, 1860, which fact, together with the evidence taken, is submitted."

To this report the plaintiffs except.

The cause then comes before me for a hearing, without a jury, on April 25th, 1879, upon the report of the referee, the exceptions thereto, and the defence of the statute of limitations set up by the defendants. The right of the plaintiffs to follow the assets of the bank in the hands of the receiver, is not questioned. After hearing the pleadings, the report of the referee, the exceptions thereto, and the argument of counsel for the plaintiffs and the defendants, I have arrived at conclusion as follows upon the issues submitted:

The section of the charter upon which the plaintiffs rely, provides—

"Section IV. That in case of the failure of said bank, each stockholder, copartnership, or body politic having a share or shares in such bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her or their share or shares."

For the purpose of this decision, I assume that under this section the stockholders are liable to the billholders for the payment of the unredeemed bills held by them, whenever the stockholder had, or was interested in, shares as specified in the section quoted.

The first question to be considered is, when did the bank fail? The referee reports that the failure occurred on November 30th, 1860, and bases his conclusion upon the fact that the testimony establishes that upon that date the bank suspended specie payment, or ceased to pay or redeem its bills with specie. The testimony reported fully establishes this latter fact, and is not disputed by the plaintiffs. The testimony further shows that the suspension was notorious, or, as one of the

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witnesses states, *"was known to everybody;" the bank never resumed, and after such suspension ceased issuing any of its own bills either for payment or in making loans. Hence, all the bills held by plaintiffs are bills which were issued by the bank, accompanied with the contract of its charter (or, as another court has held, with the contract impressed upon each bill,) that the bank would redeem or pay for such bills, specie, dollar for dollar. Now, upon November 30th, 1860, the bank ceased so redeeming its bills, and failed to make good its contract. Was not this the "failure" contemplated by Section 4? Our opinion is that a failure by the bank to fulfill any obligation or duty, or contract imposed upon it by law, is a failure in the contemplation of this section, rendering the bank or its stockholders liable, as provided in the section. The charter provides penalties to the state for certain of these failures. These penalties the state had a right to remit, and these penalties the general assembly did remit, but any liability incurred to billholders arising out of the contract made by the bank to redeem its bills with specie, the general assembly could not affect by any law it might enact without coming in conflict with Section 10, Article I., of the Constitution of the United States. The general assembly could remit penalties to the state; it could protect the bank from a forfeiture of its charter, but it could not impair the obligation of any contract made by the bank with its billholders.

I regard "failure" as the most comprehensive term that can be used in reference to a bank. A bank is insolvent when it is unable to pay its debts in the course of business; it is bankrupt when it fails to meet its business obligations, or does some act connected therewith declared by law to constitute bankruptcy; and either of the foregoing cases constitute a failure. Besides, a failure on the part of a bank to perform any contract made by it, or imposed by its charter, is a failure; although the bank might be able to perform such contracts, or might have done no act constituting technical bankruptcy. I therefore hold as a matter of law, that a suspension of specie payments by the Commercial Bank constituted, under its charter, a failure, within the meaning of Section 4. In my conclusion I am fully sustained by the reasoning and authorities cited in the de-

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cision of the *United States Supreme Court in the case of Godfrey v. The Merchants' Bank of Cheraw, 7 Otto [(97 U. S.) 171, 24 L. Ed. 944]. This case was of a South Carolina bank, with a like charter to that of the Commercial Bank. That this suspension occurred on November 30th, 1860, there can be no doubt; and hence it must be concluded that the bank failed on that day.

The exceptions to the referee's report are, therefore, overruled, and the report is confirmed.

The next question to consider is, whether the defence of the statute set up by the defendants, who are stockholders, be a good defence in bar of the action. That the statute is a good defence, was held by a unanimous court in the case of Carrol v. Green et al, 2 Otto [92 U. S.] 510 [23 L. Ed. 738], where Justice Swayne, delivering the opinion of the court, fully considers a charter the same as that of the Commercial Bank, and all the statutes of limitation of this state, giving full force and effect to the suspension caused by our stay-laws, and the decision of our courts thereon. I concur in the reasoning of, and authorities cited in, that case, and hold that four years would bar the

action. In this case the failure occurred on November 30th, 1860, and the action was brought on November 12th, 1870. More than nine years had run. From this deducting the five years' suspension caused by the stay-laws, would leave over four years that the statute had run before action was brought. The plea of the statute must, therefore, be held as a good defence for the defendants, who are stockholders.

It is urged that Section 132 of the code deprives the defendants of the right to avail themselves of the statute.

Whatever might be my view of the effect of that section, it is a sufficient answer to call attention to the fact that the cause of action in this case arose before the passage of the code, and hence, under Section 96, cannot affect this action.

It is, therefore, adjudged and decreed, that the complaint be dismissed upon the merits as to all the defendants who are sued in their capacity as stockholders, and that said defendants have judgment for their costs against the plaintiffs, the same to be taxed by the clerk of this court.

From this judgment the plaintiff appealed to this court.

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*Mr. W. W. Montgomery, for appellant.

Messrs. J. H. Rion and F. W. McMaster, contra.

March 20th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The first question to be considered involves the nature of the liability of the stockholders of the Commercial Bank of Columbia, under the following section of the charter of said bank:

"That in case of the failure of said bank, each stockholder, copartnership or body politic, having a share or shares in such bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound, individually, for any sum not exceeding the amount of his or her or their shares."

To whom was this liability intended to be incurred? Evidently to the bank or to its proper representative, which would include the receiver appointed upon its insolvency. It certainly could not have been intended that each creditor of the bank, including bill-holders and depositors, should have a separate action against each stockholder individually. The inconveniences of such a remedy is reason for not subjecting the language of the charter to such a construction when any other construction can be found reasonably to effectuate its intent and satisfy its expressions. The language of the section quoted above contemplated liability in a single sum, to be measured in the manner pointed out by the act, and would, therefore, imply liability to a single action for the purpose of enforcing such demand. The object of the provision was to make assets of the bank, in case of failure, for the payment of its debts. A person subscribing for the stock of the bank at its original issue would be compelled to understand the effect of such subscription to be this: That he was absolutely bound to pay up the proportion of the capital represented by his stock, and an equal amount should it become necessary to make good the liability of the bank to pay its debts. He would also understand that he

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could not discharge *himself of this contingent liability by merely selling and transferring his stock, although if the bank should continue to discharge its obligations for twelve months after such sale, then such contingent liability would cease. A subsequent purchaser of the stock would take it with the same contingent liability.

It is evident that the contingent liability is of the same nature with the primary liability to pay in the capital represented by the stock, and the inference would be that the payment was to be enforced by the same person—namely, by the bank itself. If anything remained unpaid on the original subscription, as where stock had not been paid up, the only way by which the creditor of the bank could reach the amount thus in arrear would be through the bank, by compelling the bank, or its representative, to call in the unpaid subscription as a debt due the bank. The contingent liability stands on the same footing. The stockholder was subjected to a contingent liability to the bank, such contingency being the failure of the bank. That event happening, he became the debtor of the bank in respect of stock presently held by him or held at any time within twelve months prior thereto, and the remedy was primarily in the hands of the bank. It was competent, through a creditor's bill, for the creditors of the bank to compel the bank to call in such assets, and for that purpose the creditor could lay hold of and exercise the remedy of the bank for that purpose, through the medium of a receiver; but the nature of the debt and remedy against the stockholder was not changed thereby.

Was the suspension of specie payments by the bank, in November, 1860, a failure within the sense of the statute? Failure means a failure to meet its current obligations at maturity. Insolvency looks to the liability to pay; failure, to the fact of payment. It is not necessary to say that the statute intended that failure, independently of insolvency, should fix the liability of the stockholders. All that need be said, for the purposes of the present case, is that failure was the outward act that was to stand for evidence that the bank was insolvent. If it should happen that the bank refused without justifiable cause to pay its current obligations at maturity, and had, notwithstanding such fact, sufficient assets to pay its indebtedness,

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the stockholder *would get the benefit of that part, for his liability depended wholly on insufficiency of assets. At the same time the creditors of the bank, and all others interested, would be justified in assuming that the failure of the bank was by reason of its insolvency.

The failure of the bank to pay its bills on presentation in specie was a failure to meet its current obligations at maturity, and, under the view we take of the statute, is presumptive evidence of insolvency. In the present case that presumption is not rebutted, but, on the contrary, it appears that the bank never did resume specie payments, thus strengthening the conclusion of its insolvency by another unrebutted presumption, namely —that the same cause that occasioned its original failure prevented resumption; that, is insolvency. This view supports the conclusion of the Circuit decree, that the cause of action had its origin in November, 1860.

The question of the operation of the statute depends upon the law as it then stood, making allowance for the suspension of the statute during the period of five years. The debt of the stockholder under this contingent liability must be ranked as a simple contract debt, barred by lapse of four years from the time the cause of action accrued to the commencement of an action for its enforcement. It is a mistake to call the liability of the stockholder a statute liability. The whole object of the provision of the charter was to regulate the relations that should arise between the corporation and its stockholders. The subscription to the stock was a voluntary act that might be performed or declined. The liability that arose from such subscription, although defined by the charter, arose as the voluntary contract of the parties. This is precisely what the law does in fixing the rate of interest on money as affecting contracts demanding interest, but not fixing the rate, and interest computed under the authority of the statute might as well be considered as representing a statute liability as the cause of action in the present case.

The decree correctly holds that the statute is a bar in the present case. The judgment appealed from must be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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*(Case No. 835.)

GIBBES v. G. & C. RAILROAD CO.

STATE, ex rel. ATTORNEY-GENERAL, v. SAME.

(November Term, 1879.)

[1. *Mortgages* ⇐429.]

A mortgage of railroad property was made to one, his heirs and assigns, as trustee for bondholders. Under proceedings for foreclosure, the mortgagee being dead, another trustee was substituted and decree of foreclosure rendered. Afterwards, a petition was filed by a son of the original mortgagee, claiming to be his heir-at-law, and praying to be made a party. Petition dismissed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1268; Dec. Dig. ⇐429.]

[2. *Constitutional Law* ⇐8.]

Doubted whether ordinances of the convention of 1868 had any legal effect upon then existing statutes.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 6; Dec. Dig. ⇐8.]

[3. *Constitutional Law* ⇐92, 93.]

Private rights vesting during the war between the states, are protected by the constitution of the United States, and cannot be impaired by an ordinance of the state constitutional convention of 1868.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 175, 198; Dec. Dig. ⇐92, 93.]

[4. *Corporations* ⇐586; *Railroads* ⇐143.]

"An act to promote the consolidation of the Greenville and Columbia Railroad Company," provided in its 4th section for a waiver of the lien of the state on the Blue Ridge railroad property, and in its 5th section, for a like waiver of lien upon the property of the Greenville and Columbia railroad property, and in its 7th section, for the endorsement by the consolidated companies of the bonds of the two companies, consolidating. The two companies not having consolidated, *held*, that the act never took effect.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2353; Dec. Dig. ⇐586; Railroads, Cent. Dig. § 449; Dec. Dig. ⇐143.]

[5. *Railroads* ⇐156.]

Where an act of the general assembly provided that all the property of a railroad company should stand pledged and mortgaged to the state for the payment of certain bonds issued by such company, and guaranteed by the state, such provision constituted a statutory lien for the benefit of the bondholders as well as the state, which no subsequent statute could postpone. Hand v. Railroad Company, (1,) 12 S. C. 314, followed and approved.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 478; Dec. Dig. ⇐156.]

[6. *Corporations* ⇐566; *Railroads* ⇐41, 168.]

Where the state guaranteed the bonds of a company, issued in exchange for outstanding mortgage bonds, under a statute which provided that the state should take and retain possession of the bonds so surrendered in exchange as "security to the state, and thereby give the state the lien under the first mortgage until all the bonds now secured by mortgage shall be retired;" all of the mortgage bonds not having been surrendered or exchanged, *held*, that the state could assert the lien of the mortgage bonds so held by her, together with the coupons thereto attached, as of equal rank with the mortgage bonds not exchanged.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2284; Dec. Dig. ⇐566; Railroads, Cent. Dig. §§ 99, 535; Dec. Dig. ⇐41, 168.]

[7. *Corporations* ⇐566; *Railroads* ⇐171.]

A statute authorizing the guarantee by the state of certain bonds of a railroad company to be secured by a statutory lien, was passed in 1861, and the bonds issued and guaranteed un-

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der the authority of this act, bore *the caption

"Confederate States of America." In 1866, another act was passed which extended the operation of the act of 1861, and authorized the issue of new bonds in exchange for the C. S. A. bonds, also certificates of indebtedness to pay interest past due on the C. S. A. bonds, and bonds for other indebtedness, all of which were to be in like manner guaranteed. *Held*, that the C. S. A. bonds, not surrendered, were of superior rank to the bonds issued under the act of 1866, but those issued under act of 1866, in exchange for bonds surrendered, could claim a lien only under the latter act, and stood upon the same footing with all other bonds issued under the act of 1866. Hand v. Railroad Company, (5.) 12 S. C. 315 approved.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2284; Dec. Dig. ⟸566; Railroads, Cent. Dig. § 575; Dec. Dig. ⟸171.]

[S. *Corporations* ⟸566; *Railroads* ⟸171.]

Under an act of the legislature passed in 1869, certificates of indebtedness were authorized to be issued by a railroad company for funding interest due upon its bonds which were secured by a lien under an act of 1866, and which lien was extended by the later act to cover these certificates of indebtedness. *Held*, that this was a mere substitution, and not a payment, and that the lien of these certificates was superior to that of a mortgage executed between 1866 and 1869.

[Ed. Note.—Cited in Kaphan v. Ryan, 16 S. C. 360; Warren v. Raymond, 17 S. C. 200; Hand v. Savannah & C. R. Co., Id., 258; Nichols v. Briggs, 18 S. C. 484; Plyler v. Elliott, 19 S. C. 264; Groce v. Jenkins, 28 S. C. 175, 5 S. E. 352; Ewbank v. Ewbank, 64 S. C. 438, 42 S. E. 194; Lyles v. Lyles, 71 S. C. 397, 51 S. E. 113.

For other cases, see Corporations, Cent. Dig. § 2284; Dec. Dig. ⟸566; Railroads, Cent. Dig. § 574; Dec. Dig. ⟸171.]

[This case is also cited in Peake v. Young, 40 S. C. 59, 18 S. E. 237, without specific application.]

Before Pressley, J., Richland, October, 1878.

The facts of the case are fully stated in the Circuit decree, and again in the opinion of the court. The Circuit decree is as follows:

The reports of the referee and the acts of assembly furnish the facts of these cases, as follows, to wit:

In January, 1854, the defendant mortgaged all its property to C. M. Furman, trustee, to secure $800,000 of its bonds, payable in 1862, 1863 and 1864. Before they became due it had incurred $100,000 other debts; and to enable it to provide for these debts and the mortgage bonds, then almost due, the state, by act of 1861, agreed to guarantee $900,000 new bonds of defendant, and further provided that the first mortgage bonds, which should be exchanged for guaranteed bonds, should stand as security to the state, and thereby give it the lien under the first mortgage until all these bonds should be retired.

By said act the state's guaranty was to be endorsed on $250,000 of the new bonds before any of the old were taken up, and thereafter the disparity was to increase so that only $400,000 of the old bonds would be held by the state, when her guaranty would be on $700,000 of the new bonds.

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*This proposed guarantee was made, during the war, up to $700,000, and the guaranteed bonds then issued were entitled "Confederate States of America."

According to the act, they constituted a mortgage to the state on the whole estate of the defendant for its faithful performance of its contract "and the payment of such obligation." The defendant was also required, after the three years, to set apart two per cent. on the amount of the guaranteed bonds for retiring the same.

This was not done, nor did defendant pay, during the war, the interest on either the first mortgage bonds or those guaranteed.

In 1866, the said interest being still unpaid, and the defendant owing $600,000 other debts, besides interest, the state passed an act which authorized its guaranty on $1,500,000 new bonds and certificates of indebtedness of defendant, which were to be applied as follows, to wit:

$700,000 to be exchanged for that amount of guaranteed bonds, which have been issued during the war, and entitled "Confederate States of America;" $200,000 to be exchanged for that amount of first mortgage bonds then outstanding; $350,000 to the payment of interest on the guaranteed and first mortgage bonds, and $250,000 to compromising the remaining debts of defendant at one-third thereof. To the whole of the $1,500,000 bonds and certificates guaranteed under this act, the mortgage of the act of 1861 was equally extended.

The report of the referee shows that holders of $241,000 of first bonds did not exchange them for those authorized by this act; only $200,000 of these should have remained outstanding when the $900,000 guaranty of the state was complete; but of the guaranteed bonds which were executed, $35,000 yet remain unused in the hands of the comptroller-general, and thus the failure to comply with the terms of the act is reduced to $6,000 outstanding first mortgage bonds, which are contested by defendant without sufficient proof.

As to how much of the $700,000 guaranteed

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under the act *of 1861 was exchanged for those authorized by act of 1866, there is no information in the referee's report or the evidence.

The defendant being again unable to pay interest on its guaranteed and first mortgage bonds for the six months ending July 1st, 1868, the state, by act of February, 1869, authorized its guaranty on $50,000 certificates of indebtedness, to be used for funding said interest, and to these certificates the statutory lien of 1866 was extended. In May, 1867, the defendant executed to C. D. Melton,

trustee, a second mortgage, to secure $1,500,000 bonds and certificates of indebtedness thereafter to be issued, and to bear date as issued.

There is no proof before me as to the date of any of said bonds, but it is quite certain that it was after the act of March, 1871, which, to promote the consolidation of the defendant with the Blue Ridge Rail[road] Company, purported to make all statutory and other liens, except existing mortgage encumbrances, subsequent to the said second mortgage.

The 7th section of this act requires that the bonds to be issued by the defendants under its second mortgage shall be endorsed by the proposed consolidated company, but the consolidation was not made, and consequently such of said bonds as were issued are without said endorsement.

Upon the facts above stated, I hold:

1. That the statutory liens, under the acts of 1861, 1866 and 1869, were securities for payment of the bonds therein authorized, not mere indemnities to the state, and therefore it had no right to waive them in favor of the second mortgage.

2. That said waivers, if lawful, never took effect, because the endorsement of the second mortgage bonds by the consolidated company was a condition precedent, and not complied with.

3. That the debts due for necessary repairs, materials and labor for operating the road, pending the litigation in these cases, and which produced income, applied to the payment of interest on the guaranteed and first mortgage bonds, are first to be paid out of the property of defendant.

4. After payment of said debts, the first mortgage bonds outstanding, and those held by the state, with all unpaid interest thereon, are the first lien on said property.

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*5. That the portion of the state under this mortgage is for its own indemnity, and is, therefore, equitable assets applicable pro rata to all the bonds it has guaranteed under the acts of 1861, 1866 and 1869.

6. That such of the bonds, if any, guaranteed under act of 1861, as were not exchanged under act of 1866, are the next lien on said property.

7. That the exchange of bonds guaranteed under act of 1861 for those of the act of 1866, was in acceptance of all the provisions of the latter act, and all the bonds issued thereunder have equal rights, and rank next to those, if any, under act of 1861, which were not exchanged; and after those of 1866, the bonds issued under act of 1869 rank next.

8. The second mortgage bonds which have been reported as issued, or which may hereafter be shown to have been lawfully issued, are entitled to the surplus assets after payment of those secured by first mortgage and the said statutory liens.

It is adjudged and decreed, that the foregoing conclusions of law and fact do stand as the judgment of this court. Further, that all orders heretofore made by me, at chambers, and which in my order appointing the receiver, were reserved for this decree, do stand confirmed as part of the same.

It is further ordered, that these cases be referred to the master to take the testimony and report what debts for labor, materials and repairs, not heretofore ordered to be paid, are entitled to payment according to this decree.

Also, what first mortgage bonds are held as indemnity by the state, and the amount of interest due and unpaid thereon.

Also, what bonds guaranteed under act of 1861 were not exchanged for those under act of 1866.

Also, what amount of guaranteed bonds were issued and are now outstanding under the latter act, and what under act of 1869.

Also, what second mortgage bonds, not heretofore proved, are entitled to share in the surplus.

The said master is hereby authorized to apply at chambers for leave to advertise all

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claimants herein provided for to pre*sent and prove their claims, and for such further orders as may be necessary to effect the purposes of this reference.

From this decree appeals were taken by H. H. De Leon, the trustee under the first mortgage, by W. A. Clark, trustee, under the second mortgage, by bondholders under act of 1861, and by B. B. Furman. The grounds of their appeal are fully considered in the opinion of the court.

Messrs. J. N. Nathans and A. G. Magrath, for H. H. De Leon, trustee.

Under the act of 1866, the state waived or relinquished the lien under the mortgage reserved to it in the first section of the act of 1861. The state had full control of this mortgage lien, which was wholly for the indemnity of the state. The statutory mortgage to secure the guaranteed bonds enured to the holders of such bonds. The legislature in 1866, did not doubt the validity of the bonds of 1861, because of their date or caption; the doubt was as to the validity of the legislature which passed the act. A change of circumstances made proper a change in the act giving state assistance. Some things were omitted, others added. The legislature then thought a re-enactment necessary, and what they did not re-enact they intended to dispense with. The act of 1866 expresses, in itself, a clear intention that it should be a substitute for the act of 1861. See, too, ordinances of convention. Gen. Stat. LX. The act of 1869, by re-enacting act of 1866 only, treats it as a substitute for act of 1861. And yet the rights given under act of 1861 were preserved in act of 1866

in priority to other liens there created. 22 Cal. 414; 21 Wis. 370.

If the lien under the first mortgage of this company reserved to the state in the act of 1861, is a subsisting indemnity for the protection of the state against liability as guarantor on the bonds of the company, then such indemnity is limited to the amount of principal and interest due on bonds guaranteed by the state under the act of 1861, for which guarantee said indemnity was given, or to the amount of principal and interest due on bonds substituted for said original bonds

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under the act of 1866. An *indemnity held by a guarantor is limited to protecting him against liability. 1 Jones on Mort., §§ 380, 384; 15 Gray 521.

If the mortgage bonds retired under the act of 1861, and in possession of the state, are a subsisting security for its indemnity against liability as guarantor, and entitled to share ratably with similar bonds outstanding in the proceeds of the property covered by the mortgage, then interest upon the bonds so held as indemnity, can only be claimed from the time the company suspended payment of interest on the guaranteed bonds for which said bonds were exchanged. 21 Wall. 622.

[For subsequent opinion, see In re Fifty-Four First Mortgage Bonds, 15 S. C. 304.]

Messrs. Melton & Wingate, for W. A. Clark, trustee.

The first and second conclusions of law present the question, whether the act of 1871 was effectual to postpone the lien held by the state, so as to give priority to the second mortgage; and this will be conceded, unless it appears. (1.) That the liens were not merely an indemnity to the state, but operated as security for the payment of the bonds to the holder; or, (2.) That the provision of the seventh section, requiring the consolidated company to endorse the bonds then "held" by the two companies, was a condition precedent upon which the waiver depended.

I. The order of the propositions being inverted, we inquire whether there was a condition precedent. What bonds were then held? There is no proof of any being held by either company. The purpose of the act was to promote the consolidation of the companies. The waiver was to enable the companies to secure this end, and must have preceded the consolidation. A condition precedent is one which must be performed before the thing to be obtained can be effectuated. It is usually imported by words clearly mandatory—by proviso, by limitation of time, by negative terms, or by language denoting an intention to make it essential to the thing in view, and clearly to suspend the attainment of this thing until the requirement be performed. But the requirement here is wholly independent of other provisions, and is purely directory. Bouvier's L. Dict.; Cooley on Const. L. 74, 84; Potter's Dwar. 220, et seq., and notes 27–29; Sedg. on Stat. & Const. L. 369, et seq.

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*II. Did the state have the right to waive her liens in favor of the second mortgage? This will affirmatively appear unless the acts of 1861 and 1866, creating and preserving the liens in question, are of such effect as to bind subsequent legislatures, and to this extent limit the exercise of the sovereign power of the state. Such limitations are not favored. Bl. Com. 90. Const. U. S., Art. I., § 10, applies to contracts made by a state, but the presumption is that the state was making laws, not contracts, unless the contrary plainly appears. If there is no contract in the acts of 1861 and 1866, between the state and the bondholders, then the validity of the act of 1871 must be conceded. The aid granted here had been before extended to other railroads. It could not have been within the contemplation of the parties to extend the lien which it was the object of the act to remove. Public credit was then the highest security known to the commercial world. To this pledge alone the bondholder then looked; the doubt is an after-thought. The lien to the state as indemnity against its guaranty, was wholly independent of the contract between the company and the bondholders, debtor and creditor. The debt existed first; the lien was afterwards created. 18 Ohio (Gris.) 35; 29 Conn. 25. The right asserted in behalf of the guaranteed bondholder to a participation in the benefit of these liens, does not arise out of express contract. On the contrary, it is asserted as a right founded upon an equitable principle, which, as it is said, gives to the creditor the benefit of any security held by the surety for his indemnity and for the discharge of the debt. This principle, established by a long current of decisions, is conceded, but it remains to be considered whether it partakes, to any extent, of the nature of the contract, so as to vest in the guaranteed bondholder a right beyond the power of legislative control; or, as between parties of any character, a right which attaches to the security in the first instance, in such a way as to place it beyond the control of the parties to the contract; that is to say, the principal debtor and his surety.

This principle has been often referred to the same considerations of equity which have given rise to the doctrines of subrogation and of contribution. In a sense this is true; but they are not identical in their

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operation and effects. Indeed, it is *rather the converse of subrogation, and the cases in support of these doctrines are quite distinct; the exposition of the doctrine of subrogation appearing in a current of authorities commencing with Wright v. Morley, 11 Ves. 12; that of contribution finding lead-

ing authority in Dering v. Earl of Winchelsea, 1 Lead. Cas. Eq. 78; and the doctrine under discussion which is not distinguished by a name, unless we might import into it that of substitution, is traced to the ancient case of Maure v. Harrison, digested in 1 Eq. Cas. Abr. 93, K. 5. The argument will not, at first thought, be traced to the same principle as that which entitles the surety to the right of subrogation; for this is referable to those deliverances of conscience and morals which afford especial protection in equity to him who stands bound merely for accommodation, and without valuable consideration or benefit to himself, and which, upon the same ground, entitles the surety who has paid the debt to have contribution of his co-surety—the equity in each case having become so familiar and well-established as to be regarded rather as a legal principle and enforced as a legal right. But in the last analysis, the principle of which we are in search, may, in its primary application, be traced to the same source, and be found in the conscientious regard of the court for the protection of the surety, and as an incident merely. This protection appears forcibly in several of the later cases. 10 Leigh 206; 1 Lead. Cas. Eq. (3d Am. ed.) 164; 12 Leigh 387; 18 Ohio 46. Apparently in conflict are 9 Cranch 43, 292. But we assert that any equity to the creditor arises subsequently, and because of certain conditions, the insolvency of debtor and surety, or danger arising of a fraudulent diversion of the security. See 1 Johns. Ch. 119, 129; 19 Ves. 349; 2 Johns. Ch. 418; 1 Paige 298, 615; 3 Saund. Ch. 428. These are the authorities upon which the motion of a trust is founded; but they do not touch the question of the surety's right to surrender the security to the debtor, if done in good faith and before insolvency. The State of South Carolina is not insolvent, and cannot be, so long as there is property to be taxed and persons to pay. But there is no question of contract here; it is only an equity. Cases above cited, and 14 Ves. 169; 4 Johns. Ch. 149. Not being a contract, its repeal by the legislature violates no constitutional provision; being for

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*the indemnity of the surety, it is for him to determine the kind and measure of his indemnity, if he shall deem it to his interest to hold it at all.

This equity of the creditor or surety can attach only to securities in hand, and cannot attach to those which have been disposed of in good faith. 16 Conn. 139; 29 Conn. 25. Before resort was had by the creditor to this security, the second mortgage was created, and their contract is now superior to this mere equity. The case of Hand v. Railroad Company, 12 S. C. 314, was different from this case; there the bond constituted a lien.

Mr. S. Lord, Jr., Mr. J. H. Rion, and Mr. W. H. Brawley, contra.

March 24th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. It will contribute to a clear understanding of these cases to make a short statement of facts out of which the questions arise.

The Greenville and Columbia Railroad Company was incorporated by acts of the general assembly in 1845–6 and 1849, for the purpose of building a railroad from Columbia to Greenville, with branches to Abbeville and Anderson. In 1854 the company executed a mortgage to Charles M. Furman, Esq., trustee, of their entire railroad, including "the bed and superstructure, the materials used in the construction, the iron, stations, station-houses, depots, fixtures, workshops and machinery, rolling stock and all the land and real estate belonging to said company," with two inconsiderable exceptions, not important here, to secure bonds of the company which had been and were about to be issued, to the amount of $800,000, for the purpose of completing the road.

In 1861 these bonds, secured as aforesaid, were about to fall due, viz., in 1862, 1863 and 1864. At maturity they might be sued, and the company desired further time. They also desired that the state, which was a large stockholder, should in some way contribute an equivalent for the assessment which had been exacted from the private stockholders, and the following scheme was adopted: The property of the company was improved in value since the mortgage was

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executed, and the debt was enlarged *by over $100,000, and the time for payment was extended twenty years upon the whole $900,000, which was to be secured by the guaranty of the state, and another lien to be declared by statute to the state in substitution of the first mortgage. The mortgage was to be taken up and the statutory lien become the first. To accomplish these purposes was passed the act of January 28th, 1861, entitled "An act to lend the name and credit of the state to the Greenville and Columbia Railroad Company, in relation to the re-adjustment of their debt." 12 Stat. 885. This act authorized the comptroller-general to endorse bonds of the company to the amount of $900,000, and declared "that as soon as the comptroller-general shall have made any such endorsement on any bond, the whole estate, property and funds within the state which the said company may then possess or shall afterwards acquire, shall thenceforth stand pledged and mortgaged to the state, without any further act or deed on the part of the company, for the faithful and punctual performance on the part of the said company of such con-

tract, and the payment of such obligation in priority and preference of any other debt which the said company may then or any other time owe, except the bond debt now secured by mortgage, which shall enure to the benefit of the state, as hereinafter provided," &c. These endorsed bonds were not to be used by the company for any other purpose than for "funding the debt of $100,000 now due by the company on notes and accounts, and of taking up the bonds of the company already issued and now secured by mortgage," &c. At that time the war was going on, and the transfer of the mortgage debt to the statutory lien went on slowly. Part of the mortgage bonds were never exchanged, and the $700,000 which were issued under the act bore date during the war, and were entitled "Confederate States of America."

In 1866 the war was over, but, as there might be difficulty about the bonds which had been issued during the war, it was determined to re-issue them with another caption; to renew the authority contained in the act of 1861 for issuing the $200,000 which had not been issued, and to put into the form of certificates of indebtedness the interest which had accrued, amounting to $350,000. To accomplish these purposes the

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act of 1866 was *passed, and thus far the act was substantially a re-enactment of that of 1861, adding nothing to the debt; for the lien was originally for $900,000, as well as the interest which might accrue. But the company had incurred new debts to the extent of $600,000, and the occasion of the passage of this act was taken to make a provision for funding that debt by a compromise of one for three. To do this required $250,000, and, by the fifth section of the act, certificates of indebtedness to that amount were authorized and guaranteed. The act did not assume to create any new statutory lien, but to re-enact and extend that of 1861 so as to cover the whole issue originally authorized and interest, and also the new element of $250,000, and was entitled "An act to alter and amend an act to lend the name and credit of the state to the Greenville and Columbia Railroad Company in the re-adjustment of their debt." 13 Stat. 395, 427.

In 1867, the company executed a second mortgage of their entire road and property to Cyrus D. Melton, Esq., as trustee, to secure other bonds of the company to the extent of $1,500,000. The state neither authorized her guaranty nor declared a statutory lien to secure these bonds. The mortgage itself, after reciting the first mortgage, the guaranty of the state and the statutory lien arising therefrom, declares in terms that the mortgage "is to be subject to the first mortgage and the statutory lien aforesaid." [See mortgage.]

In 1868, the convention which framed the constitution passed an ordinance which declared "suspended and inoperative, until ratified by the general assembly, all acts, or pretended acts of legislation purporting to have been passed by the general assembly of the state since December 20th, 1860, pledging the faith and credit of the state in aid of corporations, &c. 14 Stat. (Ordinances,) 35.

In 1869, the legislature, upon condition that the company would release its right of exemption from taxation, re-enacted the act of 1866, and a further endorsement of bonds to the amount of $50,000 was authorized to be applied to take up the interest of the mortgage and guaranteed debt becoming due from January 1st, to July 1st, 1868. 14 Stat. 183.

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*In 1870, under "An act to provide a sinking fund and the management of the same," the controlling interest owned by the state in the stock of the company was sold, and shortly after a new board of directors assumed control of the affairs of the company, and, it is alleged, issued a large amount of guaranteed bonds without complying with the terms and conditions imposed by law. 14 Stat. 388.

In 1871, the legislature passed an act entitled "An act to promote the consolidation of the Greenville and Columbia Railroad Company and the Blue Ridge Railroad Company," the fifth section of which, it is claimed, postponed all statutory liens prior to that date in favor of the second mortgage. 14 Stat. 590.

These are the acts under which this litigation arises. There is no testimony before us. The company not being able to pay all their obligations, questions of priority of lien soon arose between the holders of guaranteed bonds and the second mortgage bonds, the latter claiming that the act of 1871, last above referred to, postponed all statutory liens in favor of that of the second mortgage. The case first stated—James S. Gibbes v. The Greenville and Columbia Railroad Company and others—was instituted in 1872 by guaranteed bondholders for themselves and other creditors to foreclose mortgages, for relief, &c. The other case mentioned was in the nature of a cross-action by the attorney-general to protect the interest of the state, foreclose mortgage, enjoin creditors, for receiver, &c.

In these cases, heard together, Judge Melton, in 1872, appointed John S. Green, referee, enjoined the creditors of the company from suing, ordered them called in to prove their demands, and that the pleadings should be amended by making Charles M. Furman, trustee under the first mortgage, and C. D. Melton, trustee under the second mortgage, defendants. The referee called in all creditors of the company, and November, 1872, made his report showing the different classes of bonds, so far as they were presented, in their priorities, &c. In 1874, Judge Carpenter

extended and enlarged the reference. In May, 1878—C. M. Furman and C. D. Melton, both having died in the meantime—Judge Shaw ordered that the pleadings should be

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*amended so as to make parties H. H. De Leon, trustee, substituted for C. M. Furman, and W. A. Clark, substituted trustee for C. D. Melton. The pleadings were so amended, and the cases heard on the merits by Judge Pressley, who declared the priorities, appointed a receiver to take charge of the road, and ordered another reference. To this decision various classes of creditors have filed exceptions and the appeal comes to this court. The brief does not contain any further report from the referee or exceptions thereto. The number and amount of the different classes of bonds, or whether they were issued according to law, do not appear. This court cannot see the bearing of its judgment upon the actual facts, and can do no more than to announce the principles upon which the final report should be framed.

The cases on Circuit were fully argued, and, as the judge states, "without any objection from any one that there was want of proper parties;" but it appears that after his decree was rendered, one Bolivar B. Furman, ex parte, filed his petition in re James S. Gibbs v. The Greenville and Columbia Railroad Company et al. claiming that as the first mortgage conveyed the property of the mortgagor to "C. M. Furman, his heirs and assigns," the petitioner, who is the heir of the said Furman, [we suppose eldest son] was and is invested by descent with the legal title to the property and trustee as successor, and insisting that he is a necessary party to the proceedings, and should be impleaded as a defendant. Judge Mackey, to whom the application was made, dismissed the petition, on the ground that "the petitioner has no interest in the subject matter or the issues involved." From that order petitioner appeals, and raises the first question in the case.

The claim of the petitioner comes late, and is purely technical. The intention was to make C. M. Furman the depositary of a personal confidence in the nature of a passive trust; no beneficial interest or transmissible estate was conveyed to him by the mortgage, which was only a security for the bondholders. It was competent for the court, at the instance of the parties in interest, to appoint a trustee as successor of Mr. Furman. Judge Shaw appointed H. H. De Leon, and ordered

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him made a party. *The order dismissing the petition of Bolivar B. Furman is affirmed and the appeal therefrom dismissed. Hill on Trustees 285, 291; McNish v. Guerard, 4 Strob. Eq. 79; Davant, Trustee, v. Guerard, 1 Speers 242; Ex parte the Greenville Academies, 7 Rich. Eq. 478; Ex parte Mayrant, Rich. Eq. Cas. 1; Ex parte Knust, Bail. Eq. 489; Dean v. Lanford et ux., 9 Rich. Eq. 423.

The next preliminary inquiry is, whether the ordinance of the constitutional convention passed in 1868, declaring inoperative the acts of 1861 and 1866 until re-affirmed by the act of 1869, affects, by changing the date of lien or otherwise, the rights of the parties in these cases. It is not easy to define the powers which a convention of the people may rightfully exercise. It has been doubted whether any act of mere legislation in a state having a constitution can be passed by a convention called for a particular and different purpose. The body is not constituted with two houses, and in other respects lacks the organization necessary for ordinary legislation. The convention of 1868 was not called for a purpose fairly embracing the subject of this ordinance, which was never submitted to the people. But from the view taken by the court upon another ground, it is not necessary to consider here the abstract question of the power of the convention. The State, ex rel. McCready v. Hunt, 2 Hill 1.

It is not competent for one legislature, which is the regular law-making body, to repeal acts of a previous legislature under which private rights have vested, and, clearly, the convention had no higher power. The ordinance in this respect derives no force from the anomalous condition of the state growing out of the war. It is probable, from the time fixed from which the suspension was to commence—"December 20th, 1860"—that the ordinance was made on the idea that all acts of the legislature after secession were void. If so, such assumption was unfounded. Keith v. Clarke, 7 Otto [97 U. S.] 477 [24 L. Ed. 1071]. Private rights vested during the war are recognized as entitled to the protection of the constitution of the United States. A provision of the state constitution itself which impaired the obligation of contracts made during the war, has been declared null and void. Calhoun v. Calhoun, 2 S. C. 283; Cochran v. Darcy, 5 S. C. 125.

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*The ordinance was and is without the force of law. So much of the act of 1869 as reaffirmed the act of 1866 was unnecessary, and the rights of the parties must be determined as if the ordinance never existed.

The most important question in the case is that made by the holders of bonds under the mortgage of 1867, known as the second mortgage. It will be remembered that, in the order of time, the date of that mortgage, and certainly of all bonds held under it, is subsequent to the statutory lien created by the act of 1861, amended by the acts of 1866 and 1869. But it is earnestly urged that the fifth section of the act of 1871 postponed the statutory lien so as to leave the mortgage of 1867 next after the first mortgage. The company only executed two mortgages; all other liens were declared by statute; and the effect of postponing the statutory liens would be to leave the mort-

gages standing in the order of their dates. The act of 1871 is entitled "An act to promote the consolidation of the Greenville and Columbia Railroad Company and the Blue Ridge Railroad Company," and sections four, five and seven bear upon the point, and are as follows:

"Sec. 4. That in view of the consolidation of the Greenville and Columbia Railroad Company and the Blue Ridge Railroad Company, the action of the said Blue Ridge Railroad Company in making the bonds authorized under the act of September 15th, 1868, and of the comptroller-general of the state in endorsing the same, and thereby pledging the faith and funds of the state to the payment of said bonds, is hereby ratified and confirmed; and that the making and execution by said Blue Ridge Railroad Company and said other companies of the mortgage aforesaid to Henry Clews, Henry Gourdin and George S. Cameron, to secure the payment of the bonds aforesaid, is also ratified and confirmed, and said mortgage is declared to be a lien prior to that of the state on all property described in said mortgage, and on the entire line of the road aforesaid, and on all the properties of said several companies, or which they or either of them, may hereafter acquire; but nothing in this act contained shall be construed to divest the state of its lien on the estate and property of the said several railroad com-

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panies, or of either of them, for its *endorsement of the bonds aforesaid, but said lien is postponed to and declared to be subject and subordinate to that of the mortgage hereinbefore mentioned, to Henry Clews, Henry Gourdin and George S. Cameron, trustees.

"Sec. 5. That all statutory or other liens or lien, encumbrances or encumbrance, equities or equity, except the mortgage encumbrances now upon the property, assets, effects, rights and franchises of said Greenville and Columbia Railroad Company, or any part thereof, and also except the mortgage herein authorized, shall be and are, or is hereby made subsequent to the mortgage encumbrances now in existence thereon and subsequent to the one herein authorized, so that the holders of the bonds secured by said mortgages, or either of them, shall have a lien and security as between each other, according to the time said mortgages have been or shall be recorded, and a prior lien to all other liens or encumbrances whatsoever, any law or laws to the contrary notwithstanding.

"Sec. 7. That after the consolidation of the Greenville and Columbia Railroad Company with the Blue Ridge Railroad Company, the bonds now held by the Greenville and Columbia Railroad Company and the Blue Ridge Railroad Company, shall be endorsed by the consolidated company."

It does not appear that this act was ever accepted by the Greenville and Columbia Railroad Company or its creditors, or went into operation, in whole or in part. Indeed, the contrary appears. The company executed the second mortgage, which, in its terms, recognizes as superior the first mortgage and the statutory lien. The title of the act has been stated. In the usual manner it is divided into sections, but they all relate to the one subject of the act; otherwise there would be two or more acts in one under a false name, and violating the provision of Section 20, Article II., of the constitution, which declares that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." But we think that all the sections of this act, properly construed, have reference to the subject expressed in the title. The fourth section provides for the waiver of a statutory lien on the Blue Ridge railroad, the property of one of

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the companies to be consolidated. *The fifth section provides for the waiver of the statutory lien on the Greenville and Columbia railroad, the property of the other company being prepared for consolidation. The seventh section provides that "after the consolidation the bonds now held by the Greenville and Columbia Railroad Company and the Blue Ridge Railroad Company shall be endorsed by the consolidated company." Are these sections each an act independent of the others, or all parts of one whole? The object as stated, and as appears from the act itself, was to consolidate the two companies. Considered in reference to its purpose, the act is a unity with several parts. Each section brings its contribution to the end in view. If the taking effect of the charter of the consolidated company and its endorsement of the bonds are not technically conditions precedent to the waiver of the lien, they are provided for by the same act and are parts of one plan, and must stand towards each other in the relation of mutual and dependent provisions. In the order of time, of course, the companies had to be consolidated before such consolidated company could endorse the bonds; but is it not apparent that the endorsement, though later in the order of time, was to be the counterpart and consideration of the waiver? The fact that the parts are in different sections does not alter the case. The division into sections is purely arbitrary. Part of an act, isolated and disconnected from the context, may defeat instead of give effect to the intention of the law-maker. The fifth section of the act of 1871, which was inserted as part of a plan to consolidate the two companies, cannot, after that purpose has failed, be enforced for the sole and different purpose of effecting priorities in one of said companies. The object of the act

having failed, each and all of its parts also fail.

But if the fifth section of the act of 1871 is to be considered as a law in itself, independent of the other sections and the purposes of the act, was it within the power of the legislature to pass such a law? We need not repeat what we have said upon the subject of the infringement of rights through the forms of law in connection with the ordinance of the convention. It has, however, been earnestly and ably argued that these bondholders contracted for no other security than the obligations of the company and the guaranty of the state; that they will

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still have that if *the lien is postponed; that they never had any vested interest under the statutory lien, which was a collateral indemnity created by the state for the sole purpose of securing herself, and, as it was a creature of the state, solely to indemnify the state against loss on the guaranty, the state could waive or relinquish it at her pleasure. The principle contended for is that a security given for the protection of the surety may be waived by him, and the creditor has no such interest in the transaction that can supply the want or privity of contract.

We consider that the principle, as stated, has no application to this case, and might be admitted without affecting the result here. It will presently appear that the statutory lien in this case was not given exclusively for the indemnity of the guarantor, but to secure the payment of the debt. The general rule undoubtedly is: That when the principal debtor has given the surety a security against his liability, the creditor is entitled to the benefit of the security. 1 Lead. Cas. Eq. 196; Homer v. Bank, 7 Conn. 483; Jones v. Quinnipiack Bank, 29 Conn. 25.

There are cases in which the principle may seem to be modified, but, when carefully examined, it will be found that they stand on their peculiar circumstances, as where the security was given after the original agreement for the sole purpose of indemnifying the surety and not for the payment of the debt. The case above cited of Jones v. Bank, which, in the argument, was relied upon by both sides, may be taken as declaring both the rule and the modification. The principles announced in that case are the following:

"When a mortgage is given to secure a debt, whether the debt be in a negotiable form or not, a transfer of the old debt transfers in equity the security, if the security has not previously been surrendered by the creditor." "But when a mortgage is given, not to secure a debt, but to indemnify a security, then the security does not, in the first instance, attach to the debt, as an incident to it, but whatever equity may arise in favor of the creditor with regard to the securities arises afterwards, and comes into existence only upon the insolvency of the parties holden for the debt."

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*Apply the principles here announced to this case, and the whole point resolves itself into a question of construction: Whether the statutory lien was given to secure the debt or to indemnify the guarantor? Did or did not the bondholders contract to secure their debt? It seems to the court that there can be no doubt upon that point. They held a perfectly good security under the first mortgage. The state passed an act, and thereby proposed to them to exchange their mortgage security for the statutory lien. They did so, and the terms of the act constitute a contract between the company, the bondholders and the state, as clearly as if a new mortgage had been executed by the company, and the state had guaranteed the bonds as additional security. That contract was made at the time the bonds were guaranteed, and as part of the original arrangement, and each party has a right to insist upon its terms. Was it exclusively to indemnify the state or to secure the debt to the bondholders? It is true, it was to the state, as the first mortgage was made to C. M. Furman, but expressly and in terms to secure the payment of the debt. The act of 1861 has on the face of the covenant these words: "For the faithful performance on the part of the said company of such contract, and the payment of such obligation in priority and preference of any other debt which the said company may then, or at any other time, owe, except the bond debt now secured by mortgage."

The act of 1866 has these words: "That the statutory mortgage contained in the second section of the act of which this act is amendatory shall constitute a lien on all the property, &c., to secure the payment of the principal and interest of the whole debt of $1,500,000 thus guaranteed in the adjustment of the original mortgage and guaranteed debt of said company, also the debt of $600,000 and interest thereon, which is now secured by mortgage." And the act of 1869 declares "that the statutory lien is hereby extended to cover the additional sum of $50,000 herein provided," &c.

Can there be any doubt, from the terms of these acts, that the statutory mortgage was not given exclusively to indemnify the state as guarantor, but, in express terms, to secure the debt to the creditor? This subject has lately received exhaustive con-

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sidera*tion by this court in the case of Hand v. Savannah and Charleston Railroad Company, 12 S. C. 314, and it is quite unnecessary to say more than to repeat the words of Chief Justice Willard, as the organ of this court in that case, in which the facts were less plain than they are in this:

"In all these cases the intention is clearly

expressed that the security taken shall be for the payment of the bonds. It is in no case said that it is taken for the special indemnity of the state as endorser. That is undoubtedly implied, but the direct provision is for the payment of the bonds. A provision for the payment of the bonds is primarily a security for those holding the bonds. It is always so in equity, and at law when its forms permit it." (P. 342.) "The foregoing conclusions establish the proposition that the bond and coupon holders took a mortgage or lien upon all the property of the old company intended by that act to be subjected to such mortgage or lien, which the legislature had no right to destroy or postpone, as such attempt was in violation of the provisions of the constitution of the United States and of this state forbidding the passage of a law impairing the obligation of a contract." (P. 356.)

The next question is as to relative priorities of the different classes of bonds guaranteed by the state and held under the first mortgage. It is not questioned by any of the parties that the first mortgage of 1854 is the first lien upon the property of the company to the extent of the bonds that have never been exchanged, but are still outstanding in their original form. But it is not conceded that this is true of that portion of those bonds which were exchanged for guaranteed bonds, and are now in the possession of the state. It is insisted that the state, having guaranteed other bonds issued by the company in lieu of them, which substituted bonds are interest-bearing obligations, that the bonds in the possession of the state, are, in effect, paid, and should be regarded as either canceled or held as cumulative security for a particular class of the guaranteed bonds. The statutory lien was intended as a substitute for the first mortgage, and if all the bonds had passed under the statutory lien, the first mortgage would have become "functus officio," and the statutory lien taken its place as the first, and, in that event, the

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bonds *received in exchange would have died with the mortgage. The exchange, however, was not made of the whole, but only of part. At first view it would seem that the same result should follow as to the part exchanged, and that the bonds taken up should be regarded "pro tanto" paid, and the mortgage canceled, except so far as was necessary to cover the bonds still outstanding. On the other hand, there may have been good reasons for keeping alive the lien of these transferred bonds under the mortgage until the whole amount was transferred. But be that as it may, the words of the act are too plain and explicit to admit the view that they are to be considered paid. The act declares expressly that the bonds thus taken up and deposited with the "president of the bank shall stand as security to the state, and thereby give the state the lien under the first mortgage until all the bonds now secured by mortgage shall be retired." All the bonds secured by mortgage have not yet been retired, and we cannot declare a result directly in the face of the act. It is not conceived that the outstanding mortgage bondholders have any right to complain of this. They accepted the mortgage security, knowing that it covered the whole $800,000, and there is little equity in the claim that as each bond passed from under the mortgage the value of the mortgage to that extent must be enhanced for their benefit. All the bondholders had the right to stand still as those outstanding have done. It is the same to them whether the state holds them or the original owners.

Accepting this view, it is insisted in the next place that at least no interest should run on the bonds held by the state until after the company ceased to pay interest on the guaranteed bonds substituted for them; otherwise, it is said, the company pays interest twice on the same debt—on the bonds held by the state, and also on the guaranteed bonds given in exchange for them. This would be true if the bonds transferred to the state had been directly for the benefit of the holders of the guaranteed bonds as cumulative security. In that case the payment of one security would discharge the other pro tanto. But these are not double securities to the same creditor. The parties were competent and they have made this arrangement. The guaranty and the statutory lien stand as the security of the bondholder, and these

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*mortgage bonds are the security of the state for its liability as guarantor.

Interest is only the legal accretions of the principal and becomes part of the debt. The security of the transferred bonds and interest not being to the same creditor, is unaffected by payments on the guaranteed bonds, but is affected by its character as an indemnity, and as soon as the guaranteed debt is paid, and the state saved harmless, its functions, as a guaranty, will have been accomplished, and the excess, if any, fall into the assets of the company. It may be remarked, in passing, that this claim of the state, under the first mortgage, is primarily an indemnity to the state as guarantor, rather than a direct security to the bondholders for their debt, and in this regard differs from the security of the statutory lien, which, as we have seen, is a security primarily for the creditor. Being an indemnity, it may be that this security of the state, according to the principle so strongly urged upon the court, might be relinquished or waived by the state, but the claim is as a bondholder under the first mortgage, which is expressly excepted from the operation of the fifth section of the act of 1871, in regard to waiver.

It only remains to consider the relative priorities as between the bonds issued under the acts of 1861, 1866, and 1869. The court is not informed whether there are any bonds still outstanding, issued under the act of 1861, and still having the caption of "The Confederate States of America." If there are any such, they are unaffected by the provisions of the acts subsequently passed, the terms of which they have not, directly or indirectly, accepted, and must rank next after the first mortgage bonds as the first class of guaranteed bonds.

The act of 1866 did not assume to create a new statutory lien, but to re-affirm and extend that of 1861. It did, however, enlarge the amount of bonds authorized to be issued from $900,000 to $1,500,000—a difference of $600,000; but of this apparent enlargement $350,000 are for interest which had accrued, and which, in fact, was part of the old debt, so that to the amount of $1,250,000 the act of 1866 was substantially a substitute for the act of 1861. If the interest had not been represented by certificates of indebtedness, the debt and interest,

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which were already *under the mortgage and statutory lien, would have amounted to this statutory sum. But the fourth section of the act of 1866 did provide for another issue of bonds and certificates of indebtedness, to the amount of $250,000, to fund the floating debt of $600,000, by a compromise of one for three. To this extent a new debt was incorporated and the old lien of 1861 extended over it. It is argued that this was a wrong done to holders of bonds issued under the act of 1861 and re-issued under the act of 1866—the $700,000 confederate bonds; that the legislature cannot extend the lien which belonged exclusively to them over an increased debt, and thus impair the value of their security; that to extend an old lien over a new debt, is, in effect, to create a new lien for the new debt, which must leave the old debt under its own lien and take its place in the order of priorities by the date of the extending act. There is great force in this view, so far as the element of new debt is concerned, and we have already held that the bonds issued during the war under the act of 1861 and never passed under the act of 1866, must have priority and take rank from the date of the former act. But as to those bondholders who came in and accepted bonds issued under the act of 1866, we think this objection does not apply. They have accepted the advantages offered by the act of 1866, and they must take its disadvantages. This principle of estoppel is fully developed in the case of Hand v. Railroad, before referred to. We can add nothing to what is there said also upon this point, and will not re-open the argument. The court says: "It is too clear for argument or the citation of authorities, that one taking a provision made for himself by statute, must take upon the condition upon which it is offered. This principle equally applies to express conditions and such as may be fairly implied from the terms of the statute." (P. 348.)

To this it is replied that this is a different case from that of Hand. That the act of 1866 offered no valuable consideration and imposed no conditions; that it only re-issued the bonds in a different style. That the act is not a unity, but divisible, and, in fact, four different acts in one. That the first section provides simply for the re-issue of the bonds issued under the act of 1861; that the second section only provides for the deficit under the

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*same act; that the third section provides for an issue of certificates to pay interest, and that the fourth section provides for a new issue to fund the floating debt. It is true that these provisions are in different sections, but they are part of one act upon the same general subject. None of the above sections re-enacts the lien; that is in still another section, the sixth, which declares "that the statutory mortgage contained in the second section of the act of which this is amendatory, shall constitute a lien to secure the payment of principal and interest of the entire debt of $1,500,000, thus guaranteed in the adjustment of the original mortgage and guaranteed debt of said company, and also the debt of $600,000 and interest thereon, which is not secured by mortgage." The results of the war had made necessary a re-adjustment of the debt of the company. The act of 1866 embodies a carefully prepared plan upon the whole subject, and not upon any separate part. So far as its general purpose is concerned, it is an entirety, and we cannot avoid the conclusion that those who accepted some of its provisions are bound by all.

The act of 1869 provides as follows: "That to enable the said company to fund the interest due upon their mortgage and guaranteed debt for the six months, viz., from January 1st to July 1st, 1868, the comptroller-general is authorized and directed to endorse the name and credit of the state upon the bonds and certificates of indebtedness of the said company to the amount of fifty thousand dollars, to be applied in all respects and in the same manner and with the same conditions and restrictions as is provided in the act of December 20th, 1866, for the funding of interest, and the statutory lien is hereby extended to cover the additional sum of fifty thousand dollars herein provided."

The company and the bondholders accepted this act. The bonds and certificates of indebtedness were issued, we must suppose, in accordance with its terms, and the last question is made by W. A. Clark, trustee under the second mortgage. He insists "that, as the act of 1869 was passed after the second

mortgage was executed, the $50,000 bonds issued under its provisions are subject to the lien of the second mortgage bonds."

The Circuit judge states that "there was no proof before him as to the date of any of the

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second mortgage bonds, but it is *quite certain that it was after the act of 1871, which purported to postpone the statutory lien."

It was stated at the bar that this was a mistake in fact, and we have no evidence upon the subject before us. It does not, however, seem to us to be a material inquiry whether any of these bonds were issued between May, 1867, and February, 1869. It must be remembered that these bonds were issued only to fund interest in arrears.

Should the bonds and certificates issued under the act of 1869 be postponed to the second mortgage bonds only because of the date (1869) of the act which authorized their issue? The act of 1869 created no new debt, but put in a new form on credit the interest on the old debt from January to July, 1868. The coupons funded were already secured by the lien of 1866. They were as high security as the bonds from which they had been cut, and entitled to share "pari passu" with them. City of Kenosha v. Lamson, 9 Wall. 483 [19 L. Ed. 725]; City of Lexington v. Butler, 14 Wall. 282 [20 L. Ed. 809]; State v. The Spartanburg and Union R. R. Co., 8 S. C. 129. If the coupons had not been funded they would now have the effect of enlarging the lien debt by the amount of this issue. Must the holders of these bonds be postponed only because they accepted these bonds and certificates in exchange for their coupons already secured by lien? That must depend upon the terms upon which they were issued and received. Whether one security operates in payment or satisfaction of another, is always a question of intention. Did they intend to discharge the coupons already due and relinquish their lien by taking in satisfaction bonds for the same amount not due for twenty years, and to be secured by a postponed lien? The bond or certificate is not the debt, but the evidence of it. Nothing is payment but that which produces payment, or is received as payment. To give one security for another of equal dignity, without the intention of discharging the debt, is not payment, but substitution, and in such case it is well settled that a lien, such as a mortgage previously existing, is not discharged, but remains and still secures the debt in the new form. Burton v. Pressly Cheves' Eq. 1; Costello v. Cave & Bradley, 2 Hill 528 [27 Am. Dec. 404]; Gardner v. Hust, 2 Rich. 608; Kelsey v. Rosborough, 2 Rich. 244; Bank v.

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Bobo, *9 Rich. 34; Adger v. Pringle, 11 S. C. 527; 6 Wait's Act. & Def. 410, 413, 417.

Here the intention is not doubtful. The bonds were issued and accepted, according to the terms of the act, which is the contract of the parties, and this declared expressly that the statutory lien of 1866 "is extended over them." From the view which the court takes, the bonds issued under the act of 1869 should have priority to the bonds issued under the second mortgage of 1867, without regard to the date of their issue.

The result of this reasoning would be to place the bonds issued under the act of 1869 on the same footing with those issued under the act of 1866; but that part of the Circuit decree which places the bonds of 1869 "after" the bonds issued under the act of 1866, not being appealed from, we are not at liberty to disturb it.

It is adjudged that the Circuit decree be affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 254

(Case No. 836.)

Ex parte FARRARS. In re GARRETT v DIAL.

(November Term, 1879.)

[1. *Judgment* ⊂⊃128.]

Where a decree ascertained that certain moneys, with interest, were in the hands of an assignee for the benefit of creditors, and applicable to a debt admitted in the pleadings, and it was referred to the commissioner of the court to add the several sums together, with the interest thereon, and if insufficient to pay such debt to take testimony upon other items of the assignee's account, but the decree did not state the aggregate of the moneys charged, nor order payment—*Held*, that it was not a final money decree.

[Ed. Note.—Cited in Brown v. Rogers, 80 S. C. 292, 61 S. E. 440.

For other cases, see Judgment, Cent. Dig. §§ 237, 238; Dec. Dig. ⊂⊃128.]

[2. *Executors and Administrators* ⊂⊃261.]

To entitle a decree to rank as a judgment against the assets of one deceased, it must have ascertained a definite sum of money to be due, and ordered its payment; it must be a decree upon which an execution could have been issued. Cases considered.

[Ed. Note.—Cited in Addickes v. Allison & Bratton, 21 S. C. 259; Cook v. Jennings, 40 S. C. 210, 212, 218, 219, 18 S. E. 640; Bankhead v. Good, 56 S. C. 394, 395, 396, 398, 34 S. E. 689.

For other cases, see Executors and Administrators, Cent. Dig. § 957; Dec. Dig. ⊂⊃261.]

[This case is also cited in Brown v. Rogers, 80 S. C. 289, 61 S. E. 440, and distinguished therefrom.]

See Farrar v. Farley, 3 S. C. 11.

Before Pressley, J., Laurens, June, 1879.

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*S. S. Farrar & Bros. obtained a judgment against Joseph Crews, April 17th, 1855, for $2417.51, besides interest and costs. But before this judgment was obtained, Crews had made, in January and April, 1855, five assign-

ments for the benefit of his creditors—two to Lewis Dial, two to W. R. Farley and one to Farley & Dial; and, under the last assignment, whatever balance was left after paying certain preferred debts, was made applicable to all his other creditors in full or pro rata, who should execute a release of any balance that might be due them. The Farrars came in and accepted its terms. In April, 1859, S. S. Farrar & Bros. filed their bill in the court of equity for Laurens district, against Farley, Crews and Dial, for an account by Farley & Dial of their administration of their trust. The bill stated the amount of the Farrars judgment, with an accurate statement of the interest, and that it remained unsatisfied. Dial and Crews, in their answer, admitted that complainants were judgment creditors for the amount stated in their bill, but denied having funds to pay with. In June, 1859, all matters of account were referred by Chancellor Johnstone to the commissioner. The commissioner reported, and his report, with exceptions by Farrar Bros., and Crews and Dial, came up before Carroll, Chancellor, in June, 1868. Some of the exceptions were sustained and some overruled, and the commissioner was ordered to reform his report as directed; and an inquiry, was ordered, if, upon the calculation of interest and the addition of items ordered by the decree, it was found that there was not enough in Dial's hands to pay the Farrars, and also another small judgment held by one Penn. Such further inquiry was never made, because it was found to be unnecessary, as the calculations made under the directions of the decree showed a balance in Dial's hands more than sufficient to pay these two claims. An appeal was taken by Dial to the Supreme Court, pending which Dial died. See 3 S. C. 11. Upon the dismissal of the appeal, Dial's administratrix, Minerva Dial, was brought in by plaintiffs, and judgment entered up against her as administratrix of Dial, in October, 1877.

Meantime an action had been commenced by Patillo Garrett, administrator, against Minerva Dial, administratrix, and others, for a settlement of Lewis Dial's estate.

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Creditors were called in, *and the attorneys, who represented Farrar Bros. in the first suit, presented the judgment of October, 1877, as a claim against the estate. It was held by the referee to be a simple contract debt against Dial, and this report was confirmed by the Circuit judge, all parties consenting.

Subsequently, J. C. Farrar and C. D. Farrar, survivors of S. S. Farrar & Bros., filed their petition in the case of Garrett v. Dial, alleging that decree of Chancellor Carroll, rendered in 1868, was a final judgment, and should be paid as such out of the assets of Dial's estate; that his lands had been sold under orders in this cause, but that the purchase money was still in the custody of the court—that they had never been parties to this cause, nor had notice of its pendency. Upon this petition, duly sworn to, Hon. W. H. Wallace, judge of Seventh Circuit, granted an order requiring the parties to the record to show cause why the prayer of the petition should not be granted, and restraining the clerk meantime from paying out the funds in his hands. The answer to this petition insisted that the decree of 1868 was not a final judgment; and if it was, that petitioners were estopped by the entry of the judgment of October, 1877, and by the judgment already rendered in this cause.

The decree of the Circuit judge is as follows:

Judge Wallace hitherto, with consent of Simpson & Holmes, as representing Farrar & Bros., ordered a distribution of the funds in this case, then in the custody of the court. That order is now objected to by Farrar & Bros., who came before the court on petition and affidavit, setting forth misunderstanding between them and said attorneys. I think it established that such misunderstanding existed, and that as to such of the fund as remains in court, it should be distributed as if such order had not been passed.

The claim of petitioners presents a very difficult question, on which I find no satisfactory authority, and therefore decide it only because I must.

Joseph Crews assigned his property to Lewis Dial and W. R. Farley for payment of his debts. He owed Farrar & Bros., and in April, 1857, they filed a bill to compel payment against the said assignees. The decree

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in the case was filed by Chancellor *Carroll, in 1868, and affirmed by the appeal court in 1871, but in October, 1870, Lewis Dial died. With the previous report of McGowan, then commissioner in equity, that decree fixed the amount of the debt of Farrar & Bros., and one to T. S. & J. Penn. It settles that all other claims under the assignments had been settled, and that Dial had in hands applicable to the said two unpaid debts, the sums of $2087 profit on land re-sold by him, $719, the price of a slave Alfred, and $120 for his hire before the sale. The opinion of the said Chancellor was ordered to stand as the decree of the court, and Dial was condemned to pay the costs of the case. On the other points the case was recommitted to the said commissioner, and he was ordered to pursue other inquiries as to the liabilities of Dial, in case the assets in his hands, as settled by said decree, should not be sufficient to pay the said debts. Subsequently the commissioner amended his report, and, finding the assets sufficient, did not pursue the inquiries conditionally directed in the decree. The amended report was not acted on by the court during the lifetime of Dial. After his death, on amended proceedings, it was reported on

by Silas Johnstone, referee, and confirmed by the court, and thereupon judgment was entered for Farrar & Bros. on October 2d, 1877, for $6220.88 debt, and $285 costs.

Farrar & Bros. now claim that under this decree of Chancellor Carroll their debt, though not a lien, yet ranks as a judgment against Dial's estate under the act of 1879.

I hold under the case of Edwards v. Sanders, 6 S. C. 316, that a decree, though not a lien, may rank as a judgment under the said act.

Furthermore, that to the extent of $285, the costs of the case, and $2926, the aggregate of the items decided by Chancellor Carroll, with interest from July 5th, 1856, his said decree is one for the payment of money, and ranks as a judgment against Dial's estate, but that it does not so rank in respect of the additional amounts found due by Dial in the commissioner's amended report.

It is therefore adjudged that the former order for distribution of such fund be rescinded, and the same be distributed, in so

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far *as any still remains, in accordance with this decree, ranking the debt of Farrar & Bros. to the extent aforesaid as a judgment.

From this decree the respondents appealed to this court.

Messrs. Pope & Watts, for appellants, cited 1 McC. Ch. 32 and 1 Daniell's Pr. & Pl. 1199.

Mr. R. W. Shand, contra, contended that as the debt was stated in the bill and admitted in the answer, the only issue was, how much of the assigned estate was in Dial's hands applicable to this debt; and that when the decree of 1868 fixed the items in Dial's hands and directed interest to be charged, it, in effect, said that there was money enough in Dial's hands to pay this debt, and so the decree took rank as a final judgment for the amount charged in the bill and admitted by answer.

March 24th, 1880. The opinion of the court was delivered by

McIVER, A. J. The questions raised by this appeal are:

First. Whether the decree of Chancellor Carroll, filed in 1868, was entitled to rank as a judgment in the administration of the assets of Dial.

Second. If so, are not the plaintiffs estopped from claiming such effect for it, by reason of the action of their attorneys in having it merged into and made a part of the judgment recovered in 1877, after the death of Dial.

Third. If that be not so, are not the plaintiffs estopped from setting it up as a judgment recovered prior to the death of the intestate, by the order passed by Judge Wallace in July, 1878?

Since the case of Woddrop v. Ward, 3 Desaus. 203, it has not been doubted that in this state decrees in equity rank as judgments in the administration of assets of the estates of deceased persons. Such was the law in England, even when decrees acted only in personam and were enforceable only by process of contempt and by writ of sequestration. 2 Wms. on Ex'rs 731, (2d Am. Ed.); Morrice v. Bank of England, 4 Brown, P. C. 287. It was not, however, every decree which was entitled to that rank, for, as is

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said in the next page of Williams on Ex*ecutors: "If a decree be not conclusive of the matters in question, as if it be merely to account and do not ascertain the sum to be paid, it is analogous to a judgment quod computet at law, and that is no complete judgment till the account be stated." Smith v. Eyles, 2 Atk. 385. Such a decree is like an interlocutory judgment at law which has been held, in the case of McIntosh v. Wright, Rich. Eq. 385, not to be such a judgment as is contemplated by the act of 1789. Gen. Stat. 457. To give it such a character, it must be a final decree, and by that we understand (speaking of a money decree) such a decree as not only ascertains that a definite sum of money is due from one party to another, but orders the payment of the same. It must be such a decree as will authorize the issuing of an execution for its enforcement. As is said in Haskell v. Raoul, 1 McC. Eq. 32, a decretal order upon which an execution may be taken out is a final decree. The Supreme Court of the United States, in the case of Forgay v. Conrad, 6 How. 201 [12 L. Ed. 404], have declared the rule to be (the italics being ours): "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, *or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution*, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed." This rule is re-affirmed in the same language in the more recent case of Thomson v. Dean, 7 Wall. 342 [19 L. Ed. 94].

The inquiry, therefore, is whether the decree of Chancellor Carroll was such a decree as authorized the issuing of an execution for its enforcement. We do not think so. No definite sum was ascertained to be due by Dial to the plaintiff, and certainly there was no order for the payment to them of such sum. The original report of the commissioner is not before us, and it is not stated that in such report he recommended that any particular sum of money should be paid to the plaintiffs by Dial; and even if he had made such recommendation there is no confirma-

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*tion of the report, but, on the contrary, it is recommitted for reformation in the several particulars indicated, and no order for the payment of any particular sum of money by Dial to the plaintiffs. We do not see, therefore, how, without some further action on the part of the court, any execution could have been issued to enforce the decree; for, in order to do so, as the law then stood, it would have been necessary to enroll the decree, and to do this it would have been necessary to show some decree of the court, not only ascertaining that a definite sum of money was due by one party to the other, but also an order for the payment of the same. It may be, as was argued by the counsel for the respondents, that the decree contained within itself the data from which the amount due could have been ascertained by a mere arithmetical calculation, yet there still is an entire absence of any order or decree for the payment of such amount, and without such order there is no such judgment as would authorize the issuing of an execution to enforce the payment. It would be like a case under the old practice, wherein an action on a note to which no defence was interposed, though the record would furnish the data from which the amount due could be ascertained by a mere arithmetical calculation, yet, still, until that was done, in the mode prescribed by law, there could be no final judgment by the judge's order referring it to the clerk to assess the damages, but the judgment would continue to be a merely interlocutory judgment and not entitled to rank as a judgment in the administration of the assets of an intestate's estate. So in this case Chancellor Carroll might have had before him the data by which he could, by a simple calculation, ascertain what was due from the defendant to the plaintiffs, but the fact nevertheless remains that he did not do it, for reasons which are apparent in the decree itself, and did not decree any specific amount to be paid by the defendant to the plaintiffs. In this respect the case differs from that of Sullivan v. Thomas, 3 S. C. 531, for there the Circuit judge, in the exercise of his chancery jurisdiction, after having ascertained the specific amounts due to the several parties, concludes with an order for the payment of the said sums of money to the said parties. The case of Stovall v. Banks, 10 Wall. 583 [19 L. Ed. 1036], to which our attention has

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been especially invited *by the counsel for the respondents, does not in anywise conflict with the views hereinbefore expressed, for in that case the decree not only determined the sum due to each of the complainants and directed its payment, awarding execution therefor, but the execution was actually issued. The case of Atherton v. Fowler, 91 U. S. 143 [23 L. Ed. 265], which is also relied upon, was a case in which the Supreme Court of California reversed the judgment of the inferior court and directed a modification thereof as to the amount of damages, but without permitting further proceedings below, if the defendants consented to the modification, and the record showed that such consent was given before the writ of error was taken out. It was, therefore, very properly held that the objection that this was not a final judgment because the case was remanded to the inferior court for further proceedings, was not well taken, because it was not true in point of fact that the case was remanded for further proceedings by the court below, but only for the purpose of enabling the defendants to consent to a modification of the judgment in respect to the amount of damages. When such consent was given, as was done before the writ of error was taken out, there was a final termination of the case, and there was nothing further for the court to do, and the judgment was, therefore, a final judgment. But if the consent had not been given, or until it was given, there was no judgment, either final or otherwise. It was, practically, therefore, nothing more than an order for a new trial, nisi the plaintiff would remit a part of the damages recovered; upon such remittitur being entered, the judgment would become a final one, as nothing would be left for the court to do. But in the case under consideration the report of the commissioner was recommitted for the purpose of enabling that officer to reform the account in accordance with the directions contained in the decree, so that it might form the basis of a final judgment, and until such reformation was made and reported to the court, there was nothing upon which to base a final judgment ascertaining a certain definite amount to be due by the one party to the other, and directing its payment.

Under this view of the case, the other questions presented by the appeal cannot arise and need not be considered.

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*The judgment of the Circuit Court is set aside, and the case remanded for further proceedings in accordance with the views herein expressed.

WILLARD, C. J., concurred.

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13 S. C. 262

(Case No. 837.)

THE STATE, ex relatione MARSHALL, v. STARLING.

(November Term, 1879.)

[1. *Mandamus* ⇐154.]

County commissioners cannot be required to give a check unless there are funds in the treasury appropriated for the particular subject to which the claim belongs.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 303; Dec. Dig. ⇐154.]

[2. *Counties* ⟸162.]

Excesses in any specific appropriation, in the county treasury for a fiscal year, are applicable to other county claims for that year; an excess over all claims goes over to the next fiscal year.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 221, 222; Dec. Dig. ⟸162.]

[3. *Mandamus* ⟸102.]

Funds being in the county treasury for the fiscal year ending October 31st, undrawn, but insufficient to pay audited claims for that fiscal year, and no funds being yet collected for the fiscal year commencing November 1st, upon petition filed in January, a mandamus was granted requiring the county commissioners to draw their warrant for one-third, or the October portion, of a trial justice's salary, which was fixed by law and due for the quarter ending December 31st.

[Ed. Note.—Cited in Richland County v. Miller, 16 S. C. 252; In re Conant's Claims, 21 S. C. 364; Jennings v. Abbeville County, 24 S. C. 550.

For other cases, see Mandamus, Cent. Dig. § 221; Dec. Dig. ⟸102.]

[4. *Counties* ⟸204.]

A salary fixed by law need not be audited, as the county commissioners have no discretion to allow or reject it; when funds are in their treasury, applicable to its payment, it is their duty to draw a check therefor.

[Ed. Note.—Cited in State v. Clyburn, 16 S. C. 375, 377; State v. Jackson, 32 S. C. 27, 39, 10 S. E. 769; State v. Hallback, 40 S. C. 303, 18 S. E. 919.

For other cases, see Counties, Cent. Dig. §§ 312, 316–321, 337; Dec. Dig. ⟸204.]

Original application to the Supreme Court, January, 1880.

Application for a writ of mandamus requiring W. D. Starling, N. J. Dubard and T. A. Scott, county commissioners of Richland county, to pay the salary of the petitioner.

Mr. F. W. Fickling, for relator.

Mr. John R. Abney, for respondents.

March 24th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This is a petition by J. Q. Marshall, a trial justice in the city of Col-

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umbia, for a writ of mandamus to *compel the county commissioners of Richland county to draw their check upon the treasury of the county in his favor for $200 for his quarter salary, as trial justice, for the months of October, November and December, 1879, which became due and payable on January 1st, 1880.

The respondents made return, insisting that the rule should be discharged on the grounds—

First. That the relator did not, as he should have done, allege in his petition that there were county funds in the treasury applicable to his claim.

Second. Denying statement of fact as to the alleged promise to issue check for the claim.

Third. Denying that there is any money in the treasury "appropriated for or applicable to the payment of said claim."

Fourth. That out of the taxes for the last fiscal year, the relator had received all his salary except for the month of October, while other creditors of the county had received nothing.

Fifth. That there is no excess from the last fiscal year to come over into this fiscal year.

Sixth. That no taxes have been collected for the present fiscal year.

The return is not traversed, and the facts stated must be assumed to be true.

The relator filed a reply in the nature of a demurrer, making only questions of law.

The county commissioners' act (15 Stat. 989,) provides "that the county commissioners shall not draw any order upon the county treasurer unless he has the funds in the treasury appropriated for the particular object to pay the same, and to enable him to determine whether there is the specific fund upon which to draw, the county commissioners shall indicate on the face of each order the nature of the claim in payment of which it has been given."

And again, Section 23, page 993: "And it shall not be lawful for any county treasurer to pay any claim against the county except upon the checks of the county commissioners, which shall bear upon their face not only the

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number, amount and *name of the party in whose favor they are drawn, but the nature of the claims for which they are drawn, and the fiscal year in which they were contracted or incurred."

The county commissioners cannot be required to give a check unless there are funds in the treasury appropriated for the particular subject to which that claim belongs. The general rule is that the actor must state everything necessary to make out his case, but whether particular funds are in the treasury may not be known to the claimant, is matter of evidence, and the omission of the allegation is not necessarily fatal.

The question is, were there funds in the county treasury January 1st, 1880, applicable to the class of claims to which that of relator belongs? As a fact it is denied, and it can only be determined by applying the law to the statements of the return. The scheme of the act seems to be, that the commissioners, subject to the limit fixed by the legislature, shall indicate how much money in the year ought to be raised for the county, and distributed among the different objects as provided by law—subject to the controlling duty of keeping distinct the amount collected and the disbursements of each fiscal year. If in any of the sub-divisions of the funds, other than that for fees, disbursements, &c., there should be more than enough to pay all

dues of the class for which it was set apart, the excess falls into the residuary fund for the "payment of fees, disbursements," &c., and is applicable to the payment of any other legal claims against the county, and in the event of any excess in this last-named fund, it "shall be applied by the county commissioners to the payment of all claims of that character arising in the next ensuing fiscal year." The excesses of particular funds in a fiscal year are applicable to all claims of that year, and it is only the general excess that goes over to the next year. All claims of the fiscal year, without regard to their character, must be first paid. Some confusion arises in this case from the fact that the calendar is not identical with the fiscal year. The fiscal year commences November 1st, and ends October 31st of the next year. The ordinary expenses, state and county, are provided for as a whole for the fiscal year. The "Act to regulate the appointment and salary of trial justices in

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the city *of Columbia," approved February 23d, 1875, (15 Stat. 858,) was evidently framed with reference to the calendar year. It provides for each trial justice in the city of Columbia, a "salary of $800 per annum, payable quarterly, on the first days of January, April, July and October, by the county treasurer of Richland, and out of the county funds."

The salary of the relator has been paid up to October 1st, of last year, leaving three months still due—October, November and December, 1879, payable January 1st, 1880. October was in the last, and November and December are in the present fiscal year.

In order to comply with the law requiring each fiscal year to be kept separate, the claim must be divided. No taxes have been collected for the present fiscal year, and therefore there can be no funds applicable to claims of this fiscal year, unless they are there as an excess from the last year. It does not appear that the provision for Richland county in the last fiscal year will discharge all the obligations of that year and leave an excess. The return states that "there will be no excess from the collections of last year to apply to relator's claim." November and December being in the present fiscal year, and there being no funds on hand for that year, no mandamus should issue requiring the county commissioners to sign checks in payment of relator's salary for these months—November and December.

The result may be different as to the salary for the month of October, which was in the last fiscal year. It was not payable until January 1st, 1880, but that circumstance cannot make it a debt of this fiscal year. The statements of the return are not clear as to the balance of accounts for the year ending October 31st, 1879, but it does appear that there is in the treasury the sum of $1451.04 arising from excesses in some of the subdivisions, which, as we have seen, may be appropriated to any other legal claim against the county of that fiscal year. It seems that the commissioners have already approved claims to the amount of the funds in the treasury which are still unpaid. It is not explained why they have not issued checks for these approved claims; but it is admitted

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that the funds in the treasury have *not been actually applied by order or check for the payment of any particular claims.

The relator's salary for October, 1879, is a claim for that fiscal year, and there being money in the treasury for the payment of the class of claims to which it belongs arising from excess over the amount drawn for by checks or orders, the county commissioners should draw a check upon the treasurer for $66.66 in favor of relator for the same.

It is claimed in behalf of the respondents that it is for them to decide whether they will apply the said residuary fund, and if so, to what creditors they will pay it; that is a matter within their "discretion" and beyond control. The fund is not equitable assets for distribution pro rata among creditors. County Commissioners v. Winnsboro' National Bank, 7 S. C. 79.

In Moses on Mandamus 104, it is said: "Where county commissioners have a discretion and proceed to exercise it, courts have no jurisdiction to control that discretion by a writ of mandamus; but if they refuse to act or to entertain the question for their discretion in cases where the law enjoins upon them to do the act required, courts may enforce obedience to the law by mandamus where no other legal remedy exists."

High on Extraordinary Remedies 105, says: "Frequent applications of the rule occur in cases of salaries due to public officers, and in cases of this nature where the amount of the salary is definitely fixed and appropriated by law, the drawing of the warrant upon the public treasury is unattended with the exercise of any official discretion, and may, very properly, be enforced by mandamus."

The county commissioners have no discretion to allow or reject this claim. It is for a salary and need not be audited. It is fixed by law and ordered to be paid. When there is money in the treasury subject to the payment of legal claims against the county and not actually applied to other claims, it is the duty of the county commissioners to check for a salary fixed in amount and ordered to be paid by the county as a ministerial act positively required by law. The peremptory writ of mandamus should issue requiring the county commissioners of Richland county to draw their check upon the

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county treasurer, in favor *of the relator,

for $66.66—his salary as trial justice for the month of October last.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 267

(Case No. 841.)

BONHAM v. C. C. & A. RAILROAD COMPANY.

(November Term, 1879.)

[*Customs and Usages* ⟸15.]

A charter of a railroad company prescribed a maximum rate of charge for the transportation of heavy articles by the hundred pounds, and of articles of measurement by the cubic foot, without further definition in the act itself; whether cotton in bales should be charged as a heavy article or as an article of measurement, depends upon the meaning of those terms as used in the charter, to be ascertained by proof of the custom prevailing at the passage of the act.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 32; Dec. Dig. ⟸15.]

Before Mackey, J., Richland, December, 1879.

This case and the next succeeding case, Elder v. C. C. & A. R. R. Co., were heard in this court together, both involving a construction of the same section of the act incorporating the defendant company.

M. L. Bonham, railroad commissioner of the State of South Carolina, brought this action against the Charlotte, Columbia and Augusta Railroad Company, to require them to charge for cotton compressed in bales as a heavy article, under the tenth section of their charter, and not as an article of measurement—and to restrain them from charging higher rates of toll than fifty cents per hundred pounds. The defendant claimed that cotton in bales was an article of measurement, within the terms of their charter.

The Circuit decree, after stating the facts and pleadings, held that no judicial comity was violated in hearing this cause, while the same point was pending before the Supreme Court on appeal from a decision by Judge Wallace. The decree then continued as follows:

The matter at issue must be decided as a

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question of law, de*pendent upon the true construction of respondent's charter, the meaning and effect of which are to be determined by those established rules for the interpretation of statutes, which are alike commended by reason, and sanctioned by the highest judicial authority. If that construction should operate to affect injuriously either the interests of the corporation or of the public, the remedy is to be sought in the legislative department. Courts are to expound statutes with reference to the legal rights vested under them, and not to frame systems of expediency to fit the varying interests of corporations or individuals.

The question to be decided in this case arises upon the construction of Section 10 of the act entitled "An act to produce conformity in the charters granted to the Charlotte and South Carolina Railroad Company by the States of North and South Carolina," passed December 19th, 1848. 11 Stat. L. 535.

This clause of its charter is construed by the corporation respondent as authorizing it to charge for the transportation of cotton compressed in bales, a rate exceeding fifty cents per hundred pounds for each hundred miles, holding that such cotton as packed in the ordinary hand or horse-power presses of the country, is to be classed as an article of measurement and not as a heavy article, and is therefore subject to a freight charge not exceeding fifteen cents per cubic foot for every hundred miles.

The respondent has therefore charged upon such bales a rate of toll in excess of fifty cents per hundred pounds for each hundred miles, and claim the right, under its charter, to increase its rate upon the same to the limit of fifteen cents per cubic foot for the said distance. The difference in the amount of tolls effected by such classification may be illustrated by the instance of a bale of cotton weighing four hundred and sixty pounds, and containing thirty-five cubic feet.

If charged as a heavy article, to the full limit of the charter rate, the freight thereon would be $2.30 per hundred miles, while charged as an article of measurement, the company may demand the sum of $5.25 for transporting it the same distance. In support of its view the respondent submits that the bale instanced would weigh less by a fraction than fourteen pounds to the cubic foot, and would thus sooner exhaust the cubic ca-

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pacity *or inner area of the box cars used in transporting this class of freight than articles of less bulk and greater specific gravity or weight.

And hence to classify such bales as heavy articles would be detrimental to the interests of respondent, as the weight capacity of the cars is generally twenty thousand pounds, while twenty-six of such bales would exhaust the cubic capacity of a box car, although aggregating only eleven thousand nine hundred and sixty pounds. The respondent urges, therefore, that the true intent and meaning of its charter are that articles weighing less than thirty pounds to the cubic foot, may be classed as articles of measurement, while articles thirty pounds or more to the cubic foot are to be classed as heavy articles. It is further contended that the practical effect of this formula will be to establish uniformity in freight charges upon all articles, as the maximum charge upon an article by weight at the rate of fifty cents per hundred, would be fifteen cents for thirty pounds, while at

fifteen cents per cubic foot, the standard of specific gravity being thirty pounds to the cubic foot, the charge would amount to the same.

It is further submitted that this standard of classification will best give effect to the legislative intent, as expressed in the charter, by harmonizing the rates of toll charged, alike with the weight capacity and the cubic capacity of the cars provided by respondent for the transportation of freights.

I have thus given the salient points in respondent's argument, as unfolding the grounds on which reposes its assumed right to rate cotton in bales as articles of measurement. The theory presented might be deemed tenable if the respondent were a private individual engaged in the carriage of freights, or if the question were, whether the rate charged for the transportation of cotton in bales was a reasonable rate. In the former case, the private carrier could not be subjected to any restrictions save those imposed through considerations of self-interest, induced by the fear of competition or otherwise, while in the latter the basis of classification would be immaterial, as the reasonableness of the charge would alone be in issue.

But the respondent is a railroad corporation in the enjoyment of a highly valuable franchise granted by the state. This fran-

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*chise embraces not only a right of way over a wide and populous belt of country, extending over not less than one hundred and seventy-five miles of territory in length and one hundred and thirty feet in breadth, wherein it was empowered, for the purpose of its road construction, to divest the ownership of property by a compulsory sale after valuation made, but the free gift of all lands of the state lying within sixty-five feet of said road. (See act to charter the Charlotte and South Carolina Railroad Company, passed December 18th, 1846, Sections 16 and 18.) As a consideration for the valuable privileges with which it has been vested, and the special and exclusive rights conferred upon it, this corporation has contracted to perform certain duties to the public, which are defined in its charter, which, as a safeguard for the public, imposes limits upon its corporate powers to enforce the performance of those duties.

When a corporation, thus richly endowed by the public, is charged by the proper officer of the state with having violated its charter in a matter that deeply concerns the common interests of the people whose beneficiary it is, answers back with the argumentum ab inconvenienti, setting up its own convenience as the measure of public right, it can hope to succeed in such an issue only by prevailing upon the courts to ignore both the dictates of right, reason, and the fundamental rules for the interpretation of statutes.

In my opinion, the term "heavy articles," as used in the charter of the Charlotte, Columbia and Augusta Railroad Company, was intended to include cotton compressed in bales by the ordinary presses of the country, of the usual form and weight, as they were known in the commercial world at the date of said charter. My reasons for this conclusion are as follows:

Up to the date of said charter, and for a period of more than thirty years after its enactment, cotton in bales was classed only as an article of weight in fixing the rate of toll to be charged for its transportation. While I recognize the binding force of the rule as severely expounded by Mr. Justice Story that "contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations, or enlarge its nat-

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ural boundaries," (Story on Const. *407,) yet, when a term which has no definite legal meaning is used in a statute to embrace a large and indefinable class of articles, which could not, in the nature of things, have been enumerated, we are necessarily remitted to contemporaneous usage, as furnishing a practical construction of the legislative intent. The only just limitation is, that such usage shall not be referred to for the purpose of contradicting or varying the obvious sense of the language of the statute.

The object of construction, as applied to a statute, is to give effect to the intent of the legislature in enacting it. Says Mr. Justice Cooley: "In the case of all written laws, it is the intent of the lawgiver that it is to be enforced." Cooley on Const. Lim. 55.

The learned counsel for the respondent, however, while admitting that the statute in question requires construction, and that therefore its import is not obvious, objects to any reference to contemporary usage as a standard of interpretation. This objection is opposed by the overwhelming weight of authority in such cases. Cohens v. Virginia, 6 Wheat. 264; [5 L. Ed. 257]; Stuart v. Laird, 1 Cranch 299 [2 L. Ed. 115]; The King v. Osborne, 4 East 335; Cook v. Booth, Cowp. 822; 3 Atk. 577; Livingston v. Tenbroek, 16 Johns. 14; Perrine v. Ches. & Del. Canal, 9 How. 172 [13 L. Ed. 92]; 2 Phil. on Ev. 745; 2 Coke Inst. 282; Bank of England v. Anderson, 3 Bing. N. C. 666.

The question now recurs, has there been a long-continued, practical construction of the terms of this charter, by contemporaneous and uniform usage?

I think that this can be established beyond a reasonable doubt, and that the words in question have been interpreted by an unbroken usage extending over a period of more than fifty years.

Twenty years prior to the date of this respondent's charter, the general assembly passed an act incorporating the South Carolina Canal and Railroad Company, (act of December 19th, 1827, 8 Stat. 354,) and embodied the following words in Section 4 of

the same: "The charge for the transportation of goods, produce, &c., shall not exceed thirty-five cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles."

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*These words are identical with those contained in respondent's charter, except as to the rate of tolls. Yet the South Carolina Railroad Company has invariably, during the long period above stated, and down to the present day, classed cotton in bales as "heavy articles," and charged thereon by weight and not by measurement. At the date of respondent's charter, the South Carolina railroad was in full operation, and had been running its freight and passenger trains for years to Columbia, the capital of the state, where the legislature annually convened. That body was largely composed of cotton planters, and it must be assumed from their direct individual interest in the matter of freight charges on cotton, that when they inserted the words, "heavy articles" and "articles of measurement," in respondent's charter in the year 1846, they were fully aware of the construction that had been given to the same words in the charter of another company granted by them in the year 1827. That construction was, moreover, the one that was most favorable to producers and shippers, and least favorable to the railroad company that adopted and acted upon it.

It is highly reasonable to presume that a legislature so composed, intended that of two freight classifications to which articles of transportation might be subjected, cotton should be placed in the more favored class. This presumption is strengthened when we recur to the fact, that cotton was then, as now, the chief product of the state, and that all industries flourished or languished, and all values rose or fell with its rise or decline in price. It was emphatically the prime source of public and private revenue.

It is also important to consider that it was the product of a non-manufacturing people, and was, therefore, intended for sale in distant markets. Hence it is safe to conclude, that to furnish a cheap and rapid means of transportation to market for this valuable product, must have been the chief motive that impelled popular subscriptions to the capital stock of this company, as provided for in its charter.

But, upon respondent's theory, the legislature intended that the South Carolina Railroad Company should have the right to charge on cotton in bales as articles of meas-

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urement, which, at *the rates fixed by its charter, would have enabled that corporation to have charged on a five hundred pound bale of cotton, containing forty cubic feet, the sum of $5.20 from Columbia to Charleston, a distance of one hundred and thirty miles, while the same bale, if transported that distance as a heavy article, at the extreme charter rate, would have been $2.27½ only.

And, on this basis of classification, at the rates of toll allowed in respondent's charter, the charge on a bale of cotton of the above-stated weight and cubic contents, would be from Columbia to Charlotte, one hundred and ten miles, rated as an article of measurement, $6.60, and as an article of weight only $2.75.

The respondent's construction of its charter rights, it will thus be perceived, discriminates severely against cotton, which, it has been shown, might be reasonably presumed to have been the favored product of the state.

But we are not left to presumption in this particular, for we have positive legislation discriminating in favor of this product.

By the act of December 20th, 1828, fixing the rates of toll to be charged on boats passing through the Landsford, Catawba, Saluda, and other canals therein named, it was provided that "for every boat loaded with cotton, one cent on each bale, for each lock. For every boat loaded otherwise than with cotton, thirty-seven and one-half cents for each lock. For every empty boat, twelve and one-half cents. When a boat is loaded with less than thirteen bales of cotton it shall pass as an empty boat. When a boat is loaded with less than one ton, it shall pass as an empty boat." 6 Stat. 370.

The rates of the Columbia canal were established by an act of the same date, as follows: "For every boat loaded with cotton, one cent on each bale; but boats loaded with less than twenty-five bales of cotton shall pay $1. For boats loaded otherwise than with cotton, the following rates are required: from $4 to $2 per boat, according to size. For each empty boat, $1."

It will be observed that, as to the first named canals, a boat loaded with five thousand four hundred pounds of cotton, or twelve bales, estimating a bale at four hundred and fifty pounds was allowed to pass as an empty

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boat, and was charged only *twelve and one-half cents, while a boat with one ton, or two thousand two hundred and forty pounds of any other lading than cotton, was charged thirty-seven and one-half cents per lock.

On the Columbia canal, a boat loaded with twenty-four such bales, or any number less than twenty-five, was charged $1 as an empty boat, while a boat with any other lading, however light, was charged at least $2.

I have thought these details not unnecessary, as they serve not only to exhibit the practical effect of respondent's construction of its charter, but make manifest the fact that at the very period when the words which are now construed to impose on cotton the highest rate of toll, were first embodied in a railroad charter, it was the declared

policy of the state to discriminate in favor of that article.

That there may be a state policy not declared in terms, but deducible from the general scope of its legislation, as to a fiscal or industrial enterprise, I have no doubt. Bank of Augusta v. Earle, 13 Pet. 584 [10 L. Ed. 274]; United States v. Fisher, 2 Cranch 358 [2 L. Ed. 304]; Charles River Bridge v. Warren Bridge, 11 Pet. 544 [9 L. Ed. 773]; Penna. R. R. v. Canal Commissioners, 21 Penna. 22; Potter's Law of Corp., vol. I., 32.

It may well be held that this corporation is estopped from denying the correctness of a construction of its charter, which, although most favorable to the public, it has asserted and acted upon for more than a quarter of a century.

Certainly this is the established doctrine applied to railroad corporations, as to the location of their routes, and by parity of reasoning, it should apply to the present case. 1 Redf. on Rail. 123.

As to the thirty pounds cubic foot theory, it was, in my opinion, as foreign to the contemplation of the legislators who enacted this charter, as was the mathematical puzzle of the duplication of the cube that baffled the genius of Euclid, or the perplexing problem of the asymptote of the hyperbola. To impute to them any such occult theory, is to take a highly transcendental view of the legislative mind.

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*Now, is the capacity of respondent's cars to convey articles of measurement at all, more relevant to the issue than would be the tractive power of its engines to carry articles of weight?

The equipment of its road is changeable at the will of the respondent; and for courts to give judicial sanction to such an argument, would be to erect a most variable and uncertain standard by which to measure public rights.

In view of the law and the facts in the premises—

It is ordered, adjudged and decreed, that the rule heretofore granted in the above entitled cause, be, and the same is hereby made absolute, and that the respondent herein, The Charlotte, Columbia and Augusta Railroad Company, the officers, agents, servants and employees, be, and the same are hereby perpetually prohibited and enjoined from charging for the transportation of cotton in bales otherwise than as articles of weight, subject only to the same rates of toll per hundred pounds as are applicable to all other heavy articles, pursuant to the charter of the said company, as herein construed.

It is further ordered, that a copy of this order be forthwith served upon the said respondent, and that the respondent do pay the costs of this proceeding.

From this decree, the defendant appealed, upon the grounds that cotton in bales was an article of measurement within the meaning of its charter; and that there was no evidence to sustain the conclusions of fact as to the custom of charging for cotton on this or other railroads.

[For subsequent opinion, see 16 S. C. 633.]

Mr. J. H. Rion, for appellant.

Mr. J. T. Rhett, contra.

March 24th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The question on this appeal is one of the construction of the clause of the charter of the defendant corporation, that provides as follows: "That the said company shall have the exclusive right of conveyance or transportation of persons, goods, merchandise and produce over the

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said railroad to *be by them constructed, and shall have power to charge for such transportation of persons, goods, produce, merchandise and other articles any sum not exceeding the following rates, viz.: On persons, not exceeding six cents per mile for each person, unless the distance which any person may be transported be less than ten miles, in which case the president and directors may be entitled to make an extra charge of fifty cents for taking up and putting down such persons so transported; for the transportation of goods, produce, merchandise and other articles, not exceeding fifty cents per hundred pounds for each hundred miles on heavy articles, and fifteen cents per cubic foot on articles of measurement for every hundred miles; and for the transportation of the mails such sums as they may agree for with the agents of the United States."

The question is, whether cotton, packed in bales, in the manner used for the purpose of transportation, may be regarded as an "article of measurement," so as to authorize a charge for the transportation of the same, at the rate of fifteen cents per cubic foot for every hundred miles. The plaintiff charges that cotton, in that condition, is to be regarded as a "heavy article," within the intent and meaning of the statute. The first inquiry is, whether the court can determine, as matter of law, whether cotton in bales is a heavy article or an article of measurement, in the sense in which these terms are employed in the statute. It is true, as stated by the Circuit judge in his opinion, that the court takes notice of the general customs of the country; but that does not imply that the usages of business, as a general rule, lay within the judicial notice of the courts. Those customs that have been incorporated as part of the common law, as defined by adjudicated cases, are, beyond question, subjects of judicial notice without proof in point of fact. It is not to be denied that customs may and do become so incorporated, that have had their origin since the period

of time to which the common law looks as the test of antiquity. It may well be questioned whether any modern custom becomes incorporated in the common law until it has been established as a matter of fact by judicial authority. The change of the status of such a question from one of fact to one of law, is by gradual and almost insensible

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steps, but is of *merely speculative interest, as it regards the present case. It is clear that the terms heavy articles and articles of measurement cannot be defined, in their application to goods of different kinds, by mere legal authority; but assuming them to be intelligible to those concerned in the business of transportation by rail, or by more general means, their sense must be made apparent by testimony of such a custom or habit of business as tends to define their import. If these terms are to be regarded as used in a sense peculiar to those engaged in a particular business, then their force can only be ascertained by testimony adduced for that purpose and as matter of fact. That they cannot be regarded in any other sense will become apparent from the consideration of their nature.

It is evident that the term heavy articles is used in a technical sense, and not according to its popular use, from the fact that it is contrasted with articles of measurement. Articles of measurement are such as are ordinarily transported by measurement and not by weight. It cannot be said that there is any such class of articles as articles of measurement in a general sense, and commonly known and understood as such, and hence the term must have a particular or technical sense. Without doubt articles of measurement are charged according to volume, a cubic capacity, because they are light, as compared with the class called heavy, and that accounts for the term heavy being applied to the opposite class, but that affords the reason of the term, but not its definition.

It is said, however, that the statute affords a means by which the terms heavy and articles of measurement may be defined without the aid of extrinsic proof, in such manner as to accomplish what should be regarded as the object of the statute viz., to make every article transported pay according to a single standard by which the two elements of weight and volume are brought to a common unit of comparison. It is said that an article that weighs thirty pounds and occupies the space of one cubic foot will pay an equal amount, whether it is computed according to weight or to measurement, and that, therefore, an article weighing more than thirty pounds to the cubic foot should be charged as heavy, because it is heavier than the article selected

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as the unit, *and that articles of less than thirty pounds per cubic foot should, for the same reason, be regarded as articles of measurement. This method of gathering the sense of the statute is certainly ingenious, and, if sanctioned by the rules of construction, ought to prevail, notwithstanding its novelty. If the statute indicated an intention to furnish a mathematical formula capable of determining whether any particular article belonged to the one class or to the other, we should be compelled to say that this was the formula, as no other appears, depending wholly on the provisions of the statute, without extrinsic help. But the statute contains nothing that furnishes the indication of such an intent. If we test the mathematical standard by its fitness to accomplish the general objects of the statute, it must fail. Like all theoretical conceptions, it demands a state of things possible but that may never actually exist. For instance, if all articles carried by rail were of the same value, according to weight or volume, the formula would approach perfection. But that is not the case. Coal and diamonds, though intimately related through the element that is common to them, are very far removed from each other in point of value. It is clear that any standard that would rank these articles together as paying the same amount per pound for transportation, would be practically an absurdity. The articles subject to railroad transportation are of so varied a character as to value, liability to produce and receive injury, and convenience of handling and transportation, that the absurdity illustrated by the case of coal and diamonds re-appears with more or less distinctness throughout the whole series.

It may be said that classification of freights into several grades or classes, each paying a rate differing from the others, and passing by the regular steps of gradation from the minimum charge to the maximum, might obviate the irregularity that would result from the differences of value in the articles so graded in the application of the rule of computation already stated. If it were possible that practical classification should be based on differences of value alone, this might be the case. But there are other considerations than that of value that must enter into practical classification, such as liability to produce or sustain damage, and the convenience of handling and transportation. It is ap-

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parent *that the moment it is admitted that the amount charged for any two commodities respectively, may be regulated independently of their relative weight and volume, the rule of equality propounded in the mathematical formula is violated, as would be the case, in many instances, where differences relative to liability to produce or receive injury, and the convenience of handling and transporting were allowed to affect the amount of the sums charged for freight. It is clear that the tendency of such a construction as that contended for would be to compel railroad companies to adjust their business to

theoretical standards instead of leaving them free, within certain limits, to arrange their modes of transacting their business according to the exigencies of the business. It is equally clear that the whole purpose of the statute was to fix an upward limit to railroad charges, and not to fix a scale by which they might be computed with reference to a unit common to all classes of goods. This would leave the company free to pursue that course that would be dictated by business necessity or prudence within the limits fixed by law. Such being the case, we must conclude that the act does not afford any means of determining the force of the expressions heavy and articles of measurement, and that these terms must be defined by proof of the custom in practice prevailing at the time of the passage of the act.

There is no evidence in this case in which a construction of these terms can be made in their application to cotton packed in bales, and the judgment appealed from must be set aside and the cause remanded to the Circuit Court for further proceedings.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 279

(Case No. 842.)

ELDER & CO. v. C. C. & A. RAILROAD CO.

(November Term, 1879.)

[*Customs and Usages* ⟸15.]

Where a charter of a railroad company prescribed a maximum rate of charge for the transportation of heavy articles by the hundred pounds, and of articles of measurement by the

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cubic foot, without further defini*tion in the act itself, it was properly left to the jury to determine whether cotton in bales were heavy articles, or articles of measurement, within the meaning which custom had given to those terms at the date of the charter.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 32; Dec. Dig. ⟸15.]

Before Wallace, J., Fairfield, September, 1879.

This case and the next preceding case, Bonham v. C. C. & A. R. R. Co., were heard in this court together, both involving a construction of the same section of the act incorporating the defendant company.

The case is stated in the Circuit decree, which is as follows:

This is an appeal from a trial justice's court, upon points of law.

The facts of the case pertinent to the issue of law raised, are as follows: The plaintiffs shipped ten bales of cotton at Winnsboro, consigned to Charlotte, upon the defendants' road. The distance between those points is seventy-two miles. The cotton weighed an average of four hundred and sixty pounds to the bale, and had an average measurement of thirty-five cubic feet. The section of defendants' charter brought before the court for consideration, provides that the railroad company may charge "for the transportation of goods, produce and merchandise, and other articles, any sum not exceeding fifty cents per hundred pounds for each hundred miles on heavy articles, and fifteen cents per cubic foot on articles of measurement, for every hundred miles." The defendants charged for the transportation of the cotton at the rate of fifteen cents per cubic foot per hundred miles, or the sum of $37.80. The plaintiffs tendered payment at the rate of fifty cents per one hundred pounds per hundred miles, or the sum of $16.58. This being refused, the plaintiffs paid the amount charged under protest, and brought suit for the difference of $21.22.

At the trial, the defendants requested the trial justice to instruct the jury "that the defendants had the legal right, under this charter, to classify goods, produce, merchandise and other articles offered them for transportation, as 'heavy articles,' or as 'articles of measurement,' according as said goods, produce, merchandise, or other arti-

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cles, by their weight or bulk, first *exhaust the carrying capacity of the freight cars used for the transportation of the said goods, produce, merchandise, or other articles."

The trial justice declined so to charge; to which the defendants excepted. We shall consider that exception alone; and if error was committed in this refusal, the judgment of the court below cannot stand.

Now, if the defendants had the right to classify the cotton tendered for shipment as articles of measurement under their charter, it then follows that their classification, however arrived at, is legal. The question, then, for consideration is, whether, under the terms of the section of the charter referred to, cotton in bales can be classed as "articles of measurement," as contended by the defendants, or must be classed as "heavy articles," as contended for by the plaintiffs. What, then, is a heavy article? The term "heavy" is a comparative term, as applied to different articles. Iron is heavy, feathers are light or bulky. Yet a pound of feathers is as heavy as a pound of iron. Hence, an article is heavy when a certain bulk has a certain weight, while one which has the same bulk, but weighs less, will not be heavy. On this principle we call iron heavy and feathers light. The difficulty is in drawing the line of demarcation, or in ascertaining when the weight of an article, compared with its bulk, makes it a heavy article. We may safely say that lint cotton is not heavy, and that cotton compressed in very small bales, as is now done by powerful steam or hydraulic presses, is heavy. If we consider bales of cotton as usually packed by

farmers and such as were shipped in this case, we are of the opinion that the bulk of thirty-five cubic feet, weighing only four hundred and sixty pounds, fail to make them "heavy articles."

The difficulty, as we have said, is in fixing the line of demarcation. But does not the section under consideration aid us, or indicate a line of demarcation fixed by the statute itself? We must assume what the section intends—a uniformity of charges on what it styles "heavy articles," and what it denominates as "articles of measurement." The limit on one class is fifty cents per one hundred pounds; on the other, fifteen cents per cubic foot. Either mode of charges

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would amount to the same, if *the article upon which the charge is made weighed thirty pounds to the cubic foot. Upon such an article the limit applied to it, either as a heavy article or an article of measurement, would be fifteen cents. We may then well infer that the intention of the section is to allow a classification upon this basis of thirty pounds to the cubic foot; articles weighing over this coming under the head of "heavy," and articles weighing less, under the head of "articles of measurement." The bales of cotton in this case weighed only four hundred and sixty pounds to the thirty-five cubic feet, or not quite fourteen pounds to the cubic foot. We are, therefore, of the opinion, that by virtue of their charter, the defendants were authorized to classify and charge on the cotton in this case as articles of measurement.

This construction of the section under consideration makes it of itself effective, and obviates the necessity of a contest as to the proper classification of each and every article that may be tendered for transportation. Besides, should the railroad company charge by weight on an article of measurement, according to this standard, or, on the other hand, charge by measurement on a heavy article, it would make an erroneous classification, to its own loss.

We are, therefore, of the opinion that the trial justice erred in his construction of the statute, and that, therefore, the judgment of the court below appealed from must be set aside, and it is accordingly so adjudged.

Plaintiffs appealed.

[For subsequent opinion, see 15 S. C. 610.]

Messrs. H. A. Gaillard, A. M. Mackey and Louis Le Conte, for appellants.

Mr. J. H. Rion, contra.

March 24th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This was an action in the trial justice's court, in which the plaintiff obtained a verdict and judgment, which was set aside by the Circuit Court.

The case of Bonham v. the same defendants, just decided, disposes of the questions

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of law raised in this case. The charge *of the trial justice was conformable to the conclusions at which we have arrived as stated in that case.

The judgment of the Circuit Court must be set aside and that of the trial justice affirmed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 283

(Case No. †845.)

THE STATE, ex relatione JONES, v. BOLES.

(November Term, 1879.)

[*Sheriffs and Constables* ⟸98.]

A sheriff is not relieved from liability to the senior judgment creditor for moneys realized from a sale of the debtor's property and applied to a junior judgment, although directed so to do by an order of the Circuit Court under proceedings by rule, but to which the senior judgment creditor was not a party.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 147; Dec. Dig. ⟸ 98.]

Before Townsend, J., Edgefield, October, 1877.

This was an action upon the bond of Isaac Boles, late sheriff of Edgefield county, to which action his sureties were also defendants, to recover the amount of a judgment obtained by Lewis Jones, the plaintiff here, against one Mims. Boles, while sheriff, had sold property belonging to Mims for a sum exceeding the amount of the Jones judgment, which was the oldest existing judgment against Mims. Upon a rule to show cause, issued by Judge Orr in 1870, and the return thereto, Boles was ordered to apply this Mims money to certain junior judgments under which the property was sold. Boles complied with this order, but Jones was no party to these proceedings, and never heard of them, nor was the existence of his judgment brought to the attention of Judge Orr. The defendants relied upon this order of Judge Orr and the statute of limitations as their defences. Mims' lands were sold December, 1868, Boles vacated his office the same month, Judge Orr's order and Boles'

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payments were *January 15th, 1870; this action was commenced January 17th, 1876.

Judge Townsend charged the jury that the order of Judge Orr protected Boles from all liability on account of the application to the junior judgments of the proceeds of the sale of Mims' land, and that if there was error in such application the remedy of relator was against the junior judgment cred-

† Case No. 844, Arnold v. House, will be found in 12 S. C. 600.

itors. To this ruling the relator excepted. Verdict for defendants: and plaintiff appealed.

Mr. J. P. Carroll, for appellant.

Mr. J. C. Sheppard, contra, supported the judge's ruling, and also claimed the benefit of their plea of the statute of limitations, citing Chev. 25; 3 B. & Ald. 288, 626; 20 Johns. 33; 2 Strob. 344; 4 Rich. 39; 2 Greenl. on Ev., §§ 433, 434; 2 C. & P. 107; 1 C. & P. 312; 16 East 215; Chitty on Cont. 637.

March 24th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This action is against the sheriff and his sureties on his official bond, the relator claiming that the sheriff had improperly paid over the proceeds of the sale of the lands of an execution debtor under junior judgments, when he should have satisfied the judgment of the relator, which was the eldest. The only question that can be considered under the present appeal is, whether there was error in the charge of the Circuit judge in holding that the relator Jones was bound and estopped by an order of the Circuit Court, made against the sheriff on the application of the junior judgment creditors, directing the sheriff to pay over to them the proceeds of the sale in question, when the relator Jones was not a party to the proceeding in which the order was made, and had no notice of it.

The charge violated the fundamental principle and rule of law that no one shall be bound by a judgment or order who is not a party thereto or in privity with one who is a party. Jones had no opportunity to object to the order in question, and, of course, was not bound by it. The sheriff had the means in his power of protecting himself by causing Jones to be made a party to such *proceeding, and, failing to do so, he cannot throw the consequences on the relator.

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There must be a new trial.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 285

(Case No. 846.)

STATE v. STEPHENS

(November Term, 1879.)

[1. *Criminal Law* ⟸190.]

A party convicted of murder having moved this court in arrest of judgment, and this court having, upon that appeal, ordered a new trial, the Circuit judge at the second trial properly overruled a plea of autrefois convict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 375; Dec. Dig. ⟸190.]

[2. *Criminal Law* ⟸965.]

When one convicted of murder is granted a new trial, the second trial may proceed upon the same indictment, and there is no force in the objection that the verdict and sentence in the first trial, written on the back of the indictment, will be read by the second jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2421; Dec. Dig. ⟸965.]

[3. *Criminal Law* ⟸1192.]

A remittitur which orders a new trial, in effect sets aside the verdict and judgment appealed from.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 32, 33; Dec. Dig. ⟸1192.]

[4. *Jury* ⟸80.]

It is not necessary that thirty-six jurors should be present at the commencement of a trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 364; Dec. Dig. ⟸80.]

[5. *Jury* ⟸122.]

The state may direct a juror to stand aside until the panel is exhausted.†

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 501; Dec. Dig. ⟸122.]

Before Wallace, J., Edgefield, June, 1879.

This case having been once before this court, will be found reported in 11 S. C. 319. It will be there observed that the defendant appealed from an order overruling a motion made in arrest of judgment, and that this court directed a new trial. The remittitur, sent down by the clerk of the Supreme Court, read as follows: "Judgment. It is adjudged by the court that there be a new trial, on the ground last stated in the opinion of the court hereunto annexed."

Defendant objected to a trial upon the grounds, (1) that as appeared by the endorsement of the verdict and sentence on the indictment, he had already been convicted, and he filed a formal *plea of autrefois convict; (2) that thirty-six jurors were not present. Both objections were overruled, and defendant excepted. The state ordered jurors to stand aside, who were recalled when the panel was exhausted; to this the defendant excepted. The defendant was found guilty. He then submitted a motion in arrest of judgment, upon the ground that the record showed a previous conviction, and there was no evidence before the court to show that such former judgment had ever been arrested, or that a new trial had ever been ordered. The motion was refused and defendant was sentenced to be hanged. He appealed to this court, renewing here the objections taken below.

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Messrs. B. W. Bettis and Arthur Tompkins, for appellant.

Mr. Solicitor Abney, contra.

March 24th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The first exception embodies the proposition that the defendant, having been once convicted of murder under

† State v. McNinch, (4) 12 S. C. 89.

the present indictment, and a new trial having been granted in invitum by this court, the attempt to subject him to a second trial under the indictment was, in effect, putting him in jeopardy of his life twice for the same offence.

Section 18, Article I. of the constitution, declares that "no person after having been acquitted by a jury, shall again, for the same offence, be put in jeopardy of his life or liberty." As the prisoner never has been acquitted of the offence charged in the indictment, this clause has no application to his case. If under any circumstances granting to a person under conviction a new trial could be regarded as depriving him of any right of defence, even where such new trial was granted in invitum, still that is not the present case. The judgment of this court granting such new trial was made upon an appeal by the prisoner, and, therefore, must be regarded as made at his demand, whether the appeal prayed for a new trial or that the judgment might be arrested. An appellant asking for relief of a certain character must be regarded as asking for relief of a less comprehensive character should he be

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found not entitled to that which he *specifically demands. This proceeds from a principle manifestly in the interest of appellants, and there is no sufficient reason for denying its application to capital cases. The appellant sought to arrest the judgment, but the appellate court concluded that he was not entitled to such relief. Finding, however, that he was entitled to a new trial the court so directed. To have held that the prisoner could not have a new trial, although the record exhibited error, merely because he had not named that relief in his appeal, would have been open to serious objection in any case, and especially so in a capital case. The court properly overruled the plea of a former trial, and properly refused to arrest the judgment on that ground.

The remittitur of this court contained its judgment ordering a new trial, and it was the duty of the Circuit Court to proceed, as it did, in obedience to the requirement of that judgment.

There is no force in the objection that there should have been a new indictment. That question was settled by the judgment of this court ordering a new trial, which must be interpreted as ordering such new trial upon the existing indictment.

Neither is there any force in the objection that the former verdict and judgment was submitted to the inspection of the jury. The indictment was properly submitted to their inspection, and, it must be assumed, could not be so submitted without bringing to their attention the former verdict and judgment under it. It cannot be assumed that the knowledge of the previous proceedings under the indictment would have any tendency to prejudice the minds of the jury.

The objection that the remittitur did not expressly set aside the verdict and judgment when it ordered a new trial is without force. That which results as a necessary implication from the judgment rendered is a part of it. A new trial could not be ordered without having such effect, and the order for such new trial must be regarded as setting aside the former verdict and judgment.

It was not necessary that the whole number of thirty-six jurors should be present at the commencement of the trial. No sanction exists for such a demand either in the statute or the authorities.

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*The practice of directing jurors objected to by the state to stand aside until the panel is exhausted has been repeatedly recognized, and is too well established to be disturbed by this court, whatever may be our view as to its soundness in principle.

The appeal must be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 288

(Case No. 847.)

KAPP & ROTHSCHILD v. LOYNS.

(November Term, 1879.)

[1. *Costs* ⇨3.]

Costs are governed by the fee-bill of force at the time of the verdict, not at the time of the taxation.

[Ed. Note.—Cited in Lewis v. Brown, 16 S. C. 64; Fooshe v. Merriwether, 20 S. C. 339; Benbow v. Richardson, 21 S. C. 602.

For other cases, see Costs, Cent. Dig. § 5; Dec. Dig. ⇨3.]

[2. *Costs* ⇨22.]

Where plaintiff recovered verdict for $24, in October, 1874, in an action upon a contract for goods sold, defendant is entitled to the costs of the action.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 47–73; Dec. Dig. ⇨22.]

[This case is also cited in Lewis v. Brown, 16 S. C. 58, and distinguished therefrom.]

Before Wallace, J., Darlington, March, 1879.

Action commenced in January, 1874, by Kapp & Rothschild against A. W. Loyns to recover $201.37, the price of goods sold and delivered. Defence was failure of consideration. Verdict was rendered October, 1874, in favor of plaintiff for $24. Plaintiff demanded a taxation of costs in his favor, by the clerk of the court, which, being refused, he obtained a rule, March, 1879, against the clerk. The clerk made return that, in his opinion, the plaintiffs were not entitled to costs, but that the defendant was. The Cir-

cuit judge sustained the clerk and discharged the rule.

The plaintiffs excepted and appealed.

Mr. R. K. Charles, for appellant.
Mr. G. W. Dargan, contra.

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*March 24th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This is an action for the recovery of money upon an account for goods and merchandise sold and delivered, commenced January, 1874. A verdict was rendered at October Term, 1874, for $24. A question arose as to the right of the plaintiff to costs that was not disposed of until 1879. In the meantime an amendment of the code was passed that materially affected the rule of costs in a case of this character. The first question to be considered is, whether the right of the parties to costs is to be tested by the law as it stood at the time the verdict was obtained, or at the time when the costs were actually taxed.

Costs under the code are in the nature of damages. The code (Section 329) after repealing the statutes allowing attorneys costs, declares that "there may be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are in this act termed costs." This section professes to define the nature of costs, as that term is employed in the code, and the language employed for that purpose imports the idea of damages. Such being the case, the rule of the statute prevailing at the time of the recovery of the verdict, would be the proper measure of such damages as are ascertained by the court as matter of law, and included in the judgment. This rule appears to prevail in New York. Moore v. Westervelt, 14 How. Pr. 279; Scudder v. Gori, 28 How. Pr. 155. The point was noticed, but not decided in Stegall v. Bolt, 11 S. C. 522.

It would follow that the plaintiff was not entitled to costs in this action, it being an action for money, unless he recovered $50. The amendment reducing this amount to $20 (16 Stat. 409) not having been passed until after the verdict recovered, cannot affect the right of the parties as it regards the present question.

As was held in Stegall v. Bolt, the amount claimed is the test whether the action is one "of which a court of trial justice has no jurisdiction," in the sense of sub-division 3, Section 330, where the action is of such a nature that it may be brought in the trial justice's court, where the damages, a sum claimed, is less than $100. This conclusion is a necessary consequence of the language used in confirming jurisdiction in the trial

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justices, which, in the *instance of actions on contract and for injuries to the person or to real or personal property, makes the claim of damages the test of the jurisdiction. It must, therefore, be concluded that the present is a case of which the trial justice has no cognizance.

The effect of sub-division 4, Section 330, as it regards actions for the recovery of money, is that the plaintiff can gain no advantage in such action by placing the claim at an amount exceeding the jurisdiction of a trial justice, for in such cases he cannot get costs unless he recovers at least $50, as the act stood until the amendment, and $20 now.

Section 331 gives the defendant costs as of course, "in the actions mentioned in the last section, unless the plaintiff is entitled to costs thereon." As we have seen, this action is one mentioned in Section 330, and the plaintiff is not entitled to costs in this action, hence the defendant is entitled to have his costs under Section 331.

The order and judgment appealed from must be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

13 S. C. 290

(Case No. 848.)

THE STATE, ex relatione BROWN, v. C. & L. R. R. CO.

(November Term, 1879.)

[1. *Judgment* ⊂⊃570.]

A judgment upon the merits dismissing an action brought by certain taxpayers of a county against the county commissioners to enjoin the issue by them of certain railroad aid bonds, is an estoppel to a subsequent action after the bonds have been issued, brought in the name of the state upon the relation of certain other taxpayers of the same county, against the county commissioners, the railroad company and purchasers of the bonds, to have the bonds adjudged illegal and void.

[Ed. Note.—Cited in Watson v. Columbia Bridge Co., 13 S. C. 438; Ex parte Kenmore Shoe Co., 50 S. C. 147, 27 S. E. 682.

For other cases, see Judgment, Cent. Dig. § 1032; Dec. Dig. ⊂⊃570.]

[2. *Judgment* ⊂⊃681.]

A county having issued certain railroad aid bonds after a decree of the court had determined that the county had the power to do so, all persons purchasing such bonds become privies to the decree, and may rely upon its estoppels. Gelpcke v. City of Dubuque, 1 Wall. 175 [17 L. Ed. 520], referred to.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1202; Dec. Dig. ⊂⊃681.]

3. A statement in State, ex rel. Harris, v. Robertson, county treasurer, MS. Dec., Nov., 1877, explained; and the dissenting opinion in Glenn v. County Commissioners, 6 S. C. 412, approved.

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[4. *Counties* ⊂⊃150.]

*In our state constitution there is no restriction which deprives the legislature of the

power to authorize counties to incur obligations and issue bonds for their payment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 215; Dec. Dig. ⟸150.]

[This case is also cited in Herndon v. Moore, 18 S. C. 355; Feldman & Co. v. City Council of Charleston, 23 S. C. 61, 55 Am. Rep. 6; Floyd v. Perrin, 30 S. C. 19, 8 S. E. 14, 2 L. R. A. 242; Allen v. Adams, Mayor, 66 S. C. 355, 44 S. E. 938, as an example of the constitutional right of counties to subscribe to stock of railroad companies.]

Before Pressley, J., York, March, 1879.

For a proper understanding of this case, it will be well to read the case of Glenn v. County Commissioners of York, 6 S. C. 412. In that case, Glenn and others, taxpayers of the county of York, brought their action against the county commissioners of York, to enjoin the issue of $100,000 in county bonds to pay for a subscription made by the commissioners for the county to the Chester and Lenoir Narrow Gauge Railroad Company, without any vote by the people. The defendants there admitted the subscription, and that the bonds were about to be issued, but claimed the power to make such subscription and issue such bonds under Section 11 of the act incorporating such railroad company, (15 Stat. 395,) which reads as follows:

"Section 11. That it shall be lawful for any county or town interested in the construction of the said Chester and Lenoir railroad to subscribe to the capital stock of said company, or of any company with which it may consolidate or unite, such sum, and to be payable in such manner as the people, or proper authorities of such county or town shall deem best, determine, and authorize; and in all meetings of stockholders, the county commissioners of the respective counties, and the town councils of the respective towns, shall appoint some person to represent the stock of their respective counties and towns: provided, that the property of said railroad company, situated in this state, shall be subject to taxation during the existence of their charter."

The Circuit judge held that the commissioners had the power to subscribe and to issue bonds, and dismissed the complaint, with costs. The plaintiffs appealed, and in 1874 the appeal was dismissed by a majority of the court, but no opinion filed, and Willard, A. J., dissenting.

The present case was instituted in April, 1878, in the name of the State of South Caro-

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lina upon the relation of F. H. Brown *and sixteen others, taxpayers of York county, against the Chester and Lenoir Railroad Company, the county of York, the commissioners of York county and several other defendants, then owning or holding bonds of the county of York, issued by the commissioners of York county to pay for subscription of that county to the capital stock of the Chester and Lenoir Railroad Company. The complaint alleged that there was no authority for the subscription or the issue of bonds, and that they were null and void; and it prayed that the bonds might be adjudged illegal and void, and the defendants required to deliver them up for cancellation. The defendants, in their several answers, claimed that the bonds were legal, and protected by the decision in the former case. There were other issues involved, but they were suspended to await the single question, are the bonds valid? Trial was had on the pleadings in this case, and the record in Glenn v. County Commissioners. From the pleadings here it appeared that all of the bonds in existence had passed out of the hands of the county of York, and also of the railroad company, and were held by purchasers for value, and as collateral security for an obligation of the company.

The Circuit decree is as follows:

This case was heard by me on the pleadings, which, together with the acts of the legislature and the case of Glenn and others, hereafter referred to, sufficiently show the facts and issues involved. I have always regarded the said case of Glenn et al. v. County Commissioners, as a final decision of the whole matter now involved. The Circuit judge certainly decided it upon its merits, and the motion to reverse his judgment was dismissed by the majority of the appeal court, from which Willard, A. J., dissented, and, assuming that the action of the majority confirmed the construction of the statute made by the Circuit judge, he fully states the reasons for his dissent.

In my opinion the terms of the act clearly fall within the class of cases of which the word "or" is construed to mean "and." Any other construction would make it confer power either upon the "people" or upon the proper "authorities" to make the subscription in question. But "the people" could not possibly exercise such a power without the

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concurrence of *"the proper *authorities," unless some other agency were expressly provided for that purpose. No such agency was provided in this case. It is therefore plain that the act intended that the people and the proper authorities should not act in the alternative, but that both should act in concurrence.

Since the case of Glenn et al. v. County Commissioners was decided, matters have transpired of which courts are bound to take notice, and which change very materially the aspect of the case. Three general elections have taken place, at which the people of York county, if the majority had so desired, might have elected county commissioners who would have surrendered, or offered to surrender to the railroad company the stock which had been issued to the county in exchange for the bonds which are again

called in question. But no such action was taken, and the commissioners still hold the said stock as the property of the county, and do not in their answer even now offer to surrender it. The act prescribes no special mode by which the proper authorities were to ascertain the sense of the people. And it is now too late to do that by a vote; the road has been built through the county and is in daily operation; the people who are enjoying its conveniences and advantages may now very willingly vote to be freed from a tax to pay for it, and that without any danger of being thereby deprived of its benefits; their wishes in the matter at this time is not a question material to the proper decision of this case; the true issue is, whether or not the majority approved of the subscription at the time it was made; that could not be settled satisfactorily either by a vote now, or by the testimony of any number of witnesses, merely stating their opinion that the people would have voted for or against the said subscription; what they have done or failed to do at the general elections heretofore held, is the only test now proper.

I therefore hold that their long acquiescence has ratified the action of their county commissioners.

Further, as no clause of our state constitution prohibits the legislature from authorizing "the proper authorities of counties or of towns" to make such subscriptions, even without any vote or other concurrence by the people, it could have conferred that power in the said act if it so willed. Not having

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previously *conferred it, such subscription made in excess of authority, or even without authority, might thereafter be ratified by the legislature. If so, then the act of March 5th, 1875, which authorizes a special tax in York county to retire the bonds which had been so issued, is a clear recognition of their validity, and, consequently, cures all excess of authority by the commissioners.

I cannot assume that the said act was passed by the legislature without its having had full knowledge of all the facts of the case. The appeal court had previously rendered its decision in the said case of Glenn et al. v. County Commissioners; and in that case the excess of authority by the said commissioners was fully and plainly set forth and discussed. It was matter of public notoriety, freely discussed everywhere in the state, and must have been well known not only to the members of the legislature from York county, but to the assembly generally. Besides, it was the duty of the legislature, before passing such an act, to inquire strictly into the facts of the case. And in the absence of all proof to the contrary, I am bound to presume that such duty was properly performed. Other matters, subsequently to the said act, all concur to show acquiescence by the people, and further confirmation by the legislature. Even the act of 1878, which suspends for a year the said act of 1875, makes it manifest that until such suspension the commissioners had been collecting the tax which the said act of 1875 authorized; and after such suspension, the tax act of 1875 still permitted the levy of a tax to pay the coupons on the bonds in question. Whatever, therefore, may be the force of the decision in the said case of Glenn and others, I hold that, without it, matters have since transpired, which, taken altogether, clearly establish the validity of the said bonds. And I consequently adjudge and deem that the complaint in this case be dismissed, with costs.

From this decree the plaintiffs appealed, upon the following grounds:

1. Because his Honor erred in deciding that the case of Glenn et al. v. County Commissioners, was a final decision of the matters involved in this action.

2. Because his Honor erred in deciding that the people of York county had ever, in any manner or form, by any free action

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*upon their part, approved, acquiesced in, or ratified the subscription made to said railroad company, without their consent and against their will. The fact being that said people have, at all times and under all circumstances, as far as it was in their power, protested against the said subscription, and denied that it was binding upon them, as the plaintiff is ready to prove.

3. Because his Honor erred in deciding that the legislature of the state had the constitutional authority to give validity by way of ratification to the action of the county commissioners in making the subscription and issuing the bonds in question against the will of the people.

4. Because his Honor erred in deciding that the legislature of the state have ever, by any act or acts, ratified or made valid the said subscription by the county commissioners or the said bonds after they were issued.

5. Because his Honor erred in deciding that the said bonds are valid and binding obligations of the county of York.

6. Because his Honor erred in dismissing the plaintiff's complaint.

7. Because, it is respectfully submitted, his Honor should have decided that the said bonds were issued absolutely without authority and are void, and should have granted the relief prayed for in the complaint.

8. Because his honor should have decided that Section 11 of the act of February 26th, 1873, was in violation of Section 20 of Article II. of the constitution of the state, and had not the force of law.

9. Because his Honor should have decided that, inasmuch as the people of York county had not accepted the privileges named in Section 11 of the act of February 26th, 1873,

they could not give validity to the void action of the county commissioners in making the subscription and issuing the bonds in question by acquiescence, or other alleged acts of ratification on their part.

10. Because, it is respectfully submitted, his Honor erred in deciding the cause on questions of fact that were reserved by written agreement of counsel.

The appeal was heard at the April Term, 1879.

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*Messrs. Le Conte and Patterson & Gaston, for appellants.

The bonds were issued absolutely without authority. The act, (15 Stat. 393) conferred no authority upon the commissioners to subscribe or issue bonds. See dissenting opinion and argument for appellant in 6 S. C. 412. The legislature had no power to enforce obligations upon the county of York, except upon consent of her people. Counties are only agencies of the general government to aid in the administration of general laws in their several districts. Dillon Mun. Corp. § 10. There is no such thing as a county government. There is nothing in Article IV., Section 19 of our constitution, which contradicts this fundamental principle. The term jurisdiction carries the meaning of the power to administer, not to make laws. The general assembly must determine the necessity; the county have jurisdiction to carry out and administer. Compare with Article IX., Section 9. Again, counties are not named in Article IX., Section 9. Here is cotemporaneous exposition. See the several acts relating to county commissioners. Counties are only sub-divisions of the state, created as instrumentalities of the state government, to subserve the administrations of the general laws of the state in their particular localities. The constitution does not seem to contemplate their incorporation. Art. II., § 3; Art. IX., § 9. But having a corporate form, advantage is taken of this to endow them with powers and privileges which are private as respects the rest of the state, although public in respect of the inhabitants of the county. It is upon this that the questions to which this argument is directed must arise. As respects the acquisition and enjoyment of such special powers and privileges, what are the relations which the county bears to the state, and what control has the state legislature over it? As to such matters, the county corporation is upon the same footing with a municipal corporation fully developed, and indeed a private corporation. The legislature has no compulsory power over it, and can do no more than to grant the power or privilege, subject to the right of the corporation to accept or reject it at its will. Cooley on Coast. Lim. *231; 28 Mich. 228; 13 Wis. 37; 29 Wis. 413; 51 Ill. 17; 2 Am. R. 278; 53 N. Y. 128; 4 Wheat. 694. It is said

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that *all this is met by State v. Charleston, 10 Rich. 491; so it is as to cities or towns, which possess a complete representative government. But in the case of a county, who represents the corporation? Certainly not the commissioners who are administrative officers of the state not of the county. The people of a county have no one to act for them, and must speak for themselves. It is a mockery of free government to say that a legislature representing thirty-three counties, can, at will, dispose of the property or fortunes of the people of York county, either directly or indirectly, by accepting, as the will of the people, the consent of a board of petty officials elected to fulfill certain subordinate functions, as the agents of the state in the county. Locke's Essay on Gov., § 142. Nor can they raise taxes upon the property of the people without the consent of the people.

If the legislature had, itself, the constitutional power to determine this subscription and authorize these bonds without regard to the will of the people of York, still it could not delegate this power without restriction to be exercised by subordinate functionaries, appointed for purposes wholly foreign to the exercise of such powers. 6 S. C. 436; Cooley on Const. Lim. *116, *119.

Section 11 of act, (15 Stat. 393,) is in violation of Article II., section 20 of the constitution.

The bonds being absolutely void, have not acquired validity by reason of any matter subsequent to their issue. Not by acts of the legislature. 15 Stat. 865; 16 Stat. 485. These acts are not validating acts. 4 Otto 269. Could it be supposed that a legislature which prohibited county commissioners from building a poor-house, without a vote of the people, (15 Stat. 989) would have stultified itself by sanctioning action here? As to purpose of second act, see House Journal, 1877–78. Not having power to authorize, the legislature could not validate. Cooley on Const. Lim. *381; 13 Wis. 37. The bonds did not acquire validity under judgment in Glenn v. County Commissioners. The plaintiff here was neither party nor represented. 2 Dill. on Mun. Corp.; 2 Duer 664; 18 N. Y. 115; 23 N. Y. 318; 26 Mich. 264; 2 Bligh, (H. L.) N. R. 312; 10 Rich. 491. Glenn and his associates were individual taxpayers, suing on

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their own *account alone. If capacity to sue they represented only themselves. 5 Rich. Eq. 342; 11 Gray 436; Lleady 610; 17 How. 130. See remarks in State, ex rel. Harris, v. Robertson, MS., Dec., 1877. The order of the Supreme Court in the Glenn case does not show that it was final. It does not appear that issues were decided.

The bonds have not become valid by reason of any act or thing done by the people of York county. The acquiescence of the people of York county was specially reserved, and was not before Judge Pressley at all. We were prepared to show that every thing had

been done in protest, which a people could do. Only two elections were afterwards held, and if stock was held up to filing of complaint, the action of commissioners could not estop the people. 10 Wall. 676. If the bonds were void, the doctrine of estoppel can have no application. Dill. on Mun. Bonds, 52, 53; 20 Wall. 655. But defendants knowing how the bonds were issued, cannot claim the benefit of an estoppel; nor could claim of bona fide holder avail when there is total absence of authority to issue.

Mr. J. F. Hart contra.

Both state and relators are estopped from bringing this action. The state is estopped. 15 Stat. 395; 6 S. C. 412; 15 Stat. 865, § 7; 16 Stat. 485; and in connection with the fact that York and Chester were the only counties authorized by law to levy a tax to retire bonds issued in aid of railroads, 16 Stat. 288 and 797. The state is estopped. 10 Rich. 499. The relators here are also estopped. In using the word "parties" in Harris v. Robertson, the court meant to include privies. If not, then who were the parties in the Glenn case? As the plaintiffs there were taxpayers, then all taxpayers are bound. Code, § 142. Otherwise, every taxpayer might bring his separate action. And all people of York are bound, because the county commissioners were parties. The judgment there bound the county and all people in it. 10 S. C. 141; 7 Otto 376; 29 Iowa 197; Freem. on Judg., §§ 174, 176, 178.

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*If plaintiffs are not estopped, then it is submitted that original subscription and issue of bonds were authorized. Const., Art. IV., § 19; Art. IX., § 8; 1 Dill. on Mun. Corp. 233. Such was the intent of the legislation. 15 Stat. 865; 16 Stat. 288, 485, 797. This is cotemporaneous legislation, to which we may resort in cases of doubt. Pot. Dwar. 136, 189 and note; 191 and note; 5 Cranch, 1. If "or" means "and," as intimated in the Circuit decree, the execution of the bonds by commissioners alone would make them valid. 5 Wall. 784. If power was not fully conferred in original acts, defect has been cured by subsequent legislation. 10 Rich. 494; 16 Wall. 663; Dill. on Mun. Corp., §§ 46, 424; 2 Rob. (La.) 209. If these acts do not purport to be validating acts, it is of no consequence—the form is not material. 7 Wall. 619; 22 Wall. 75; 95 U. S. 653; 121 Mass. 460; 76 N. C. 489; 66 N. Y. 129; 57 N. Y. 177; 5 Wall. 203.

The act of the commissioners has been ratified by the people of York, as held by the Circuit decree from the pleadings, the statutes of the state and other matters within judicial cognizance. 19 N. Y. 218; 17 N. Y. 453; 24 Ill. 90; 5 Wall. 772; Dill. on Mun. Corp., § 385.

The legislature has recognized, the courts sanctioned, and the people ratified these bonds. If Glenn v. County Commissioners was wrong, it cannot now be reversed so as to affect these bonds. 22 Iowa 11; 8 Wall. 584; 1 Wall. 175; 16 How. 432; 3 Wall. 330. If all these positions are erroneous, neither the county of York, nor its people can repudiate the contract with the defendant railroad company while holding its stock. Sedg. on Const. Law 90; 19 Wall. 678.

On September 19th, 1879, this court passed the following order:

It is ordered that the above-stated case be re-argued at the next term of this court. The attention of counsel is especially directed to the following questions, some of which were not fully noticed in the former argument, viz:

1. Does the constitution of 1868 constitute the several counties of this state corporations?

2. If it does not, has the general assembly power to do so?

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*3. Has the general assembly the power to confer upon the board of county commissioners the right to issue negotiable bonds for the purpose of aiding in the construction of a railroad?

Messrs. Simonton & Barker, for the affirmative.

The constitution has either created counties corporations, or contemplates their creation into corporations by the general assembly. Const., Art. IV., § 19. This recognizes the county as a unit, distinct from the state. Article IX, section 8; shows that counties are or can be made corporations. Compare this with the next succeeding section. The eighth section speaks for the present; the ninth commands for the future.

It is claimed, however, from Art. II., § 3, that there is no change from our old judicial districts, except in name. The last sentence in the same section says that each county shall constitute an election district. Up to that time, election and judicial districts were distinct, in fact, and in their history.

In order to explain our position we must go into a brief examination of the history of the state.

From the earliest settlement of South Carolina down to the adoption of the constitution of 1868, the entire government of the commonwealth was in the hands of the legislature. With the exception of a few incorporated towns, the whole municipal administration was exercised and supervised directly by the general assembly. All the taxes were levied by that body. The whole proceeds of taxation went into the state treasury. Every dollar, for every purpose, general or special, from the building of the state-house to the erection of a county jail, was appropriated and expended under an act of assembly. From the most petty item of expenditure—the costs of a constable for serving a warrant—to the millions expended in internal improvements, the appropriation had to be made

by a bill originating in the house of representatives, and passed with all the formalities required by the constitution. There were no district taxes; no district funds; no district purposes, in which the people of the district had any exclusive control; in-

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deed, had *any voice whatsoever. An election district sent its senator and representatives to Columbia, and furnished its taxes. But, except in the share which these representatives had in the vote of their respective houses, the district had no voice or claim in the disbursement of the money they raised. For very many years, indeed, down to a period not very distant, every official in the state was elected or appointed by the general assembly—governor, judges, clerks, sheriffs, ordinaries, tax collectors, justices of the peace, magistrates, managers of election, commissioners of the poor, of public buildings, of free schools, of roads, bridges and ferries. And, notwithstanding the spread of democratic doctrines throughout the Union, and in spite of many efforts to the contrary, the majority of these offices continued to be filled by the general assembly until the new constitution of 1868 was adopted. The local officers, especially the commissioners of the poor, of public buildings, of free schools, of roads, bridges and ferries, appointed by, were directly responsible to the legislature—made their annual reports to, and got their instructions from that body. Annually the comptroller-general reported their accounts, and the accounts of every public servant in the districts, to the general assembly; and on such report, and upon reference to and an examination by committees of each house—an examination going into every item of charge—the accounts which were allowed were paid by the state treasurer, after an appropriation for that purpose. The state was a thoroughly centralized government; and, with the exception of a few towns and villages, there was no form of municipal government—distinct, self-supporting—within the limits of the state.

There have been in South Carolina three kinds of territorial divisions—counties, election districts and judicial districts.

Originally there was, apparently for convenience in territorial designation, counties, such as Craven county, Berkeley county, Granville county and Colleton county, with outlying precincts, such as Ninety-six, the Cheraws, Camden, and so forth. Afterwards, as the up-country became more settled, these outlying precincts were sub-divided into coun-

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ties, bearing, for the *most part, the same names they now do—Abbeville, Fairfield, Chester, and so forth. 1 Brevard Dig. 253.

The judicial districts were formed for the more speedy and convenient trial of causes in the Court of Common Pleas and General Sessions.

Originally, the only court in the province was held at Charles Town. This proving the cause of great inconvenience, circuits were established, and the province was divided into precincts or districts. Brevard 219. Charleston precinct embraced all the territory between the Santee, Combahee and the sea; Beaufort precinct, all the territory between the Combahee and Savannah rivers and the sea; Orangeburg, between the Savannah, Santee, Congaree and Broad rivers, extending beyond Newberry. 1 Brevard Dig. 256. In 1798, these precincts or districts were subdivided into smaller districts, following very much the boundaries of the counties which had been previously fixed, but not so absolutely or in every instance. For instance, Sumter district was composed of Claremont, Clarendon and Salem counties; Kershaw district comprehended Richland and Kershaw counties; Orangeburg district comprehended Orangeburg, Lexington and Newberry counties; Georgetown district embraced Williamsburg, Kingston and Georgetown. The purpose of this act was declared to be a more easy, certain and uniform system of judicature, by the establishment of courts under proper regulations in districts of convenient dimensions. This division, however, was in no sense political or municipal. The districts were not organized—had no powers and no duties. They only formed the boundary lines within which process from a particular courthouse ran.

The third division of the state was into election districts. These, in some instances, covered the same territory as the judicial districts. In others, as in Charleston, Beaufort, Colleton, Georgetown, Sumter, Horry and Orangeburg, they were widely different. Charleston judicial district had, within its limits, ten election districts, distinct, separate, independent of the judicial district. Georgetown and Horry each had one and a half, dividing All Saints between them. Some election districts, although they had the same boundaries as the judicial district,

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*had distinct names—Lexington district was represented in the legislature as Saxe Gotha; Marion as Liberty. Each of the election districts had its separate tax collector, and they approached more nearly to our present idea of a county than any other division.

For very many years a political struggle was waged in the state, the object of which was to make the judicial districts and the election districts coterminous and the same. The war produced a change of power in the state, and the convention of 1865 nearly ended the struggle by making in all but one instance the desired change. Every judicial district in the state, but one, was made an election district; and in 1868, by the absorption of the district of Berkeley into Charleston, the entire change was effected.

The constitution of 1868 made all the judi-

cial districts counties, gave to the legislature the right, under certain limitations, to make counties at its pleasure, and declared each county, existing and to exist, an election district.

The new county system had machinery provided for it, whereby the local concerns of each political sub-division should be administered by a board elected by and representing the county, specially charged with its local concerns of every description, and capable of possessing and of using power of taxation over the county, and of thus creating a county fund. This constitution was made by men who had had a wider experience than in South Carolina. They came from states in which counties had been in the habit of discharging some of the functions of government. When they used the word county, they meant something more than mere territory. With the abolition of the name district, a peculiarity in this state, was effected a wide revolution. Instead of its centralized state government, South Carolina was placed on the plane of what Mr. Cooley calls the American system, which is "one of complete decentralization, the primary and vital idea of which is, that local affairs shall be managed by local authority, and general affairs only by the central authority." Const. L. 189. The result is, that in every matter—in all expenses incurred in the care of the poor; erection and repair of public buildings; payment of

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*juries, witnesses, constables; all expenses of court; salaries of county officers—the county is responsible, and provides for them out of the county funds alone. This was the practical operation, under the constitution, in every matter but the funds for educational purposes. And since the adoption of the last constitutional amendment, this has been brought within the general system, so that every dollar used for county purposes, is raised from taxes levied upon and collected in the county, and is expended in the county by the county officers. Each county raising and paying its own expenses, and the expenses of no other county. This revolution in the internal administration of the state forbids the idea that the counties of the constitution of 1868 are nothing more than the scraps of territory, called under the former constitutions, judicial districts, with no functions whatsoever.

Under second question, counsel cited Gen. Stat. 145; 19 Wall. 673; 7 Otto 376; Cooley on Const. Lim. 87, 173, 191; 15 N. Y. 543; 27 Vt. 142; 4 Wheat. 316; 16 Wall. 676; 13 Ill. 30; Dillon on Mun. Corp., § 10, a.

Under third question, counsel cited 4 Rich. 382; 1 Spears 218; 8 Leigh 120; 15 Conn. 475; 9 Hump. 252; Dillon on Mun. Corp., § 105 a; 19 Wall. 677; 1 Wall. 176; 16 Wall. 669; 19 Wall. 666; 1 Black. 39; 2 Cl. & Fin. 349.

Messrs. J. F. Hart, Hemphill & Hemphill, Rion, Witherspoon & Spencer, on same side.

Messrs. LeConte, Patterson & Gaston, contra.

In addition to the authorities in their former argument, counsel cited as follows:

1. 1 McM. 222; 1 Spears 218; 4 Rich. 382; 10 Pick. 172; 23 Wend. 103; Potter on Corp., § 432; 1 Dillon on Mun. Corp., § 22.

2. 9 S. C. 1; 7 Otto 374; 11 S. C. 333.

3. 1 Dillon on Mun. Corp., §§ 23–30; 2 Id. 445; 9 B. Mon. 330; 9 Mo. 507; 8 Blackf. 361; 21 Ill. 451; 17 Wall. 322; 1 Otto 540; 3 Hill (N. Y.) 531; 31 Penna. 175; 26 La.

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478; 28 *Mich. 228; 18 Gratt. 338; 1 Black. 39; 12 Ohio 375; 2 Kent 275; Cooley on Const. Lim. 230, 236, 238, note 2, 250, 251, 252, note 1; Cooley on Const. Lim. 117, 211–235, 287; 104 Mass. 87; 62 N. Y. 160; 9 Mich. 165; 40 Conn. 72; 15 N. Y. 543; 2 Kans. 215; 31 Vt. 226; 9 Cranch. 43.

March 25th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The leading question in this case involves the estoppels resulting from a previous action arising out of the same transactions. The action is in the name of the state, upon the relation of citizens and taxpayers of York county, to have certain bonds for the payment of money issued in the name of the county of York declared null and void, as issued without due authority of law. The defendants are the Chester and Lenoir Railroad Company, to whom the bonds in question were issued, certain parties claiming to have some right or interest in the said bonds derived from the railroad company subsequent to their delivery by the county commissioners to such railroad company and the county commissioners of said county.

It is alleged that a suit was brought prior to the issue of such bonds by the county commissioners, and while such issue was in contemplation, by Glenn and others, as citizens and taxpayers of York county, to test the authority of the county commissioners to issue said bonds, and an injunction prayed to restrict them from issuing the same; that the Circuit Court refused such injunction and dismissed the complaint, and that such judgment was affirmed on appeal to this court; that under the decision of that case and deeming it authority for so doing, the said county commissioners issued said bonds, and they came to the possession of the parties holding them as to bona fide purchasers for a valuable consideration and without notice of any defect.

The question of the effect of the judgment in the case of Glenn v. County Commissioners, 6 S. C. 412, upon the present case, involves two inquiries. First, as to its effect on the right of the present plaintiffs to maintain

their action, which is alleged to be upon the same cause of action, and substantially between the same parties. Second. What right, if any, the present defendants acquired in virtue of the fact of having, since the rendi-

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tion *of such judgment, become invested with the rights that were the subject of controversy therein. The first of these questions is substantially identical with that which would have been raised by a former plea of a former recovery between the same parties, on the same cause of action, while the second inquiry has a large scope and involves the whole effect by way of estoppel of the judgment in the case of Glenn v. County Commissioners, in sustaining the rights which they claim to have acquired under that judgment.

We will consider, in the first place, whether the action of Glenn v. County Commissioners is to be regarded as a former recovery upon the same cause of action and between the same parties as those involved in the present case. If this had been an action in the nature of a suit at common law, and the defence of a former recovery made upon the record of a judgment in an action at common law, the question would have had a more restricted character than in the present case, as it would have to be determined in view of the legal effect of a judgment record at common law. The action of Glenn v. County Commissioners was in the nature of a bill in equity, and the present action is of the same nature. Equity will not permit a matter once formally adjudicated to be reopened between the same parties or those holding under them under its decree in a collateral proceeding. The remedy of parties and privies for any errors of fact or law that may be found in a decree, is by appeal or petition or bill of review. A formal proceeding by way of review is, in substance, a prolongation of the original bill, and not in any sense a collateral proceeding. But this action is, in form and substance, a collateral proceeding. The complaint does not seek to re-open a decree and point out its errors for correction, but treats the former suits as void in toto for certain reasons therein assigned.

Is there, then, that degree of identity between the two actions that would authorize them to be regarded, as in substance and effect, between the same parties and concerning the same cause of action? As this question arises in equity, substance, rather than form, is to be looked at, as a consequence of the prevailing habit of equity. Is there, then, identity between the causes of action in the two cases? The question in the Glenn

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case was whether, *under the act of the legislature, which was claimed as authority for issuing the bonds, the county commissioners had a right to make the subscription to the stock of the Chester and Lenoir Railroad Company, and to issue the bonds of the county of York in payment therefor, without first submitting the question to a vote of the people or electors of the county, whether such subscription should be made? If that question was decided in the affirmative, then it would follow, as a consequence, that the prayer of the complaint for an injunction would be denied, and the county commissioners would be free to proceed and issue the bonds at their discretion. The question in the present case is identical with that just stated. The difference between the two cases, as far as it concerns the cause of action, is in the nature of the relief demanded. Glenn's case only sought an injunction, as no rights had been acquired at that time under the intended action of the county commissioners, but at the time of the commencement of the present action such right had matured, and the relief could not, to be effectual, fall short of a decree declaring such right to be invalid. It may be contended that the prayer for relief is not a test of the identity of the causes of action; it is enough to say that it is not in the present case. The controversy is the same throughout, resting on the same facts and views of the law. At one stage of the controversy one measure of relief is called for, while at another and more advanced stage that measure of relief may be inappropriate and different relief demanded. It cannot be questioned that two actions, brought at different stages of the same controversy, although moulded to the special circumstances existing at the respective times of their commencement, yet each tending to the same general result, must be regarded as involving the same cause of action. If the contrary was admitted, there would be no stability of rights under judgments, for the moment a transaction, even judicially sustained, passed into a new stage of development it would be thrown open to question from its very origin. As applied to proceedings in equity, this view is sustained by the principles on which equity administers justice. The contrary would tend to deprive equity of that characteristic power of adapting itself to courts contemporaneous and suc-

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cessive, which is the ground on *which it has maintained itself, side by side, with the courts of common law. It must be concluded that in substance and effect, and therefore in the view of equity, the two causes of action are identical.

It becomes necessary, then, to inquire whether there is a substantial identity as to parties. The formal record in the case of Glenn v. County Commissioners, is not before us, so that we are compelled to take the title of that cause as it is reported in 6 S. C. 412. It is there stated to be an action by E. L. Glenn and others, alleging themselves to be citizens and taxpayers of York county,

against H. K. Roberts and others, as county commissioners. The present action is in the name of the state upon the relation of certain other persons, alleging themselves to be citizens and taxpayers of York county, against the county commissioners of that county and parties who, since the case of Glenn was decided, have become holders of, or interested in, the bonds issued by the county commissioners. As far as it regards the defendants, the identity is complete, as the addition of parties who have acquired an interest in the controversy since the judgment in the first case, is a circumstance consistent with the fact of the identity of the controversy in the two cases. Had the case of Glenn continued undecided to the present time, and were the plaintiffs in that case seeking still the general results sought by the complaint in that case in some form to suit the condition of matters that have arisen since that suit was commenced, it would be a matter of prudence to make the persons who had acquired rights after the commencement of that suit parties, so that a direct decision upon their individual rights could be reached, which should act immediately, and not merely indirectly, upon them. Parties acquiring an interest in the subject matter of a suit after action commenced, from or under the parties to such action, apart from the question of notice, are privies, and it certainly cannot be contended that there is a want of identity between the suits in equity merely because persons who are privies under the one are made parties to the other.

Are, then, the plaintiffs in the two cases to be regarded as, substantially, and in the view of equity, identical? It is necessary to look to the character of suits like the present

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in order to *understand fully the nature of this question. This belongs to the class of remedies proceeding, nominally, in the right of the state, but, actually, in the interest of a class of individuals having common rights that need protection. It is, therefore, related to that more general class where individuals possess the right to represent the class to which they belong in respect of rights either common to the class, or competing as to a certain subject of property. A bill to enjoin a common nuisance is an instance of this class, based on common rights, and a creditor's bill another, based on competitive rights. This jurisdiction, in some respects, rests on the principles of a proceeding in rem, as the court of equity, through it, lays its hands upon a fund at the instance of some of the parties interested in it, and, by a proper proceeding, administers it with a conclusive effect upon the rights of all others having similar rights thereto. Although equity, as a system, proceeds upon the ground of personal duty, and hence against persons rather than things, yet there are many instances where proceedings in equity partake of the nature of an action in rem. Another principle that appears to be fundamental to such jurisdiction by means of class representation, has an analogy to the familiar principle of the law that where rights of a certain nature are common to large classes of persons, individuals may acquire, by prior occupancy, a superior right, whether temporary or permanent, over all others of that class in respect of such right. The strict illustration of this principle is where such common right has its origin from the law of nature, as in the case of waste and unoccupied lands never subjected to individual right, and animals feræ naturæ, and the like. Where many have a common right to the means of protection by a legal proceeding, this principle is suggested and would enable such as seek the remedy, with the advantage of priority, to have a superior right to prosecute such remedy. Where there are competing rights in a single subject, equity recognizes and protects the priority by injunction, as in the case of a creditor's bill. This right of representation is, however, from its nature, subject to the restriction that the door of controversy must be opened to all of the class represented, who may, on certain conditions, unite in exercising control over the prosecution of the remedy.

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*Common or public rights having their origin in the municipal law, are usually protected by the action of the public authority. In England that right of procedure is in the King or his attorney-general, while with us it is in the state. It is customary to allow private individuals having a personal interest in the protection of such rights, to use the name of the state for the purpose of protecting them, and, applying the principles of class representation, a portion of the persons of the community are enabled to become relators, such a proceeding being, in reality, the representatives of the class to which such relators belong.

Such is the nature of the present action. Whether the name of the state is indispensable in such proceedings need not be considered. If it is not, then in the present case its use may be treated with surplusage, and the nature of the case regarded as the same as if the action had proceeded wholly in the names of the persons here styled relators, as was the case in Glenn v. County Commissioners. If, on the other hand, the name of the state is indispensable, then the want of such name would have constituted a ground of defence in Glenn's case. As no such objection was made in that case, it must be treated as if it had been properly brought in the name of the state. In this view, the difference between the two cases would be resolved to that of a misnomer alone, and that equity, at least, would overlook.

We come, then, to the main question involved, as it regards the identity of the

plaintiffs in the two cases. It is easy to see, from the principles already stated, that the rights that were represented in the former case are here attempted to be represented again for the same general purpose. The principle of representation is embodied in Section 142 of the code, as follows: "Where the question is one of a common or general interest of many persons, or where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." It is clear that this language contemplated cases where the results of such an action would affect, finally and conclusively, a larger number of persons than those who are immediate parties, for the object of the section was to enable some of a class to act in a manner conclusive to others of the same class, by representing

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*them. Without the aid of this provision of the code, or the principles on which it was founded, the immediate parties could bind themselves; that in which they needed the aid of the statute, or the principles that existed prior to it, was that the subject of the controversy might be exclusively affected in such a way as to bind others not parties, but merely represented by others as such. The code, evidently, was not intended to exclude others who might choose to come in with those who assume to act as their representatives, but is consistent with the idea that if they stand out they will be bound by what is done in their name. It would follow that when plaintiffs, or relators standing in the place of plaintiffs representing a class of persons, bring an action based on such class rights and are defeated in such action on the merits, no subsequent action can be effectually brought by the same parties or by other parties of the class thus represented. This would dispose of the present appeal if it shall appear that the case of Glenn v. County Commissioners was decided finally and on the merits, provided the use of the name of the state does not interfere with the application of the principles that would apply had the present suit been maintainable and actually brought in the name of the relators without that of the state. This last proposition will be first considered. It is not reasonable to suppose that the state, in lending its name to individuals for the protection of their rights, intended to subvert the principles governing controversies of the class to which this belongs. We need not consider what would be the result if the state, having a substantial interest in this action, should claim that it was not affected by the case of Glenn, for that is not the case here. The state, as such, has no interest in the suit beyond the indirect interest of having protection afforded to the common and public rights represented by the relators. It must then be considered that the same principles apply to the present case that would apply had the relators been the only plaintiffs and capable of prosecuting as such. Then all that remains is the inquiry whether the case of Glenn v. County Commissioners appears to have been finally and conclusively decided upon the merits.

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*We will consider, in another place, the matters of fact and law decided in that case, but at present, the question is whether the disposition must be regarded as upon the merits of the controversy. If it appears that the bill was dismissed for lack of proper parties, for the want of a statement of a sufficient cause of action, or for defect of proof leading to a non-suit, then nothing would prevent its renewal in the form in which it appears in the present case. But can such a conclusion be drawn?

It is stated in the report of the case, (6 S. C. 415,) that "on August 16th, 1873, the cause was heard upon its merits before the Hon. Judge Mackey, who, on September 12th, 1873, filed the following order and decree."

The opinion of the Circuit judge is confirmed as to the merits of the case. He says: "I have considered the questions at issue solely upon their merits, and without interposing those technical rules of practice which would have justified the court, sua sponte, in dismissing the complaint." What would have justified the court sua sponte in dismissing the complaint is not stated, and as no defect of jurisdiction has been suggested as appears, cannot be conjectured, but it is quite apparent that no objection had been taken to matters of form, as then it would have been unnecessary to suggest the possibility of the dismissal of the complaint sua sponte. The decree was, then, clearly on the merits. The plaintiffs appealed from the decree, and, of course, only raised by way of appeal questions of substance. The appeal was dismissed by this court and that left the decree of the Circuit Court standing on the ground on which it was originally pronounced. It is true that the majority of this court did not state the grounds for dismissing the appeal, but that, though of interest in an aspect not at present under consideration, is of no importance to the present question. If it is assumed that the appeal was dismissed for irregularity and not upon the merits, that would not alter its effect, for it left the Circuit decree standing with the same force and effect that it had when first pronounced. It must be concluded that the Circuit decree in the case of Glenn v. County Commission-

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ers was *a decision upon the merits, and in its nature final and conclusive and a bar to the present action.

Although it may not be necessary in order to dispose of the present appeal to go beyond the matters already discussed, yet the importance of the principles and the magnitude

of the interests involved, render it appropriate that certain other questions raised in the case should receive consideration. Among these, one already noticed, is entitled to a place, namely, what is the effect, by way of estoppel, of the decree in Glenn v. County Commissioners, considered apart from the question of the bar of a future action created by such decree? Assuming that there was no formal objection to the maintenance of the present action, must the matters decided in the Glenn case be regarded as so far settled between the present parties that the record in that case is conclusive of all the allegations of fact and law in the present complaint? It is clear that the county commissioners, being parties to both suits, have a right to rely on the conclusive character of the decree in that case. If they had not, they might be placed in the position of having unlawfully issued the bonds in controversy, although at the time of issuing them they had the sanction of a decree of the Circuit Court in a suit to which they were parties, affirmed as the result of an appeal to the Supreme Court. The other defendants stand in the position of having acquired rights under the decree in question, and upon the faith of such degree. By the acquisition of such rights they became privies to the decree, and had a right to rely on its estoppels and were bound by its consequences. As such, they may allege the bar of the decree to any further agitation of the questions involved, as they would be precluded from averring against such decree, as it regards its effect upon the property acquired by them under the decree, had it gone against their interest, as effectually as if they had been parties to the suit in which the decree was rendered. It would not be questioned, if the subject of the former action was the title to land, that a decision thereon would conclude all parties becoming purchasers after judgment from parties bound by such judgment. In the present instance, the subject of the action was a power to issue bonds, and the question

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was its legal *validity, and the defendants, who have taken bonds under such power, may well contend that their titles were conclusively passed upon when the power under which it has arisen was judicially sanctioned. It would follow that in the present case they have the right to set up the decree as a bar and estoppel to any attempt to disturb the decision on which their title rests.

We have said in State v. County Treasurer, (MS., Dec., Nov., 1877,) that as the majority of the court who decided Glenn's case did not disclose the grounds of their decision, that this court is not committed to any view of the questions discussed in that case, and that the court deems all questions of law that arose therein as open and undecided, except so far as relates to the parties in that action. Parties here should be taken to include privies; indeed, privies are always intended when a general reference is made to parties. This court concurs in the positions taken in the dissenting opinion in the Glenn case, and if the question was open before us, would have no hesitation in placing the case upon such grounds.

This extension of the protection of a decree to those deriving their rights under it at any time subsequent to such decree, when in harmony with the technical rules that govern remedies and their effects, is demanded by a principle that has received its most unqualified statement in the case of Gelpcke v. City, 1 Wall. 175 [17 L. Ed. 520]. It is there held that if at the time when municipal bonds are issued, the law, as expounded by the highest court of a state, sanctions the validity of such issue, no subsequent decision of the court can impugn the validity of such bonds by overruling its former decision. This principle is applied in that case in the most general manner, and without regard to whether the former decision was upon the power or authority to issue the particular bonds in question. It is, therefore, in effect placing the principle of stare decisis upon higher ground than it has ever before occupied. We are now compelled by the language of the case to believe that the Supreme Court of the United States intended to hold that a decision of a state court overruling a former decision, under such circumstances, becomes, in effect, a law of a state impairing the obligation of a contract, so as to become involved

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under the constitution of the United *States. We cannot assume that that court intended to expand the constitutional sense of the word "law" so as to become a guaranty that no state court should violate the rule of stare decisis so as to affect contract rights. Whatever difficulty may suggest itself as to the possibility of safely applying the principle in question in the naked form in which it is presented in the case just cited, it is easy to recognize the principle itself as just and suitable to be applied whenever the nature of our remedial system will admit of it. In the present case its application is consistent with the rules governing the proper effect of remedies, and therefore justifiable.

It only remains to notice the objection that was raised upon the argument of the appeal, that the county of York, not being a corporation, bonds issued in its name are without validity. The question of the right of the county commissioners to issue the bonds of the county of York, that was presented in Glenn's case, necessarily involved the further question, whether the county of York is capable, legally, of making a valid bond, and therefore it is manifest that the question cannot be re-opened in the present case. If it could be, it would not be necessary to consider the broad question whether the county of York is a corporation. It would be suffi-

cient to ask whether it had legal power to contract obligations within the scope of its legitimate interests. If it possesses such capacity, the only question would be whether the legislature had authorized its exercise, and that question is disposed of, as between the present parties, by the decree in Glenn's Case. It will be conceded, without difficulty, that it is competent for the legislature to confer upon the people of a county power to incur obligations binding upon them, as a community, unless forbidden by the constitution. The argument before us has been mainly addressed to the question whether the constitution has created the counties into corporations, or so arranged their character and powers as to amount to exhaustive legislation on the subject, thus, impliedly, excluding the legislature from legislating either antagonistically or cumulatively on the same subject. This view is not a necessary one to the matters at issue in the present case. The true inquiry is whether there is anything in the constitution that precludes the legisla-

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ture from *permitting the counties to incur any obligation whatever in the nature of a contract; for the objection is such as would apply to any contract obligation whatsoever. It is impossible to find any clause in the constitution that admits of the construction contended for; but, on the contrary, there are provisions of a positive character from which it is reasonable to infer that the counties were intended either to have originally or from the legislature capacity to contract obligations necessary to the transaction of their local business.

Section 19, Article IV. of the constitution provides that "the qualified electors of each county shall elect three persons, for the term of two years, who shall constitute a board of county commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursements of money for county purposes, and in every other case that may be necessary to the internal improvements and local concern of the respective counties." Here is an express recognition of the capacity of the communities styled counties to have interests peculiar to themselves and not common with all other citizens of the state. The terms "local concerns" are of the most general character, and, that they are not intended to be confined to such matters of state administration as may happen to fall for execution within the territorial limits of the respective counties, is evinced by the provision for "internal improvements;" clearly internal improvements of a general character as affecting the state at large, or one or more counties were not here referred to as the administration of such improvements would not be committed to boards circumscribed by county lines, but to more general bodies, whose jurisdiction would be commensurate with the local extension of such internal improvements. It must then be understood that what may be called county improvements may be brought within the capacity of the counties as local communities. The words internal improvements admit, naturally, of an extended signification. It is left to the legislature to fix the character of the improvements that may be thus undertaken within the scope of the sense of the constitution. The right of improvement embraces power to create facilities that do not exist. The right to make improvements of a local

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*character implies power to acquire and hold property and to renew obligations and make contracts in relation to such property as ordinary means for that purpose. It cannot be doubted that if the legislature should authorize a county to purchase the road and franchises of a turnpike company and throw the road open to the public, that such a transaction would be an improvement in the sense of the constitution. To allow such a transaction is, impliedly, to allow an obligation to be contracted for that purpose.

Section 8, Article IX. of the constitution speaks of the "corporate purposes" of counties as objects for raising and expending county taxes, thus strengthening the view already presented, that these communities are capable of acquiring interests distinct and apart from such as concern the state at large; the limit is put by the constitution to the extent or character of such corporate purposes. That the community may have local interests calling for the expenditure of money is clearly recognized and provided for, and that implies the power of incurring obligations and of satisfying them.

It must be concluded that there is no constitutional restriction depriving the legislature of the power of authorizing counties to incur obligations, and that is decisive of the question under consideration.

The judgment must be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 317

(Case No. 849.)

SUBER v. ALLEN.

(November Term, 1879.)

[*Action* ⊂⊃50.]

A judgment creditor brought his action against the several parties, their sureties and representatives, who had administered upon the estate of his judgment debtor, deceased, for account, settlement, &c., alleging also that the lands of the deceased were bound by his judgment, and that "plaintiff is informed and believes that one S. claims to be the owner in fee of the land herein described, but the plaintiff de-

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nies the validity of said title, *if any he have,

and alleges that the same is illegal and void"—*Held*, on demurrer of a defendant properly a party, that complaint was multifarious for misjoinder of the cause of action against S.†

[Ed. Note.—Cited in Barrett v. Watts, 13 S. C. 441, 444.

For other cases, see Action, Cent. Dig. § 524; Dec. Dig. ⊂⊃50.]

[This case is also cited and explained in Arthur v. Allen, 22 S. C. 432.]

Before Thomson, J., Richland, May, 1879.

Action commenced in December, 1878, by C. H. Suber, as administrator of John Coate against Nancy Allen and others, heirs-at-law of J. M. Allen, the administrator de bonis non of Allen, the administrator of the first administrator, a surety of the first administrator, and the administrator of a deceased surety. *and J. C. F. Sims, who, it was alleged, claimed a lot of land belonging to Allen. The complaint demanded an accounting and payment of a judgment obtained by John Coate against J. M. Allen during his lifetime. The land in Sims' possession, it was alleged, was bound by this judgment. All of the defendants answered, except Simeon Younginer, the administrator of the deceased surety, who demurred as follows:

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The defendant, Simeon Younginer, as surviving administrator of the estate of Peter B. Smith, deceased, demurs to the complaint herein, for the grounds that it appears upon the face of the complaint—

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*First. That there is another action pend-

†A decree upon the question of multifariousness, rendered by the Hon. John A. Inglis, formerly one of the Chancellors of this state, and afterwards one of the justices of the Court of Appeals, is worth preserving, and may therefore be appropriately inserted here. The cause was tried at June Sittings, 1860, of the Court of Equity for Union District, and the decree was filed August 1st of the same year. So much of it as bears upon the demurrer for multifariousness is given in full:

George B. Tucker v. James A. Tucker et al. } Bill for account, partition, &c.

[*Executors and Administrators* ⊂⊃473, 474.]

[Cited in Stallings v. Barrett, 26 S. C. 478, 2 S. E. 483, to the point that several distributees may unite in demanding an account from the administrator.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041–2060; Dec. Dig. ⊂⊃473, 474.]

The parties to this cause are the children, and, as such, the heirs-at-law and distributees of Fanny Tucker, late of Union District, who died intestate in December, 1857. At her death the intestate was seized and possessed of a considerable real and personal estate, consisting of one or more plantations, a number of negro slaves, and the usual stock of horses, cattle, &c., found about a planting establishment. Administration of the personal estate was, in the early part of last year, 1859, duly granted to Thomas C. Jeter, the husband of one of the intestate's daughters; as it is said, to him and his wife jointly. Under an order from the Court of Ordinary, all the personal chattels, which came into the possession of the administrators, have been sold on a credit. George B. Tucker, one of the distributees, was a purchaser at this sale to the extent of nearly $22,000, and, to secure payment of the purchase money, gave his two notes; each for one half the amount, with interest, payable the one on January 1st, 1860, and the other on January 1st, 1861. The former of these notes not having been paid at its maturity, an action for the recovery of the amount due thereon was brought in Common Pleas at last Spring Term. Pending this action $7000 has been paid in part satisfaction of the note, and the administrators are proceeding to judgment for the balance. During the last eighteen years of the intestate's life, George B. Tucker, who was her youngest son, lived with her, and had the oversight and management of her property and business, upon a contract, as he says, for compensation. He holds a note, under seal, purporting to be made by her, bearing date March 23d, 1853, for the payment to him of $6,500, at three days, "for value received in managing

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*her business for the thirteen years" then last preceding. The validity of this paper is denied by the other distributees, on grounds touching the legal competency of the intestate to bind herself by deed at the date which it bears, and force or fraud put upon her will by the undue influence exerted by the holder. An action in the Common Pleas has been brought by George B. Tucker against the administrators, wherein he is seeking to recover out of the assets in their hands the amount of this demand, with interest, and also a further demand of $2,500, claimed to be due to him upon his contract as manager for the intestate for the five years intervening between the date of the note and her death. This recovery is resisted by the other distributees, who, on the contrary, allege that he never accounted with his intestate in her lifetime for his receipts and disbursements as her agent, for the crops made under his management and control and disposed of by him, from year to year, during the period of his stewardship, and for other moneys of the intestate which came to his hands; that upon such accounting he would be in debt to her estate, and that the other distributees are in this court, and in the settlement of the estate entitled to such accounting from him. And, indeed, to his action at law a discount or set-off has been filed by the administrators, charging him with the alleged value of the yearly crops made.

For more than a year after the intestate's death, during which the question of her intestacy was in litigation, and there was consequently, no administration, George B. Tucker retained in his possession all the property left by the intestate. It is alleged that upon the grant of the administration he did not deliver to the administrators all the "goods, chattels and effects" of the intestate which had been thus in his hands. Certain negro slaves, now in his possession, are claimed to have been the property of the intestate at her death and to have been converted by him to his own use; and the administrators have an action of trover now pending in the Common Pleas for the recovery of damages for such conversion. But besides these, it is charged that he had in his possession, after the intestate's death, sundry other chattels, and particularly two promissory notes or other securities for the payment of money, all the property of the intestate; one of the said securities being his own obligation in some form for the payment of $1800, subject to a credit of

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$800, paid in *part thereof; and the other a small note of one of the other distributees, James A. Tucker; and that these he has retain-

ing between the same parties for the same cause of action.

Second. That several causes of action have been improperly united; one being to marshal the assets of the estate of John M. Allen, and for the payment of the debts found to be due by said intestate, and for an account by Daniel B. Miller, as administrator of the estate of Addison R. Phillips, who was the administrator of the estate of the said intestate; the second being against this defendant as the surviving administrator of Peter B. Smith and William Glaze, who was a co-

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surety with defendants' *intestate, upon the bond of the said Addison R. Phillips, as administrator of the estate of the said John M. Allen, deceased; and a third being against the defendant, James C. F. Sims, for the purpose of trying the titles to the lot of land described in the complaint.

His Honor, the Circuit judge, overruled the first demurrer and sustained the second, "for the reason that it appears to the court that the cause of action embraced in the complaint against the defendant, James C. F. Sims, is improperly joined with other causes of action therein set forth."

Plaintiff appealed.

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*Messrs. Baxter & Seibles, for appellant.

Messrs. Melton & Clark, contra.

March 25th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This is a judgment creditor's bill against the administrator de bonis non of the assets of the intestate debtor, seeking satisfaction of the judgment out of the intestate estate. The only question made by the appeal is one of alleged multifariousness in the complaint. The complaint makes

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ed wrongfully. In the year during which he kept possession of the whole property, he cultivated the land and used the labor and services of the negro slaves, horses, &c. It is stated in the pleadings that during the year 1859, George B. Tucker and Thomas C. Jeter have each had in possession and use, portions of the land of the intestate. In such a condition of the affairs of this estate, George B. Tucker, on April 11th, in the present year, filed his bill of complaint against his brother, James A. Tucker, and his two sisters, Nancy Oxner and Mary Jeter, with their husbands, Emanuel Oxner and Thomas C. Jeter. This bill prays that the lands of which his deceased mother died seized shall be partitioned; that Thomas C. Jeter and wife shall account for their administration of the personal estate, and that the residue of the said estate, after the payment of debts, which shall be found upon such accounting, shall be distributed; and that the administrators shall be restrained from further prosecuting their action at law against him for the recovery of the balance which is due on his note, and he be permitted to settle the same in the general distribution of the estate. To this bill the defendants, James A. Tucker and Emanuel Oxner and wife, have filed a joint demurrer, and have assigned for cause of their demurrer, that in joining this matter with the prayer for an account of the administration, that the bill is multifarious. The other defendants, Thomas C. Jeter and his wife, have also filed a demurrer to so much of said bill as seeks a partition of the real estate, and have likewise assigned for cause of their demurrer, that in joining this matter with the prayer for an account of the administration and a distribution of the surplus of the personal estate, the bill is multifarious. All the defendants, except James A. Tucker, have also answered to the several parts of the bill. The demurrers of Jeter and wife and Oxner and wife, have been waived by their respective answers, each of which covers the whole case made by the bill and all the matters embraced in the several parts, and for this reason, if there were none other, would be overruled. But the demurrer of James A. Tucker, for the same cause, would still remain, and the objection of multifariousness must, therefore, be considered and disposed of. Lord Cottenham, in delivering his judgment in Campbell v. McKay, remarked: "To lay down any rule applicable universally,

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or to say what constitutes multifarious*ness, as an abstract proposition, is, upon the authorities, utterly impossible; the cases upon the subject are extremely various, and the court, in deciding them, seems to have considered what was convenient in particular circumstances rather than to have attempted to lay down an absolute rule." Lord Redesdale describes it as "demanding several matters of different natures, of several defendants in same bill." The definition furnished by Mr. Story, is "the improperly joining in one bill of several matters properly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature, against several defendants in the same bill." In another passage of his work he is more satisfactory. "Frequently," he says, "the objection raised to a bill, though termed multifariousness, is, in fact, properly speaking, a misjoinder of causes of writ, that is to say, the claims asserted in the bill are of so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole transactions which form the subject of the suit; but, nevertheless, these transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by multifariousness, as applied to a bill, is where a party is brought as a defendant, upon a record, with a large portion of which, and of the case made by which he has no connection whatever." Without, however, attempting to define multifariousness in exact terms, an undertaking, declared by such high authority, utterly impossible of accomplishment, it may be safely affirmed that the present bill is not liable to this objection. Which one of the matters, in respect of which relief is here sought, is so distinct from and independent of all the others, that it ought not to be joined with them in one suit? What inconvenience can result from litigating in one record all the matters contained in this bill? The object of the whole suit is single—the settlement and distribution of the estate of the intestate, Fanny Tucker. It is true this estate consists, in part, of realty, and partition of this is asked; in other part of personalty, and it is asked that the surplus of this share be ascertained and distributed. It is true also that the personalty is in the hands of administrators, who are, in respect thereof, charged with the payment of the intestate's debts, and the bill prays that in order

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to ascertain *what is the surplus liable to distribution, these administrators shall account for their administration. It is further true that the assets in the hands of the administrators

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J. C. F. Sims, *an entire stranger to the estate, as must be assumed, a party, and demands relief against him. The facts alleged as connecting Sims with the case are that he is in possession of a parcel of land alleged to have belonged to the intestate at his decease, claiming title thereto. Plaintiff alleges further that at the decease of the intestate debtor the land in question was bound by his judgment. The statement of the complaint tendering an issue to Sims is as follows: "That the plaintiff is informed and believes that one James C. F. Sims claims to be the owner in fee of the tract of land herein described, but the plaintiff denies the validity of the said title, if any he have, and alleges that the same is illegal and void."

The code (Section 167, Sub-division 5,) allows a demurrer on the ground "that several causes of action have been improperly united." From the nature of this provision it is evident that any defendant may take the objection. If two independent causes of action, incapable of being united for the purposes of prosecution, are set forth in a complaint, all the defendants concerned are interested in having them separately considered, for the objection rests on the general ground that complete justice cannot be done where matters, foreign to each other, are considered together. This principle applies as directly to one party as to the other.

The objection of multifariousness in the present case comes from the defendants, who are proper parties to the creditor's bill, and not for Sims, who, as is alleged, was improperly joined with the others. The objection of a misjoinder of causes of action or multifariousness is general, going to the whole frame of the complaint, for the reasons already stated, and may be taken by any defendant; hence that question is open in the present case.

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*The question thus arises whether there has been a misjoinder of independent causes of action. The code (§ 190,) distributes the various causes of action into seven classes, allowing independent causes of action between the same parties, appertaining to any single class named, to be united together in one action, but does not permit a cause of action of one of this class to be united with one of another class in the same action, although the parties are the same in each.

The present complaint, considered as a creditor's bill, must belong either to the first or second class, which was described as consisting of cases arising out of: "1. The same transaction or transactions connected with the same subject of action. 2. Contract, express or implied;" while the cause of action against Sims, involving claim for the recovery of land, belongs to the fifth class.

The first part of class No. 1 embraces causes otherwise independent, but when arising between the same parties and out of a single transaction or course of dealing between such parties, it is conceivable that the same transaction between certain parties might give rise to several causes of action of a separate and distinct nature, such as a cause of action for the recovery of money on contract and one for the recovery of land or personal property or for damages to the

consist, in part, of the note of the plaintiff, George B. Tucker, which they are suing to judgment at law, and he asks that as he is entitled to one-fourth of the whole estate, he may not be subjected to the expense of a suit at law to be compelled to pay money which is presently to be returned to him. But all these matters are parts of one whole, and the relief sought in respect of them severally, all conduces to the one end of a settlement and distribution of the estate. What distinction is there between realty and personalty, so wide and deep that, although constituting parts of the same estate, the partition of each must be sought in a separate suit? They are both assets for the payment of debts, and are both distributable in the same shares among the same persons. Shall there be distinct bills required for the distribution of choses in possession, as for example negro slaves, and choses in action? Such things have been done. Of all the matters embraced in this bill, which one is it in which all the parties are not interested, and, if any, which of the parties is it who is not interested in that particular matter? The real estate? They are all equally interested in that. The personal estate? Each one is entitled to an equal share. The accounting asked from the administrators? These are equally liable to account to all. All are equally concerned in ascertaining the full surplus liable to distribution. Will it be tolerated that the distributees of an intestate shall maintain, as such, each his separate suit against the administrator for as many successive repetitions of the same accounting? On the contrary, and because this will not be allowed, one distributee may not now maintain his suit for such account without joining all the others. And as to the injunction prayed, that is a relief incidental merely to the general object of the bill, the settlement of the estate. It touches the recovery and application of the assets, and concerns all the parties. But it is not necessary in order to avoid the objection of multifariousness, that all these defendants should be interested in every matter embraced in the bill. There must be a thread of connection among the matters themselves. Some of the defendants must be interested in the whole, but others may be necessary parties, although their interest touches the subject of the suit only at particular points.

So far is a bill which, like this, seeks to have

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the whole estate of an intestate *brought into one settlement, from being justly liable to the objection of multifariousness, that, upon consideration of fairness, convenience and completeness of justice, it greatly commends itself in this respect to the favor of the court. The contrary practice of splitting up the settlement of an estate into two or more suits, whether in the same or different courts, so that it is difficult, if not impossible, in any one to survey the whole field occupied by the interests of the parties, and their mutual equities, the full adjustment of which ought to enter into the settlement, is one "more honored in the breach than in the observance." The demurrers are overruled, and it is adjudged that the plaintiff is entitled to have the partition, account and distribution prayed for.

person or to real or personal property, and also to causes of both legal and equitable cognizance. Independently of the connection established by Section 1, by means of the identity of the transaction out of which they arise, they would fall respectively under two or more of the seven different classes named, and could not be joined in one action, although between the same parties. The code connects them in class No. 1 for the purposes of prosecution when they have their origin in the same transaction.

The next case mentioned in class No. 1 is that of "transactions connected with the same subject of action." It must be remembered that this is not intended as the means of determining what matters, direct and collateral, may be brought together as parts of a single cause of action. The section of the code under examination uses the terms causes of action as including such as are recognized either at common law or in equity.

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It *leaves the question as to what matters may be brought within the compass of a single cause of action, whether of legal or equitable cognizance, to be determined by the antecedent rules of law and equity upon the subject. Its object is to declare what cases, which, prior to this code, had to be considered separately, and, by an independent form of procedure, can be grouped together in one action under the code. Viewed in this light, the language under immediate examination may be regarded as in substance declaring that when a certain right, or certain connected rights, between the same parties are brought into legal controversy, all transactions between the parties bearing on the state of these rights may be included within the scope of the action, although such transactions considered as independent transactions, would, in their nature, call for different forms of legal procedure for the purpose of investigation, according to the practice that prevailed prior to the adoption of the code.

It would follow, from the foregoing, that unless it can be made to appear that Sims was a proper party to the creditor's bill, as such, according to the rules of equity existing prior to the code, and so was fairly within the scope of that single cause of action, the demand against him would have to be regarded as a separate and independent cause of action, neither arising between the same parties, nor out of a single transaction, nor out of transactions affecting the same subject of action. This will readily be made apparent. The proper parties to an action against Sims to recover the land are the heirs or distributees of the intestate, in the absence of title made under him. The plaintiff not having made title under his judgment, has no claim to recover the land. The administrator, as such, does not appear to have any present demand upon the land, as it has not been made assets for distribution as will hereafter appear. There is, then, a complete failure of identity between the parties concerned in the respective causes of action. The claim against Sims has no relation to the transactions that are the proper subject of examination under the creditor's bill. So the causes of action do not concern the same subject of action. The subject of the creditor's bill is the right of

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the creditor to compel the *proper distribution of assets of the intestate estate, and for that purpose to compel the administrator and those connected with him in liability, to account, while the subject of the demand against Sims is the relative strength of the title by which the intestate and Sims respectively claimed the land in controversy. It is clear, then, that the code gives no means of connecting together the causes of action against the administrator and that against Sims, if they are to be regarded as independent causes of action.

It only remains to inquire whether the demand against Sims is a proper incident of the creditor's bill. If it is, then it is a part of a single cause of action in the sense in which the code refers to causes of action in the section under consideration.

It is true that when assets of an intestate may be traced into the hands of a stranger, coming to him through a devastavit committed by the administrator, by which such party is affected, he may be brought within the scope of the bill and decree, as was held in Ragsdale v. Holmes, 1 S. C. 91, and reiterated in Melton v. Withers, 2 S. C. 561. But in the present case the land of the intestate in the hands of Sims cannot be regarded as assets of the character for which the administrator is liable to account.

The lands of an intestate are not primarily assets for the purposes of administration, although made general assets for the payment of debts by the statute of 8 Geo. 2, ch. VII. The lands of a decedent may be sold, and the proceeds of the sale paid to the administrator for the purposes of administration. Gen. Stat. 458, § 10. When sold by the Probate judge he is required to take a special bond for their custody and application. As to such assets coming to the hands of the administrator, the language of the statute is: "And the administrator or executor receiving the same shall be chargeable therewith as with other assets which have come into their possession in the regular course of administration." Gen. Stat. 458, § 10. While, then, the lands of the decedent are, strictly speaking, never assets in the hands of an administrator, and only become such in the hands of the executor, through special provisions in the will for that purpose, yet the proceeds of

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the sale of such real estate may *become

assets in the hands of the administrator, and his accountability correspondingly extended.

No such assets are alleged to be in the hands or subject to the control of the administrator; in fact, no attempt to sell the lands in question appears to have been made. The whole subject is then foreign to the proper accountability of the administrator. It is not to be denied that it might become material to the present suit to seek a sale of the land in question, if it should appear that the present assets are insufficient for the payment of the debts of the estate; but such a proceeding would be incidental to the principal purpose of the complaint, and would not render it necessary that Sims should be made a party. It must be assumed that Sims claims to hold under title paramount to that asserted for the intestate; in that case it would be competent to sell the lands in Sims' possession, if necessary for the purposes of administration without making him a party, and leave the purchaser to contest the title of Sims in a proper action.

Neither the administrator nor the heirs of the intestate are seeking any remedy against the land in Sims' hands; the plaintiff alone is seeking to force them into such a controversy. One objection to allowing the plaintiff to insist that the controversy with Sims should be prosecuted at the expense of the estate and for his benefit is the fact, alleged in the complaint, that the plaintiff's judgment has a lien against the land in question as the estate of the judgment debtor. If so, the plaintiff has a direct remedy by enforcing his judgment against the land. There is, therefore, no necessity arising from the want of an adequate remedy at law that would justify the plaintiff in attempting to compel the administrator and heirs of the intestate to contest Sims' title at the expense of the estate, and for all that appears without a reasonable hope of sucess.

There is also another objection. Sims is not placed in the position of having assets of the intestate estate, through either a wrong of the administrator or of himself. He must be regarded as a bona fide holder of possession under claim of title, and can only be ousted by legal process. He is not in the least affected by the equities in the present

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case, and cannot be deprived of his *defense at law; nor can he waive it to the disadvantage of the other parties. Sims must, therefore, be regarded as a stranger to the present controversy, and the cause of action alleged against him as a distinct and independent cause of action, forming no part of the proper matters in controversy.

The order appealed from must be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

13 S. C. 328

(Case No. 850.)

McGRATH & BYRUM v. BARNES.

(November Term, 1879.)

[1. *Evidence* ⟸420.]

Where an executor gave his promissory note for the payment of money which was expressed to be the amount due by his testator's estate to the payee "for medical services rendered, most of which during last illness," parol evidence of a contemporaneous agreement that the note was to be paid only upon a certain condition, is incompetent.

[Ed. Note.—Cited in Cline v. Farmers' Oil Mill, 83 S. C. 205, 65 S. E. 272.

For other cases, see Evidence, Cent. Dig. § 1943; Dec. Dig. ⟸420.]

[2. *Evidence* ⟸441.]

When parol evidence may be received to show a verbal agreement not expressed in a note, considered; and cases reviewed.

[Ed. Note.—Cited in Kaphan v. Ryan, 16 S. C. 357; Moffatt v. Hardin, 22 S. C. 27; Bulwinkle & Co. v. Cramer & Blohme, 27 S. C. 381, 3 S. E. 776, 13 Am. St. Rep. 645; Willis v. Hammond, 41 S. C. 163, 19 S. E. 310; Groesbeck v. Marshall, 44 S. C. 544, 22 S. E. 743; Doyle v. Hill, 75 S. C. 263, 55 S. E. 446; Russell v. Tillman, 89 S. C. 259, 260, 71 S. E. 836.

For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. ⟸441.]

[3. *Executors and Administrators* ⟸96.]

When and to what extent an executor is personally bound by his written promise to pay a debt of his testator, considered; and cases reviewed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 413; Dec. Dig. ⟸96.]

[4. *Executors and Administrators* ⟸202.]

Such promise, when based upon the possession of assets and his duty to pay, without other consideration, is binding only to the extent of the amount actually due by testator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 748; Dec. Dig. ⟸202.]

[5. *Executors and Administrators* ⟸96.]

Though the debt due by testator at the time the executor qualified had become barred by the statute of limitations at the date of the written promise to pay, it will be supported as a good consideration for such promise.

[Ed. Note.—Cited in Armour Packing Co. v. London, 53 S. C. 546, 31 S. E. 500.

For other cases, see Executors and Administrators, Cent. Dig. § 413; Dec. Dig. ⟸96.]

Before Fraser, J., Anderson, February, 1879.

This was an action commenced in April, 1877, by the plaintiffs against James T. Barnes, to charge him personally with the payment of the note set out in the opinion of the court. Plaintiffs had purchased the note from H. H. Scudday, for valuable consideration some time after its maturity. The defence was that the defendant gave the

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note as executor of C. V. Barnes for *balance struck upon a settlement of mutual accounts between Scudday and C. V. Barnes, upon

express condition that any other accounts afterwards discovered, should be credited; and if the voucher should not be approved by the judge of Probate, this note or memorandum was to be given up or destroyed; that Scudday should be notified of the time of trial before the Probate Court, so that he might appear and defend his accounts; that he was so notified but failed to appear, and the vouchers were disallowed. At the trial these matters were offered to be proved by parol testimony. Plaintiffs objected; their objections were overruled and they excepted.

Scudday's accounts were for the years 1855 to 1856, inclusive, and amounted to $550.50; due by Scudday to C. V. Barnes, $206.92, and to J. T. Barnes $70.28, leaving balance due to Scudday $273.30, for which the note was given June 26th, 1875. C. V. Barnes died in February, 1866; J. T. Barnes and C. V. Barnes, sons qualified as executors within a month afterwards. August 19th, 1875, there was a balance in executor's hands of $5925.65, of which $4595.36 was set aside to widow, to revert to the estate at her death; and adding the amounts already received by legatees, the sum of $203.80 was the share of each child. At this settlement the judge of Probate (sometimes called Ordinary) refused to allow J. T. Barnes credit for the notes.

The charge of the Circuit judge to the jury was as follows:

1. It is doubtful whether the note sued on was not nudum pactum, inasmuch as there was no consideration personal to the defendant.

2. That Scudday, the payee of the note or memorandum, and the defendant differed as to whether they had frequent conversations about the mutual claims in the long interval of time between 1866, when the testator died, and 1875, when the memorandum or note was signed by the defendant, one of the executors; but without charging them upon this issue of this fact, or giving any intimation of opinion upon the subject, he charged as matter of law, substantially, that even if such conversations as Scudday claimed had taken place, and there were promises to pay the balance, (which defendant denied,) yet these conversations were merely parol, and could not, after the adop-

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tion of the code in *March, 1870, have the effect of keeping the original debt alive longer than four years after that time, and that on June 26th, 1875, when the memorandum or note sued on was signed, the original claim on the accounts was barred, and the right of action gone.

3. That at that time the original claim being barred, one of the executors could not, even by contract in writing, make a new debt to bind the estate. That an individual who owes a debt, which becomes barred, may make a new debt of his own by a new promise in writing, (the old debt being the consideration of the new promise,) but that as to a debt against a dead man's estate, when the right of action against the executors is clearly barred, the executor cannot make a new debt against the estate by a new promise. It is not like the promise of an individual to make a new debt with sufficient consideration against himself, but is unauthorized, without consideration, and nudum pactum. It is true the estate was said to be solvent, but it did not follow that Barnes, the executor, had any interest in it. The estate may have been given to others, or the defendant may have been fully advanced. There was absolutely nothing to show that the executor had any interest in the estate, and it could not be assumed.

The jury found for the defendant.

The plaintiffs appealed, alleging error in the admission of the parol testimony and in the charge to the jury.

[For subsequent opinion, see 18 S. C. 606.]

Mr. J. W. Harrison, for appellants.

1. That the court erred in admitting parol testimony to vary the terms of the written contract. 1 Bay 303; 2 M. Const. R. 31; Id. 265; Harp. 401; 3 McC. 469; 6 Ves. 327, and notes; 2 E. C. L. R. 427; 5 E. C. L. R. 268; 2 Strob. 122; 4 Strob. 99; 8 Rich. 407; 9 Rich. 50; 12 Rich. 31.

2. That the court erred in charging that on June 26th, 1875, the original claim on the account was barred. 7 Wait's Act. & Def. 266; 3 Strob. 196; 4 Strob. 67; Hays v. Clinkscales, (not reported;) 14 Eng. R. (Moake) 304–326; 3 Hill 16; Dud. 121.

3. That the court erred in charging that the debt being barred, one of the executors could not, even by contract in writing, make

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*a new debt to bind the estate. 13 Am. R. 417, and authorities referred to.

Mr. S. McGowan, contra.

Mr. A. T. Broyles, in reply.

March 25th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The action was upon the following promissory note:

"$273.30.

Anderson, S. C., January 26th, 1875.

"One day after date, I promise, as the executor of the estate of C. V. Barnes, to pay H. H. Scudday, or bearer, the sum of two hundred and seventy-three 30-100 dollars, due by said estate to H. H. Scudday for medical service rendered, most of which during last illness.

(Signed,) "Jas. T. Barnes, Executor."

Evidence was admitted, subject to objection, tending to show that the note was given in pursuance of an agreement that the payment of the note should be conditional upon the allowance by the Ordinary of the claim made against the estate by the payee

of the note. The objection urged was that the admission of this testimony violated the rule that written instruments cannot be varied by oral testimony.

It appears to be well settled in this state, that in an action on a promissory note between parties affected by the rights and equities existing between the original parties to the note, where the note does not state the consideration upon which it was given, or where only a general consideration is stated, such as value received, it is competent to prove in defence that the note was given as part of an agreement by which the payment was to be conditional instead of absolute, and such agreement, when it appears to have been the consideration of such note, may be resisted to show either partial or entire failure of consideration on which the note was made.

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*That promissory notes and other obligations for the payment of money absolutely are frequently given upon considerations of an expectant character, as upon contracts, calling for acts to be performed by the party to whom the note is given, and are put in an absolute form for the convenience of the parties, is a fact well known. When a party gives his note upon the promise of the payee to perform a certain act, and the payee fails to perform, it is reasonable that the transaction should be considered as a whole for the purpose of ascertaining what is due between the parties. This cannot be done where a negotiable note has come into the hands of one who is not affected by the rights and equities existing between the original parties independently of the terms of the note itself; as where held by a purchaser before maturity without notice. The question is, whether such a defence to a promissory note is sanctioned by the principles of law and the adjudicated cases.

The principle upon which such evidence has been admitted seems to be this: That a promissory note as between the original parties to it, unless supported by a consideration, is nudum pactum. Bank v. Topping, 9 Wend. 273. Here arises the propriety of inquiring whether such a consideration existed. When the note states the consideration specifically, it may well be said that, to admit oral testimony to show a different consideration, is, in effect, to vary the terms of the written instrument by oral proof. McClanaghan v. Hines, 2 Strob. 122, is a case of this class. In that case, according to the express terms of the note, the payer promised to pay the amount due upon the notes of a third party belonging to the payee. The court held that an attempt to show by parol proof that the maker merely promised to take in hand the collection of such notes and to pay over only what was collected therein, was an attempt to change the contract as it appeared on the face of the note, and, therefore, inadmissible under the rule that precluded the alteration of the terms of written instruments by parol. But when the note expresses no consideration or a merely formal or general consideration, as by the usual words value received, or by similar general or formal expressions, it is evident that if the true consideration of the note

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rests in an agreement, written or *oral, between the parties, the proof of such agreement does not necessarily tend to charge the terms of the note, although by showing the true consideration upon which it was given it may control the recovery upon the note.

Barnes v. Shelton, Harp. 33 [18 Am. Dec. 642]. In that case it was held that the maker of a promissory note could set up by way of discount or a breach of a parol contract what was the consideration of the note in suit. This decision was put upon the right of discount and not upon the broad principle of a failure of consideration.

Gazoway v. Moore, Harp. 401. In that case the note stated that it was given "for the hire of his negro man Abraham," and it was held that it could not be shown by parol evidence that a different rate of hiring was agreed upon conditionally. Here the note expressed the contract of the parties as it regarded the consideration for which it was given, and its expressed terms could not be contradicted by oral proof.

Hampton v. Blakeley, 3 McC. 469. The promissory note here was alleged to have been given for the balance due on a settlement of sundry accounts. The Circuit judge excluded the proof of the consideration of the note, and the decision was reversed on appeal. It would seem that the court were of opinion that the production of the written accounts by which it would appear that the sum stated in the note was entered by mistake, would not involve the objection of varying written instruments by parol proof. The principle upon which this view depended was that in effect the note and the written accounts on which it was based constituted one written instrument, so that one part could be corrected by reference to another. Although this case involved merely a question of the correction of a mistake, yet it recognizes the rule that this note and the agreement in virtue of which it is given, constitute, in view of the law, a single transaction. It may be that it was material for the purpose of correcting, at law, a mistake in the written instrument that the means of such correction should be in writing also; but where the question is, was there a consideration, and what was the consideration,

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when it leaves untouched *the terms of the instrument, no such necessity for exclusively written testimony could exist.

Hagood v. Swords, 2 Bail. 305. Here the court went a step further than in Barnes

v. Shelton, and allowed as a defence to a promissory note proof that it was to be surrendered upon a certain contingency. Had the agreement to surrender the note been made subsequent to the making of the note, it would have been a clear case of discharge in the nature of payment that might have been proved by oral testimony alone. But the fact was that the agreement to surrender was part of the original agreement that formed the consideration of the note. Although Judge O'Neall lays stress on the fact that the parol proof offered related to matter of discharge alone in the nature of payment, yet as the agreement was contemporaneous with the note, the case really involves the whole question, whether the recovery on the note could be affected by the discovery, through parol testimony, of the fact that the consideration of the note depended upon a contingency. McClanaghan v. Hines, 2 Strob. 122, has already been alluded to as a case where the note assumed to express the specific consideration on which it was founded. Clearly, in that case, parol proof of a different consideration would tend to vary the express declarations of the note itself, and, therefore, was inadmissible.

Knight v. Knotts, 8 Rich. 35, finally settled the question by placing the defence upon the true ground, namely, as involving the consideration of the note. The verbal agreement accompanying the note was held to be the consideration of the note, the two constituting but one agreement, and when the contract failed to give support to the note the latter could not justify a recovery.

In the present case the evidence admitted under objection tended to show that the parties had agreed at the time of the making of the note, that if the demand for which the note was given was rejected by the Ordinary, the note should not be paid. This was very different from placing the liability of the executor upon the actual validity of the debt, for the debt might be afterwards established, notwithstanding the decision of the Ordinary. The evidence was, therefore, an attempt to show that a different agreement was made than that which is expressed

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in the note, *and one that would place the claim on a different footing from that on which the law placed it. It is, therefore, like McClanaghan v. Hines and Gazoway v. Moore, a case where parol evidence was resorted to to vary the terms of a written instrument. The evidence was improperly received.

The next question to be considered is, what is the binding force and effect of the promise of the executor, expressed in the note in suit? Like all other promises and engagements, it must be upon adequate consideration to be capable of legal enforcement. We have here to inquire—1st, whether an executor can bind himself by his agreement or promise to pay a debt of his testator, so that an action can be maintained at law upon such promise; 2d, what consideration is necessary to support such a promise; and, 3d, what is the effect of such a promise?

The cases uniformly hold that a promise to pay a debt or legacy made by an executor is nudum pactum, unless supported by an adequate consideration. It is agreed that if such executor derives any benefit individually, or for the estate of his testator, or subject the promisee to disadvantage, the promise made upon such consideration binds him individually, and that an action at law can be maintained upon such promise and judgment obtained against such executor individually. It would seem also that in such a case the action may be brought against the defendant as executor, and judgment de bonis propriis will follow; and that in such case the executor cannot plead plene administravit, at least to defeat such judgment de bonis propriis. It is also held that if there be no such consideration as that just stated, yet if there be assets sufficient to pay such debt or legacy at the time of making such promise, it is obligatory, and may be enforced by an action at law against such executor individually or as executor, and the judgment as affecting such executor will be de bonis propriis.

The ground upon which the promise is held to be binding in law, when there are assets sufficient to pay the debt or legacy, is that the executor having sufficient assets for the purpose, is bound, both morally and by virtue of his office, to pay the debt or legacy, and such duty is a sufficient consideration to support a promise to pay, so that indebitatus assumpsit will lie upon it.

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The rule, *so far as it regards the payment of the debts of an intestate, applies equally to administrators. Nor does it make any difference whether the promise was made individually or as executor or administrator.

The consideration of forbearance generally appears in the cases where the executor has been held bound by his promise, independently of their being assets sufficient to pay at the time of making the promise. If the executor induces forbearance to sue on the part of the creditor of his testator by means of his promise, such consideration is sufficient and the executor is bound. There may be other instances of an adequate consideration than that of forbearance, but that is the consideration illustrated in the cases.

The authorities will be next considered. Rann v. Hughes, 7 T. R., note 350, is a leading case, and holds that a promise of an administrator to pay a debt of his intestate is nudum pactum, unless supported by a consideration. That although the promises must, under the statute of frauds, be in writing, still a consideration is necessary to support it. The only kind of considera-

tion discussed in the case is that of forbearance, which is recognized as sufficient, upon the ground that "if a person indebted in one right, in consideration of forbearance for a particular time, promises to pay in another right, the convenience will be a sufficient consideration to warrant an action against him or her in the latter right."

Childs v. Monins, 2 B. & B. 460. The action was upon a promissory note made by the defendants as executors, by which they severally and jointly promised to pay a certain sum on demand, together with lawful interest. It was held that the agreement to pay interest implied that the promise to pay was upon an agreement to forbear. This was based upon the idea that as the executor could not, by law, pay interest on the debts of his testator, the agreement to pay interest was to be regarded as something engaged on the part of the executor individually, and that it could only be ascribed to the motive of securing delay on the part of the creditor of the testator. It was also held that though the promise was made as executor, yet, from the nature of the transaction, it must be considered an individual obligation.

Atkins v. Hill, 1 Cowp. 284. This was an

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action of assumpsit *against an executor, brought by a legatee upon a promise to pay a legacy, made at a time when there were assets sufficient for its payment. It was held that such an action could be maintained at law. The sufficiency of the consideration to support the promise, was placed on the ground that the executor having assets sufficient to pay the legacy, was bound in consequence so to do, and such an obligation would support the promise to pay.

Hawkes v. Saunders, 1 Cowp. 289. That action was against the executor individually for a legacy, alleging sufficiency of assets and liability to pay at the time when the promise was made; also a promise of the executor. It was held that the action lay. Lord Mansfield held that the possession of assets and liability to pay was a sufficient consideration to support the promise.

Trevenian v. Howell, Cro. Eliz. 98, holds that a promise by an executor to pay when he has sufficient assets therefor, is good to support a judgment de bonis propriis.

Bank v. Topping, 9 Wend. 273, was an action against an administrator on a promissory note payable at sixty days. It was held that the delay of payment for sixty days could not be construed as an agreement to forbear, and that the promise was nudum pactum, unless there were assets at the time it was made.

Walker v. Patterson, 36 Me. 273. The same doctrine was held in that case as in the cases already referred to.

It must be conceded that had the defendant offered to prove that there were not assets sufficient to pay the debt at the time the promise to pay was made, such evidence could not have been excluded. It is true that if there had been some other consideration, such as forbearance, the question of assets would not have been material, but no such consideration is presented in the evidence. There is no agreement to pay interest as in Childs v. Monins. The payment was not deferred for any particular time as it was in Bank v. Topping, while in that case such delay was not regarded as evidence of an agreement to forbear. Under such circumstances it was clearly competent for defendant to have shown that there were no assets applicable to the payment of the note at the time the promise was made. If, then, such fact could be shown, could it not also be

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shown that there was *nothing due to the plaintiff, or that less was due than the amount demanded?

It is the duty of the executor, coupled with his promise, which gives legal validity to such promise. If nothing was due to the plaintiff, no such duty existed to support a promise to pay. If less than the amount promised was due, the amount actually due was the measure of the duty of the executor and must be the measure of the recovery under his promise.

The Circuit judge was clearly in error in holding, in an action against the executor individually, as this must be considered, in which judgment was not sought de bonis testatoris, (Ashby v. Ashby, 7 B. & C. 444,) that the promise of the executor could not stand for want of consideration on the ground that the debt had been barred by the statute of limitations. A debt which becomes barred after the executor has qualified is a good consideration for a promise to pay, and there was nothing to prevent the executor from binding himself by a written promise to pay. Whether the executor could obtain remuneration out of the assets of the estate where he has failed to interpose the bar of the statute is a question not presented by this record. He could bind himself by his direct promise as well as indirectly by failing to plead the statute in an action seeking to charge the assets.

There must be a new trial.

McIVER, A. J., concurred.

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13 S. C. 338

(Case No. 851.)

DIERCKS v. ROBERTS.

(November Term, 1879.)

[1. *Bills and Notes* ⊂=60.]

Where one endorses a note in blank under agreement with the maker that the blank shall be filled with a certain amount, and the maker

fills it with a larger amount, and delivers it to the payee, who has no knowledge of such agreement, the endorser is liable to the payee for the note as written.

[Ed. Note.—Cited in Mars v. Mars, 27 S. C. 136, 3 S. E. 60.

For other cases, see Bills and Notes, Cent. Dig. § 89; Dec. Dig. ⟸60.]

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[2. *Evidence* ⟸441.]

*If a note on the face of it, purports to be an absolute engagement to pay money at a certain time, no parol evidence of an agreement at the time to renew and give indulgence will be admissible to defeat the action on the note.

[Ed. Note.—Cited in Smith Bros. v. Brabham, 48 S. C. 341, 26 S. E. 651.

For other cases, see Evidence, Cent. Dig. § 1894; Dec. Dig. ⟸441.]

3. Rugely v. Davidson, 2 Mill's Const. R. 33, limited.

[4. *Bills and Notes* ⟸537.]

Whether the holder of a note has used due diligence to discover the endorser's place of residence, is a question of fact for the jury; but it is error to submit to them the inquiry whether due diligence had been used in giving to the endorser notice of the dishonor of his note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1888; Dec. Dig. ⟸537.]

Before Thomson, J., Richland, March, 1879.

Action by G. Diercks against W. T. Roberts. Verdict for plaintiff. The facts are fully stated in the opinion of the court.

Mr. John Bauskett, for appellant.

Mr. W. S. Monteith, contra.

April 9th, 1880. The opinion of the court was delivered by

McIVER, A. J. This action was brought against the defendant as endorser of a promissory note for $250, made by one Francis Hammond, June 19th, 1878, payable sixty days after date, and protested for non-payment on August 21st, 1878.

The defence interposed was based upon three grounds: 1. That the note was in blank when it was endorsed by the defendant, and that it was agreed at the time, between defendant and Hammond, that it should be filled up for $100, and that the plaintiff had notice of such agreement. 2. That it was also agreed at the time of the endorsement, that three notes should be executed and used as renewals of each other, so as to make the amount fall due "when the cotton crop should come in." 3. That due notice of the dishonor of the note had not been given, so as to charge defendant as endorser. The exceptions to the judge's charge were designed, doubtless, to raise three questions: 1. Whether the fact that the amount secured by the note was in blank at the time of the endorsement could affect the question of the defendant's liability. 2. Whether the parol agreement, made at the time the notes were endorsed, that the notes should be renewed was a good defence to the action.

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3. Whether the *Circuit judge erred in charging the jury "that the main question in the case was, whether due diligence had been used in giving notice of the dishonor of said note to the defendant, Roberts, and that he would leave this question of 'due diligence' to them to determine."

As to the first question, we do not see how it can arise under the evidence adduced in this cause; for there is no evidence whatever tending to show that there was any understanding between the plaintiff and the defendant that the amount to be inserted in the note should be limited to $100, but, on the contrary, the plaintiff distinctly testifies that the note was filled up for $250 before the endorsement was made; and although the defendant in his answer, which is not evidence, does say that he endorsed the note in blank, with the understanding that the amount to be inserted was $100, and that the plaintiff had notice of such understanding, yet, in his testimony, which is evidence, he only says that such was the agreement between him and Hammond, and does not even intimate that the plaintiff was a party to or had notice of any such agreement. It is clear, therefore, without entering upon the hypothetical inquiry as to what would have been the legal effect of such testimony, if it had been adduced, that there was no error on this point; for, certainly, no private understanding between the defendant and Hammond, not brought to the notice of the plaintiff before he took the note, could affect the question of the defendant's liability.

The next inquiry is as to the effect of the parol agreement, made at the time of the endorsement of the note, that it should be renewed from time to time. The proposition that where a person signs or endorses a note payable at a particular day, or, what amounts to the same thing, where he signs or endorses a note in blank, which is afterwards filled up by being made payable at a particular day, (Carson v. Hill & Jones, 1 McM. 76; Aiken v. Cathcart, 3 Rich. 133 [45 Am. Dec. 764]) parol evidence can be admitted to show that the agreement was that it should not in fact be payable on such day, but should be renewed, cannot be sustained. We take the rule to be as stated in Chitty on Bills, ch. II., p. 61: "If the instrument, on the face of it, purport to be an absolute engagement to pay money at a certain time, no

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parol evidence of *an agreement at the time to renew and give indulgence will be admissible to defeat the action on the bill or note." To same effect see Phillips on Evidence, 433. As is said by Lord Ellenborough, in Hoare v. Graham, 3 Camp. 57: "The condition for a renewal entirely contradicts the instrument which the defendants have signed; such an arrangement rests in con-

fidence and honor only and is not an obligation of law. There may, after a bill is drawn, be a binding promise, for a valuable consideration, to renew it when due, but if the promise is cotemporaneous with the drawing of the bill, the law will not enforce it. This would be incorporating with a written contract an incongruous parol condition which is contrary to first principles." See also Free v. Hawkins, 8 Taunt. 92, (4 E. C. L. R. 313) Thompson v. Ketchum, 8 Johns. 146. It is very true that some of the remarks made by Gantt, J., in delivering the opinion of the court in the case of Rugely v. Davidson, 2 Mill's Const. R. 33, are well calculated to convey the impression that the parol evidence adduced in this case should have the effect claimed for it. In that case one of the grounds of defence was, that at the time the note was endorsed it was verbally agreed that the endorsee would "sue the drawer and proceed against him to insolvency, before he was to have recourse to the endorser; and that, in the event of the drawer's insolvency, that the endorsee should not call upon the endorser for payment until the expiration of three years next succeeding the proof of insolvency." At the trial below the testimony as to this parol agreement was withdrawn from the jury as incompetent, and it was upon that ground that a new trial was granted. It must be observed, however, that in the first place that case was an action against the endorsee of a note past due, and in such a case the question whether due diligence has been observed in making the demand and giving the notice of non-payment is a question for the jury, whereas, in a case where the action is against the endorser of a note before maturity, the rule is otherwise, and the question of diligence (all the circumstances necessary for giving the notice being known) is one of law for the court. Gray v. Bell, 2 Rich. 67 [44 Am. Dec. 277]. Hence the court might very well have held, in the case of Rugely v. Davidson, that where the

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parties have, by their own agreement, *determined the degree of diligence which should be required to fix the liability of the endorser, the evidence of such agreement ought to be allowed to go to the jury, in an action on a note endorsed after due, whether the question of diligence is for the jury. A careful examination of that case will, however, reveal the fact that the decision could only be regarded as the law of that particular case, for it was, in fact, decided by an equally divided court, although nominally by a vote of three to two, for as the law then stood, the judge who heard the case on Circuit not being allowed to participate in the determination of the case in the Court of Appeals, the voice of Cheves, J., one of the three dissenting judges, who had heard the case on Circuit, could have no weight in the decision of that particular case. It furthermore appears that Nott, J., one of the majority, who delivered a separate opinion, did not concur in so much of the opinion of the court, as presented by Gantt, J., as seemed to recognize the idea that the agreement to indulge the endorser for three years after the making of the note had been pursued to insolvency constituted a defence to the action, for he expressly held that portion of the agreement to be incompetent, as going to control the legal effect of the endorsement, and limited his concurrence to the proposition that parol evidence was admissible to show that the parties had, by their own agreement, fixed upon what should be due diligence in making demand upon the maker of the note. The case does not seem to have been recognized in the subsequent cases of Eccles v. Ballard, 2 McC. 388, and Brock v. Thompson, 1 Bail. 322, but only to the extent allowed by the opinion of Nott, J., that such evidence may be adduced to show what degree of diligence in making demand of the maker of a note should be sufficient, under the agreement of the parties, to charge the endorser of a note transferred after maturity, and not to the extent of allowing such evidence to be received for the purpose of extending the time fixed for payment of such note.

The next inquiry is as to the propriety of the charge upon the question of diligence. The evidence was that the endorser was a resident of Richland county, and that Columbia was and had been his post office for the

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past thirty years, and that Eastover *was not his post office, he never having received a letter from that office in his life. The notary testified "that he protested said note on August 21st, 1878, and mailed a notice to W. T. Roberts, at Eastover. That he did not inquire as to the post office of W. T. Roberts, but believed that Capt. J. H. Sawyer told him the post office was Eastover."

It also appeared from the plaintiff's testimony that he sent a notice of protest by private hand to the defendant some time in September, 1878, and the defendant testified that he never received any notice of the dishonor of the note until September 12th, 1878, when he received a note from the plaintiff notifying him of the fact. In this case the question of diligence involved two inquiries —one of fact and the other of law. Whether due diligence was used in ascertaining the post office of the defendant, was a question of fact for the jury, but when the fact of residence was ascertained, or when due diligence had been employed in endeavoring to ascertain such fact, the question of diligence in giving the notice is a question of law, upon which it was the duty of the court to have instructed the jury. Thompson v. Bank, 3 Hill 82-3 [30 Am. Dec. 354]; Central Bank v. Adams, 11 S. C. 452 [32 Am. Rep. 495]; Bateman v. Joseph, 12 East 433. As is said

in the last-named case: "Whether due notice has been given of the dishonor of a bill, all the circumstances necessary for the giving of such notice being known, is a question of law; but whether the holder has used due diligence to discover the place of residence of the person to whom the notice is to be given, is a question of fact for the jury." In this case the whole question of diligence was left to the jury, and it may be that they concluded that the notice sent on September 12th, 1878, was sufficient to charge the endorser. Be that as it may, however, it was error to refer to the jury the question "whether due diligence had been used in giving notice of the dishonor of said note to the defendant Roberts."

The judgment of the Circuit Court is set aside and a new trial is ordered.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. *344

(Case No. 753.)

STATE v. WILDER.

STATE v. JACKSON.

(November Term, 1879.)

[1. *Bail* ⟸77.]

The Court of General Sessions has jurisdiction under proceedings by scire facias to estreat a recognizance given to secure the appearance before that court of a person charged with crime. Section 443 of the code of procedure relates only to writs of scire facias as a civil remedy.

[Ed. Note.—Cited in State v. Johnson, 77 S. C. 253, 57 S. E. 846.

For other cases, see Bail, Cent. Dig. § 336; Dec. Dig. ⟸77.]

[2. *Courts* ⟸42.]

Sections 8 and 9 of Chapter CXLII. of the general statutes, are not in conflict with Article IV., Section 1, of the constitution, but only provide a means by which the Court of General Sessions may carry into effect its unquestioned powers.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163–170, 181–183; Dec. Dig. ⟸42.]

[3. *Criminal Law* ⟸1110.]

The mode suggested by which alone matters omitted from the brief may be brought to the attention of this court. Facts appearing only in argument of counsel will not be considered.

[Ed. Note.—Cited in McPherson v. McPherson, 21 S. C. 267; Welch v. Gleason, 28 S. C. 249, 5 S. E. 599; In re Estate Neubert, Burkhim v. Pinkhussohn, 58 S. C. 474, 36 S. E. 908.

For other cases, see Criminal Law, Cent. Dig. §§ 2896, 2903–2917, 2919; Dec. Dig. ⟸1110.]

Before Shaw, J., Richland, April, 1878.

These were rules issued by the state against Charles M. Wilder and Ann E. Jackson, to show cause why a recognizance entered into by them as sureties for the appearance of one Houston at the Court of General Sessions to answer to a bill of indictment, should not be forfeited, Houston having failed to appear. The defendants, for cause, showed that the writ of scire facias has been abolished by Section 443 of the code of procedure, and the remedies obtainable under that form must be obtained by civil actions.

The Circuit judge overruled the returns, declared the recognizance forfeited, and ordered execution to issue for the collection of the penalty, if not paid by a day named.

Defendants appealed. In the argument of appellant's counsel in this court, the further ground was taken that the recognizance had not been acknowledged in the presence of either a judge or trial justice, and that there was no certificate from either of such officers of such acknowledgment; and that therefore the recognizance was void under Chapter CXLII., Section 7, of the general statutes.

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*Mr. John Bauskett, for appellants.

Mr. Solicitor Abney, contra.

April 16th, 1880. The opinion of the court was delivered by

McIVER, A. J. These two cases, involving the same question, were heard and will be considered together. That question is, whether the Court of General Sessions has jurisdiction to estreat a recognizance given to secure the appearance before said court of a person charged with crime to answer to a bill of indictment to be preferred against him.

The grounds upon which jurisdiction is denied are, that the provisions of Sections 8 and 9 of Chapter CXLII., (Gen. Stat. 750.) under which the proceedings in these cases were instituted, are practically identical with the proceeding by writ of scire facias, and that writ being abolished by Section 443 of the code of procedure, and the remedies previously obtainable in that form provided for by a civil action, the Court of General Sessions, which, under the constitution, has no civil jurisdiction, could not exercise the jurisdiction claimed for it in these cases. A sufficient answer to this is that the second part of the code, in which the provision abolishing the writ of scire facias is found, relates only to civil actions, and cannot, therefore, be construed so as to apply to criminal action or to any proceedings in the court invested with jurisdiction of such actions. This provision must, therefore, be construed as applying to that writ only, as it had heretofore been used to obtain or enforce a civil right as contra-distinguished from a criminal proceeding. There is no doubt but that at the time of the adoption of the code the writ of scire facias could be used in the Court of Common Pleas as a civil remedy merely, for example, to revive a judgment, and the provision of the code unquestionably abolished it as a remedy in such and the like cases. But it is equally true that the writ

could then be used in the Court of General Sessions, under the provisions of the act of 1787, 6 Stat. 130, as a remedy for the enforcement of the performance of the condition of a recognizance given to secure the attendance before said court of persons charged with crime, or witnesses in such cases;

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and so the law *continued to be—unaffected by the provisions of the code above cited—until the adoption of the general statutes, when the act of 1787 was repealed, and the provisions of Sections 8 and 9 of Chapter CXLII., of the general statutes were substituted therefor. It is apparent, from a similar course of reasoning, that the provisions of Section 443 of the code of procedure do not apply to the proceedings in these cases.

It is argued, however that the provisions of the general statutes under which the proceedings in these cases were instituted, are unconstitutional, because they purport, in violation of Section 1, Article IV. of the constitution, to confer civil jurisdiction upon the Court of General Sessions, which, by that section, is invested "with criminal jurisdiction only." Such a construction of that clause of the constitution would so cripple the powers of the Court of General Sessions as greatly to impair, if not absolutely destroy, its usefulness, and it is not, therefore, admissible. The powers conferred by the sections of the general statutes in question, are not given for the purpose of investing the Court of General Sessions with any "civil jurisdiction," but solely for the purpose of enabling it to exercise the powers with which it is unquestionably clothed by the constitution. If the court, which is invested with the power to try and punish offenders against the law, had no means of enforcing the attendance of such persons, and of the witnesses necessary to testify against them, it would indeed be an empty farce to give it the power to try and punish; and certainly the proceedings prescribed by the sections under consideration have no other purpose but to enable the Court of General Sessions to carry into effect the powers with which it is undeniably vested, by securing and enforcing the attendance of parties and witnesses. Such a construction as that contended for would result in the denial to that court of the right to preserve order and enforce its mandates by the use of the proceedings in case of contempt.

The other ground taken in the argument—that the recognizances were not acknowledged in the presence of either a judge or a trial justice—is not properly before us, inasmuch as the fact upon which it is based, though alleged in the argument of the appellant's counsel, nowhere appears in the "case"

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as submitted, *and we cannot, therefore, consider it. While this court would be disposed in a criminal case, especially were it one involving human life, to extend every indulgence possible to the appellant, it must be manifest to every one that we have no right to decide a case upon facts which do not appear in the record, and can only be learned from ex parte statements of counsel made in the argument. As well might it be claimed that a jury could base their verdict upon facts, the proofs of which had been inadvertently omitted, and which only appeared from the statements of counsel in argument. If counsel find, in any case that they have omitted, as any one is liable to do, to insert in the "case" as prepared for this court, facts which are necessary to enable them to raise a question which they deem important, the proper practice is, before the argument has commenced, to obtain the consent of the counsel on the other side to an amendment of the "case" by the insertion of such facts; or, if such consent cannot be obtained, to move the court, upon affidavits submitted, to recommit the record to the Circuit Court for amendment.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 347

(Case No. 854.)

CAROLINA NATIONAL BANK v. WALLACE.

(November Term, 1879.)

[1. *Bills and Notes* ⊂⊃414.]

Notice of non-payment of a promissory note to one of two executors of a deceased endorser, is sufficient.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1150; Dec. Dig. ⊂⊃414.]

[2. *Bills and Notes* ⊂⊃421, 537; *Customs and Usages* ⊂⊃21.]

While the general rule requires that where the parties reside in the same city or town, notice of dishonor must be given personally to the endorser, or, in his absence, must be left at his residence or place of business, yet where the note is made payable at a bank whose usage it is to give such notices through the post office, that mode of giving notice will be sufficient. Whether such usage exists, is a question of fact for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1178, 1888; Dec. Dig. ⊂⊃421, 537; Customs and Usages, Cent. Dig. § 47; Dec. Dig. ⊂⊃21.]

[3. *Bills and Notes* ⊂⊃537.]

An endorser is bound by notice of dishonor actually received in due time, and where there is any evidence in the case tending to show such receipt, the question should be submitted to the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862–1893; Dec. Dig. ⊂⊃537.]

[4. *Bills and Notes* ⊂⊃394.]

Where the endorser of a note dies before its maturity, and the maker becomes executor,

notice to such executor of non-payment is necessary to fix the liability of the endorser's estate.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1040; Dec. Dig. ⟸394.]

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*Before Wallace, J., Richland, July, 1879.

Action by Carolina National Bank against William Wallace and William P. Geiger, executors of the will of Jacob Geiger, deceased. The facts are stated in the opinion of the court.

Messrs. Melton & Clark, for appellants.

The general rule laid down in Foster v. Sineath, 2 Rich. 339, has exceptions. It may be varied by contract, or by implication, as where the bank at which the paper is payable has a different usage. 9 Wheat. 582; 11 Wheat. 431; 1 Pet. 32; 11 Mass. 88; 17 Mass. 452; 13 Pick. 419; 9 Metc. 585; 2 Dan. on Neg. Inst., § 1013, note; 1 Sm. Lead. Cas. 920, (*685); 1 Am. Lead. Cas. *403. By the acquiescence of the community, it has become a usage; certain, reasonable and sufficiently ancient to be known. 1 Sm. Lead. Cas. 925, (*688.) Usage of trade, unlike general customs, need not be immemorial. 2 Bouv. L. Dict. tit. "Usage." Usage becomes a part of the contract. 1 Spear's 323; 3 Rich. 333; 2 Rich. 339. There are so many exceptions, the rule should be declared obsolete and be abolished. 1 Am. Lead. Cas. 502, (*403); 2 Dan. on Neg. Inst., § 1010.

There was evidence going to show that Geiger received the notice by mail, and this question should have been submitted to the jury. If Geiger received the notice, the manner of its transmission was immaterial. 2 Dan. on Neg. Inst., § 1003; 1 Pars. B. & N. 483; 3 McLean 96, 582; 26 Me. 45. If sent by mail, it is sufficient if received. 10 Allen 524, et supra. That fact may be presumed by the jury from the evidence. 2 Pet. 132; 3 McLean 96. There was enough evidence in this case for the jury to have presumed that the notice had been received. Stark. on Ev. *741, 754, 763; 2 Mills 133; 21 E. C. L. R. 402; 26 Me. 45; 19 Pick. 114.

Notice to Geiger, executor, was unnecessary, as he knew of his own default as maker. 1 Pars. on B. & N. 523, 526; 2 Dan. on Neg. Inst., § 1169. This case differs from Magruder v. Bank, 3 Pet. 87, and the grounds upon which that case was put.

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*Mr. William Wallace, contra.

The non-suit was proper under the rule laid down in Foster v. Sineath, 2 Rich. 339, sustained by 16 Johns. 221; 11 Johns. 231, and cases there cited. Usage cannot bind unless the endorser was conversant of it. Chit. on Bills 416; or exercised beyond legal memory. 2 Bouv. Inst. 490.

April 16th, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action against the defendants as executors of Jacob Geiger, endorser of a note drawn by the said Wm. P. Geiger, and made payable at the Carolina National Bank of Columbia. The defence interposed was an alleged failure to give due notice of the non-payment of the note, so as to charge the estate of the endorser. The testimony adduced tended to show that the bank authorities learned of the death of the endorser only a few days before the maturity of the note, and supposing that Wm. P. Geiger, the maker of the note, was the only executor, on the day the note became payable, after demand and refusal of payment, deposited a notice of nonpayment in the post office, in Columbia, addressed to "Wm. P. Geiger, executor of the estate of Jacob Geiger, Columbia, S. C," he being, at the time, a resident of Columbia. Testimony was also adduced tending to show that on the back of the envelope in which the notice was enclosed, was the usual printed notice "Return to the Carolina National Bank, of Columbia, if not delivered in five days;" that it was the rule of the post office, when a leter, with a notice endorsed upon it, was not delivered within the time specified to return it to the sender; that the bank was in the habit of receiving its mail from the post office at least three times a day, (Sundays excepted,) and that the envelope above-mentioned had never been returned to the bank. It was also in evidence that it was the custom of this bank, as well as all the other banks in the city of Columbia, to give notices of the dishonor of notes through the post office, as well as persons residing in the city as to those residing elsewhere, and that such had been the usage of this bank from the time of its establishment up to and after the time of the maturity of the note in question.

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*Upon this evidence a motion for a nonsuit was made upon the ground that a notice deposited in the post office, addressed to the endorser, where both parties lived in the same city, was not sufficient. The motion was granted and exceptions duly taken. No question seems to have been raised in the court below, and certainly none in the argument here, as to whether a notice to one of two executors would be sufficient. But as the defence rested upon the general ground of want of due notice, and as the grounds upon which the Circuit judge based his judgment are not stated, it may be proper for us to say that notice to one of two executors would be sufficient. Dan. on Neg. Inst., § 1000.

The questions raised by the exceptions are: 1. Whether the general rule, where both parties reside in the same town or city, requiring notice of the dishonor of a note to be delivered personally to the endorser, or in case of his absence, to be left at his place of

residence or place of business, was not so modified by the evidence as to the usage of this bank to give such notices through the post office as to render that mode of giving notice sufficient. 2. Whether the Circuit judge was not bound, under the evidence adduced, to submit the question of fact to the jury as to whether Wm. P. Geiger had actually received the notice in due season. 3. Whether any notice at all was necessary under the circumstances. Wm. P. Geiger, the maker of the note, having become one of the executors of the endorser before the note became payable, and, therefore, necessarily cognizant of the fact of the non-payment of the note.

As to the first question, it cannot be denied that the general rule is that where the parties reside in the same town or city, the notice must be given to the person entitled to it, either personally, or in case of his absence, it must be left at his residence or place of business. Story on Prom. Notes, § 312; 2 Dan. on Neg. Inst., § 1005, and this rule has been recognized in this state. Foster v. Sineath, 2 Rich. 338. And although it has been suggested that this rule "has lost its reasonable force and exists only by authority," and, therefore, should be abrogated rather than undermined, as it has been, by exceptions, (1 Am. Lead. Cas. 403; 2 Dan. on Neg. Inst.,

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§ 1010,) yet we do not regard it as *within our province to adopt the remedy proposed, and, therefore, leave the suggestion to be considered by that department of the government to which it properly belongs. To this rule, there are, however, exceptions, one of which is that where a note is made payable at a particular bank, and it is proved to be the usage of such bank to give notices through the post office to persons residing in the same town or city, that mode of giving notice will be sufficient. This is upon the ground that persons who become parties to such a note are presumed to have knowledge of the usages of the bank at which they have chosen to make the note payable, and have agreed to be bound by such notice as it is the usage of the bank to give. In the American notes to the case of Wigglesworth v. Dallison, 1 Smith Lead. Cas. 416–17, it is said:

"It has been repeatedly decided, in relation to the contract of endorsement, that an established usage of particular banks as to the time of demanding payment and giving notice differing from the time fixed by the general law-merchant, with which banks the parties deal, is evidence of intention and consent that the contract of the endorser shall be modified according to this usage, and that, therefore, the endorser is bound by such demand and notice as the usage prescribes; * * * and the same principle has been applied to the manner of making the demand," citing the cases to sustain both propositions.

It would seem necessarily to follow from this that the same principle would apply to the manner of giving notice, and a recent writer, Daniel, in his work on Negotiable Instruments, states that it has been so held in several cases which he cites, but to which we have not access. Nor is it necessary that knowledge of such usage should be brought home to the person sought to be affected by it; for, as is said by Marshall, C. J., in Bank of Washington v. Triplett, 1 Pet. 33 [7 L. Ed. 37]; adopting the language which had been previously used by Story, J., in Mills v. Bank of U. S., 11 Wheat. 438 [6 L. Ed. 512]:

"When a note is made payable at a bank whose invariable usage it is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not. In the case of such a note the

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*parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable."

These remarks will apply as well to the manner of giving notice as to the time when the demand of payment should be made and the notice of non-payment should be given. This view was plainly recognized in the case of Bowling v. Harrison, 6 How. (U. S.) 248 [12 L. Ed. 425], where a charge to the jury that, in order to fix the liability of the endorser, who resided in the same town where the note was payable, "the notice must be personal, unless he had agreed to receive it elsewhere, or unless by custom and usage of the bank at which the note is payable, the notice of non-payment was left at the post office," was approved, although it seems to have been held in that case that there was no sufficient proof of such a custom or usage as would dispense with notice—the proof, in fact, being exactly the other way, and that it was the usage to give notice personally, unless there was a memorandum on the note providing for a different mode of notice. But to make such usage effectual it must, of course, be properly proved. As is said in the case just cited: "A usage to be binding should be definite, uniform and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract." To this we may add that the usage should be reasonable. The question, therefore, should have been left to the jury to determine whether there was sufficient proof of such a usage at the plaintiff bank as would, upon the principles above announced, dispense with the necessity of notifying the endorser personally, or by leaving a notice for him at his residence or place of business.

As to the next question, there can be no

doubt that whatever may have been the mode adopted of giving the notice, if the party actually received it, and received it in due time, he would be bound, and the mode of transmission would, in such a case, become wholly immaterial. 2 Dan. on Neg. Inst., § 1003, where the cases are cited. So that if there was any evidence in this case tending to show that the notice was actually received, and received in due time, the ques-

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tion should have been left to the *jury. The fact that a party has received such a notice may be proved, like all other facts, either by direct or circumstantial evidence, and while it is very clear that there was no direct evidence in this case to show that William P. Geiger received the notice, there were circumstances adduced in evidence which should have been submitted to the jury with instructions to inquire whether such circumstances satisfied their minds, not only that the notice was actually received, but that it was received in due time. The evidence upon this point may have been of a slender character, but still that was a matter for the jury and not for the court to pass upon, and, therefore, we think that the non-suit was improperly ordered.

As to the third question, we are entirely satisfied that there was no error in the ruling of the Circuit judge. The object of notice is not merely to inform the endorser that the note is not paid, but also to let him understand that the holder looks to him, as well as the maker, for payment; and without such notice the endorser would have a right to conclude either that the note was not paid or that the holder was satisfied to look alone to the maker for payment. Tindall v. Brown, 1 T. R. 169–70. We think, too, that this case comes within the reason of the decision of the Supreme Court of the United States in the case of Magruder v. Union Bank, 3 Pet. 87 [7 L. Ed. 612], recognized in Bank v. Tyler, 4 Pet. 384 [7 L. Ed. 888], and re-affirmed in Union Bank v. Magruder, 7 Pet. 287 [8 L. Ed. 687]. In that case the maker having died before the maturity of the note, the endorser became his administrator, and it was held that demand and notice were nevertheless necessary. There, as here, it was contended that it was entirely useless; but Marshall, C. J., in delivering the opinion of the court, said, after stating the general rule as to demand and notice: "The defendant in error does not controvert this rule, but insists that this case does not come within it, because demand of payment and notice of non-payment are totally useless, since the endorser has become the personal representative of the maker. He has not, however, cited any case in support of this opinion, nor has he shown that the principle has been ever laid down in any treatise on promissory notes and bills. The court ought to be well satisfied of the correctness of the principle

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before it sanctions so *essential a departure from established commercial usage." And after suggesting that it was possible that assets which might have been applied in payment of the note, had payment been duly demanded, may have been diverted to other purposes, or that it was possible that the maker had, during his lifetime, paid the note before maturity, concludes as follows: "Be that as it may, no principle is better settled in commercial transactions than that the undertaking of the endorser is conditional. If due diligence be used to obtain payment from the maker without success, and notice of non-payment be given to him in time, his undertaking becomes absolute, not otherwise." In this case we may also say that no case has been cited in support of the view contended for by the appellant, but on the contrary, Daniel, in his work on Negotiable Instruments, Section 1175, seems to take the same view of the matter which we have done and cites the cases. William P. Geiger may very well be regarded as having knowledge of the fact that the note was not paid, but William P. Geiger, as maker of the note and as executor of the endorser, are two different and distinct persons in law, and while he may have known that he, as maker, had not paid the note, yet he could not know, until notified, that he, as endorser or representative of the endorser, would be expected to pay it. It was possible that the bank might have seen fit to look alone to the maker for payment, and therefore William P. Geiger, as executor of the endorser, might have applied, as he would have had the right to apply, the assets belonging to his testator to other purposes, until he was notified, not only of the non-payment of the note, but that the estate which he represented would also be looked to for payment.

The judgment of the Circuit Court is set aside and a new trial is ordered.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. *355

*(Case No. 855.)

BULL v. ROWE.

(November Term, 1879.)

[1. *Execution* ⇐280.]

A decree in summary process in 1869, was entered by the judge upon the docket, but no entry in the minutes was shown, and was revived without objection under summons in 1876. *Held*, that a purchaser at a sale of land thereunder had sufficiently proven the judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 813; Dec. Dig. ⇐280.]

[2. *Execution* ⇐102.]

The renewal, by default, of an execution under proceedings for that purpose, estops de-

fendant from objecting that the original execution had not been returned to the clerk before the summons to renew was issued.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 203; Dec. Dig. ⟸102.]

[3. *Constitutional Law* ⟸180.]

The state constitutional provision as to homestead must be so read as if that part which violates the constitution of the United States had been expressly excepted.

[Ed. Note.—Cited in Agnew v. Adams, 17 S. C. 370.

For other cases, see Constitutional Law, Cent. Dig. §§ 498-500; Dec. Dig. ⟸180.]

[4. *Constitutional Law* ⟸180; *Homestead* ⟸7.]

An assignment of homestead is absolutely void as to a debt contracted before the adoption of the constitution of 1868, but not in judgment at the time of such assignment.

[Ed. Note.—Cited in Carrigan v. Bozeman, 13 S. C. 376; Charles v. Charles, Id., 385; Adams v. Agnew, 15 S. C. 40; Agnew v. Adams, 17 S. C. 370.

For other cases, see Constitutional Law, Cent. Dig. § 499; Dec. Dig. ⟸180; Homestead, Cent. Dig. § 9; Dec. Dig. ⟸7.]

[5. *Homestead* ⟸2.]

An assignment of homestead made but not recorded in court, can in no way affect the rights of one whose debt, excepted from the operation of the homestead law, was not then in judgment; and a purchaser of the homestead under a judgment obtained upon such debt and levied before the record of the assignment, is entitled to recover the land.

[Ed. Note.—Cited in Douglass v. Craig, 13 S. C. 373; Carrigan v. Bozeman, Id., 377; Charles v. Charles, Id., 386; Agnew v. Adams, 17 S. C. 371; Youngblood v. Lathen, 20 S. C. 375; Turner v. Malone, 24 S. C. 402; Hosford v. Wynn, 26 S. C. 133, 1 S. E. 497; Woods v. Bryan, 41 S. C. 80, 19 S. E. 218, 44 Am. St. Rep. 688.

For other cases, see Homestead, Cent. Dig. § 3; Dec. Dig. ⟸2.]

6. This case distinguished from McKeown v. Carroll, 5 S. C. 75.

[7. *Estoppel* ⟸95.]

Estoppel by conduct defined.

[Ed. Note.—Cited in Douglass v. Craig, 13 S. C. 375; Agnew v. Adams, 17 S. C. 372; Carter v. Du Pre, 18 S. C. 183; In re Covin's Estate, 20 S. C. 475; Jennings v. Harrison, 33 S. C. 209, 11 S. E. 695; Graham v. Fire Ins. Co., 48 S. C. 226, 26 S. E. 323, 59 Am. St. Rep. 707.

For other cases, see Estoppel, Cent. Dig. §§ 285-287; Dec. Dig. ⟸95.]

[8. *Homestead* ⟸107.]

A creditor, whose claim is not in judgment, remaining silent and inactive while a homestead is being assigned to his debtor, is not thereby estopped from enforcing his judgment, afterwards obtained, against such homestead.

[Ed. Note.—Cited in Bradley v. Rodelsperger, 17 S. C. 13; Myers v. Ham, 20 S. C. 527; Trimmier v. Winsmith, 41 S. C. 116, 19 S. E. 283.

For other cases, see Homestead, Cent. Dig. § 166; Dec. Dig. ⟸107.]

[9. *Estoppel* ⟸56.]

[Cited in Smith v. Oglesby, 33 S. C. 197, 11 S. E. 687, to the point that there must be some act done or omitted, or a change of position made by the person claiming the estoppel.]

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. ⟸56.]

[10. *Homestead* ⟸1.]

[Cited in Trimmier v. Winsmith, 41 S. C. 114, 19 S. E. 283, to the point that the operation of the homestead exemption does not affect the title to the land.]

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 1; Dec. Dig. ⟸1.]

[This case is also cited in Douglass v. Craig, 13 S. C. 371, as to the doctrine of estoppel.]

Before Hudson, J., Orangeburg, January, 1879.

Action by Norman A. Bull against John C. Rowe, to recover five hundred acres of land, purchased by plaintiff as the property of defendant at a sheriff's sale, in the case of Sarah Watt against John C. Rowe. Defendant resisted upon the ground that it was his homestead, duly assigned to him on January 27th, 1869, as appears by the following return:

"We, the undersigned, commissioners appointed respectively, by the sheriff, J. M. Cope, and John C. Rowe to set off a homestead claimed by John C. Rowe do make this return of our action in the premises: We

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do assign and set apart to John *C. Rowe, as his homestead, a tract of land upon Snake Swamp, containing five hundred acres, which we appraise at $2 per acre, together with the building and improvements thereon. All of which we assign, transfer and deliver to John C. Rowe.

"January 27th, 1869.

"C. M. McMichael.
"W. H. Smith,
"W. C. Moss."

J. M. Cope
v.
John C. Rowe } Orangeburg County.

Personally appeared before me, C. M. McMichael, W. C. Moss and W. H. Smith, and made oath that they, the appointees of the creditors, sheriff and defendants, in the case above set forth as appraisers, to allot a homestead to John C. Rowe, will faithfully carry out the provisions of the act of the general assembly, in such case made and provided.

C. M. McMichael,
W. C. Moss,
W. H. Smith.

Sworn to before me this 25th day of January, 1869. Geo. Boliver, Mag. ex off.

Endorsed: Filed March 12th, 1877.

Homestead of John C. Rowe.

Recorded in Record Book No. 15, page 408, March 12th, 1877. Geo. Boliver, Register.

Appraisement and return of homestead to John C. Rowe.

W. C. Moss, $2; C. M. McMichael, $2; W. H. Smith, $2; oath, seventy-five cents; survey, $7; total, $13.

N. A. Bull was one of the plaintiffs in the case of Case & Bull v. Rowe, referred to in the statement contained in the opinion of the court.

This land was levied on by the sheriff in

the Watt case, January 27th, 1877, and sold April 2d, 1877, for $675, to N. A. Bull. The other facts of the case are stated in the opinion.

The Circuit judge charged the jury that, originally, this claim of homestead was invalid as against the Watt judgment, which was based upon a contract made prior to

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1868: and that it was *invalid because Rowe did not reside on it; that the return, while indefinite, was made and filed in the clerk's office for record; that record was not necessary, but proper; that creditors may attack the return within a reasonable time, although no time is fixed; that while the return was indefinite, still, as the land was surveyed, and notice given at the sale of the assignment of the homestead, the return could not be held void for want of definiteness; that creditors thus had notice; and the only way the assignment could be vacated was by direct proceedings attacking the return, and could not be avoided in a proceeding by a purchaser at sheriff's sale to recover the land; that the verdict should be for the defendant, and that the creditor, through whom Bull claims, was estopped by acquiescence.

To these instructions, the plaintiff excepted, and requested his Honor to charge, inter alia, as follows.

4. That the state constitution prescribes that the homestead consists of the "dwelling-house, out-buildings and lands appurtenant," and that lands not appurtenant to the dwelling-house are not included. And that a homestead, as against debts existing prior to the adoption of the constitution of South Carolina, is not only voidable, but utterly void.

5. That the lapse of time and laches of plaintiff cannot operate to make that valid which was void ab initio.

6. That the defendant derives his title either under the assignment or by possession; that the assignment is void ab initio, and that it requires ten years' possession to give him title.

7. That the assignment and return should have been recorded in the clerk of the court's office.

8. That the assignment and return is void from uncertainty and obscurity!

Upon these requests the court charged as follows:

"As to the fifth request, I charge you that the lapse of time and laches of the plaintiff cannot operate to make that valid which was void ab initio, but may operate to make that a title which otherwise could not have been a title."

"As to the sixth request, I cannot so charge, but hold that by failing to avail himself of the method pointed out by statute, to set aside the admeasurement of homestead, the

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plaintiff has lost *the rights which he otherwise would have had under the constitution of the United States, as well as the constitution of South Carolina."

"Upon the seventh request, 'that the assignment and return should have been recorded in the office of the clerk of the court,' I hold that when the return was filed for recording in the court, it was the beginning of notice."

"As to the eighth request, 'that the assignment and return is void from uncertainty and obscurity,' I charge you that the return is very unsatisfactory and quite indefinite; but under the evidence, and in view of the fact that express notice was given on the day of the sale, I hold that it was sufficient."

To all of which the plaintiff excepted.

The defendant's counsel then requested the court to charge the jury as follows:

1. "That in order to make out a title to land purchased at sheriff's sale, the judgment and execution under which the sale was made must be produced; and in order to prove a judgment obtained under the summary process practice, it was not only necessary to produce the entry of the presiding judge on the docket, but the original entry of the decree in the book containing the minutes of the court; and this proof not having been made, the plaintiff has not made out his title, and the verdict of the jury must be for the defendants."

Upon this request the judge charged as follows: "Such, gentlemen of the jury, is the ordinary rule and requirement of law; but in this case there was sufficient evidence of the judgment upon which the execution was issued to sustain the sale therein and the title of the purchaser."

2. "That if the jury believe, from the evidence, that the execution in the case of Sarah R. Watt v. John C. Rowe was never returned by the sheriff to the clerk for renewal or otherwise, the subsequent proceedings for the renewal of the said execution were irregular and void; and the sale made under the renewal execution in said case, of the defendant's homestead, was therefore void, and the jury should find for the defendant."

Upon this request the court charged as follows: "That proposition embraces a cor-

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rect rule of practice; but the fact that *the return of the execution to the clerk's office may be proved by evidence other than an endorsement on the execution, the proceedings for the renewal of the execution and the entries upon the dockets and minutes of the court raise the presumption that it was returned to the clerk's office before the second execution was issued."

Defendant's counsel excepted to the charge of the court as to each of these requests.

Verdict for defendant. Plaintiff appealed.

Messrs. W. J. DeTreville and S. Dibble, for appellant.

Mr. J. F. Izlar, contra.

Plaintiff must recover on strength of his own title. 1 Tread. 99. The judgment is a part of the title. 1 McM. 377; 1 N. & McC. 468; 2 Ib. 417. A decree in summary process may be shown only from the entry in the minutes of the clerk. 1 McM. 493; 2 Mills' Const. R. 247; 2 Spears 311.

There could be no proceedings to waive the Watt judgment until the original fi. fa. was returned to the clerk's office.

The homestead in this case was set off under act of 1868. 14 Stat. 19. No complaint was then made, although the present plaintiff was then a judgment creditor of Rowe. Being set off, and the assignment returned for record, the homestead cannot be subjected to further proceedings until so permitted by the court under whose process it was set off. 46 N. H. 363; 12 Ohio 431; 5 S. C. 75. It was a judgment, and must stand. Thomp. on Home., § 667 and notes. The judgment creditor is estopped. 54 N. H. 128. So are all judgment creditors then holding liens.

As a judgment, it is binding upon all who could have resisted it. Herm. on Estoppel 165; 1 Johns. Ch. 436; 2 Spear. 620; 2 Rich. 560; 13 Iowa 549; 14 Ib. 320; 7 S. C. 148, 172. The plaintiff here was then a judgment creditor; and therefore he is bound.

The right of homestead is a good defence in ejectment. Thomp. on Home., § 686.

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*April 20th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. On January 30th, 1869, Sarah Watt obtained judgment in the Summary Process jurisdiction of the court for Orangeburg county against John C. Rowe on a cause of action arising on a contract made before the adoption of the constitution of 1868. Under this decree execution was issued, which subsequently lost its active energy and was renewed by scire facias by order of Judge Reed, October 18th, 1876. A second execution was issued thereon under which the plaintiff levied upon a tract of land of five hundred acres on "Snake Swamp," fifteen miles from Orangeburg, as the property of Rowe, the defendant in execution, and had the same sold by the sheriff. At this sale the land was purchased by Norman A. Bull, the appellant, who received sheriff's title for the same, and he brings this action to recover the land from the said Rowe and his tenants in possession.

At this sheriff's sale Rowe had public notice given that he claimed the land as his "homestead" which had been assigned to him under the constitution and laws of this state. In the trial of the case that was his principal defence and the following facts were disclosed:

There were other judgments in the sheriff's office against Rowe, but it will not be necessary to refer to more than three of them. That J. M. Copes for $501.91, entered February 13th, 1867, and that of F. M. Rogers for $2812.31, by confession, and entered March 20th, 1867, and that of Case & Bull for $322.72, entered March 22d, 1867. The execution of Copes was levied, and on January 27th, 1869, three days before Sarah Watt obtained her decree, appraisers, appointed for the purpose, signed the paper which is printed in the brief, setting off to Rowe, as his homestead, the five hundred acres of land now sued for. The return was not marked, filed or recorded until March 12th, 1877, and had, probably, been in the record in the case of Copes for most of the intervening time. When it was placed on the record does not appear. Briggs, who was sheriff at the time, says: "I kept it for a while, and then I think I returned it to the sheriff's office for recording." The land assigned as homestead was not sold at that

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time (afterwards, *as above-stated,) but the remainder of his lands were sold and applied to executions according to their priorities, and for what remained unpaid, the executions were returned "nulla bona." Livingston, who was sheriff when the five hundred acres were sold in 1877, also applied the proceeds to executions in his office according to their priorities. That of Case & Bull received its "pro rata," but it does not appear that the proceeds of either sale reached the case of Sarah Watt.

Upon these facts the case was submitted to the jury, who, under the direction of the judge, found a verdict for the defendant. The judge was requested by the counsel on both sides to charge certain propositions of law, which he did, and the case comes up on exceptions to his rulings.

We will first dispose of the exceptions of the defendant. His first exception was, "that in order to make out a title to land purchased at sheriff's sale, the judgment and execution under which the sale was made must be produced; and in order to prove a judgment obtained under summary process, it was not only necessary to produce the entry of the presiding judge on the docket, but the original entry of the decree in the book containing the minutes of the court; and this proof not having been made, the plaintiff has not made out his title and the verdict of the jury must be for the defendant." Upon which the judge charged "that in this case there was sufficient evidence of the judgment upon which the execution issued to sustain the sale."

We find no error in this charge. No separate judgment could be produced for the reason that the decree was rendered in a Summary Process, in which no formal judgment was required by law. The original entry of the decree on the docket in the

handwriting of the judge who rendered it, and the fact that the execution had been renewed against the defendant without objection, was sufficient. Douglass v. Owens, 5 Rich. 534.

Defendant's second exception was "that if the jury believe, from the evidence, that the execution in the case of Sarah R. Watt v. John C. Rowe was never returned by the sheriff to the clerk for renewal or otherwise, the subsequent proceedings for the renewal of the said execution were irregular and void; and the sale made under the renewed exe-

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cution in said case of the *defendant's homestead was therefore, void, and the jury should find for the defendant." We find no error here. The defendant was estopped by the proceedings for the renewal of the execution. Herman's Law of Estoppel 191; Jackson v. Patrick, 10 S. C. 197.

That brings us to the defence of Rowe and the exceptions of the plaintiff. These may be considered as condensed into the third and fifth. The third exception is "that the constitutional provisions and the statutes of this state as to homestead are void as to contracts pre-existing before April 15th, 1868." The fifth exception is, "that the lapse of time and laches of plaintiff cannot operate to make that valid which was void ab initio."

Several cases involving the same or kindred questions are now before the court, and for that reason, and because we are desirous of supporting the provision for homestead, especially as to old debts, if it can be done properly, we have considered this case with care and have gone more fully into the reasons for the opinion than otherwise would have been necessary.

The homestead exemption is of modern origin and exclusively American. Most of the states of the Union have adopted homestead laws since 1839, when Texas, then a young republic inviting settlement, led the way. These laws in no two states are in all respects the same. The difference in these enactments has produced want of symmetry in the decisions, but the leading idea in most of them is that the right of homestead in the debtor is neither a lien, encumbrance nor an estate, but a negation of the ordinary remedies of the creditors as to certain property for certain purposes—an "exemption," dealing merely with the means of enforcing the contract and leaving the title of the property untouched.

Several irregularities were alleged against the claim of the homestead in this case, growing out of the details of this proceeding; as, for instance, that the land assigned was not "the family homestead of the defendant," who never lived on it, but miles away at Orangeburg; that "the return" of the appraisers is without plat or metes and bounds, and is too vague; that it was never "returned for record" until the levy under which the land was sold by the sheriff, &c.; but we do not think it neces-

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*sary to consider these points and give no judgment upon them. The main question is, whether the plaintiff is barred of his recovery of the land sued for by the homestead claim of the defendant.

The plaintiff purchased under the execution of Sarah Watt, and the sheriff's deed conveyed to him all her rights. In this action for the land the inquiry is narrowed down to the simple question, whether Sarah Watt was barred by the assignment, either under the law at the time of the assignment, or by lapse of time, or by any subsequent acts of her own up to the day of sale. We will endeavor to keep these points from running into each other, and consider first the rights of the parties as they stood under the law on the day of assignment, reserving for consideration hereafter the alleged effect of the acts of the plaintiff in execution.

The constitution (Art. II, § 32,) declares "the family homestead of the head of each family residing in this state, such homestead consisting of dwelling-house, out buildings, and lands appurtenant, not to exceed the value of $1000, and yearly product thereof, shall be exempt from attachment, levy or sale, on any mesne or final process issued from any court. * * * Provided, that no property shall be exempt from attachment, levy or sale for the payment of obligations contracted for the purchase of said homestead or the erection of improvements thereon. * * * It shall be the duty of the general assembly, at their first session, to enforce the provisions of this section by suitable legislation."

In 1868 the general assembly passed "An act to determine and perpetuate the homestead," which provided that "the sheriff or other officer executing said process shall cause a homestead, such as said person may select, not to exceed the value of $1000, to be set off to said person in the manner following, to wit: He shall cause three appraisers to be appointed, one to be named by the creditor, one by the debtor, and one by himself, who shall be discreet and disinterested men, resident in the county, and shall be sworn by a justice of the peace to impartially appraise and set off by metes and bounds a homestead of the estate of the debtor, such as he may select, not to exceed the

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value of $1000; *and the said appraisers shall proceed accordingly to set out the homestead, and the set-off and the assignment so made by the appraisers shall be returned by the officer along with said process for record in court; and if no complaint shall be made by either party, no further proceedings shall be had against the homestead, but the residue of the lands and tenements of the head

of the family, if any more or other he shall have, shall be liable to attachment, levy and sale; provided, that upon good cause shown, the court, out of which the process issued, may order a re-appraisement and re-assignment of the homestead, either by the same appraisers or others appointed by the court; and provided further, that should the creditors or debtor neglect or refuse, after due notice from the officer executing the process, to nominate an appraiser, the said officer shall appoint the same." 14 Stat. 19.

In 1869 the general assembly passed "An act to punish sheriffs and other officers for violating the homestead." 14 Stat. 172.

In 1872 was passed the "Act to reduce all acts and parts of acts to determine and perpetuate the homestead into one act, and to amend the same," which, as to the manner of laying off homestead, changes the law of 1868 only in allowing for complaint "thirty days after return for a record in court." 15 Stat. 229.

In 1873 was passed an "Act to revise and amend the homestead law," which substantially re-enacted the act of 1872 as to the manner of laying off homestead, only adding that the return should be made by the appraisers "within ten days after the assignment and set-off is made." 15 Stat. 369.

These are the provisions of our constitution and laws upon the subject of homestead. They were firmly enforced according to their terms by this court, as appears from the cases In re Kennedy, 2 S. C. 216, and Howze v. Howze, 2 S. C. 229. But in December, 1872, the Supreme Court of the United States, in the case of Gunn v. Barry, 15 Wall. 610 [21 L. Ed. 212], held that so much of the constitution of the State of Georgia as gave a homestead exemption against debts in existence at the time of its adoption, was void. The judgment declares that the legal remedies for "the enforcement of a contract which belong to it at the time and place where it is made, are a part of its obligation. A state

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may *change them, provided the change involves no impairment of a substantial right. If the provision of the constitution or the legislative act of a state fall within the category last-mentioned, they are to that extent utterly void. They are for all the purposes of the contract which they impair as if they had never existed."

This is undoubtedly the law, and our courts, conforming their decisions to the principles announced in that case, have decided that so much of our constitution and laws as purport to allow a homestead against a debt older than the constitution, are in violation of the constitution of the United States and void. Cochran v. Darcy, 5 S. C. 125; Ex parte Hewett, 5 S. C. 409.

This created a new state of affairs, and the difficult duty is devolved upon the court of deciding the rights of parties according to principles not in the minds of those who made the laws, and which, of course, contain no provision applicable to the case.

Although it was not known at the time Rowe's homestead was set off in 1869, the same principles were applicable then which have been since declared. If the question of assigning the homestead in this case were before us to-day, it is clear that it could not be allowed. De La Howe v. Harper, 5 S. C. 470. In conformity with these latter cases and the principle on which they are founded, we are bound to interpret the constitution and laws as if the provision for allowing homestead exemption against debts then in existence were spunged out, and in place thereof another exception embracing such debts were added to the proviso, which declares "that no property shall be exempt from levy and sale for taxes, or for payment of obligations contracted for the purchase of said homestead," &c. Judge Cooley lays it down in his Constitutional Limitations, p. 188, "that if an act is unconstitutional in part, it is to be construed as if the unconstitutional part were expressly excepted." We are therefore constrained to hold that the assignment of homestead to Rowe in 1869 was unauthorized as to the debt of Sarah Watt, which must be considered as excepted and beyond the jurisdiction to assign homestead, and such assignment as to her debt was absolutely void.

If the assignment as to the debt of Sarah

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Watt was void on *the day it was made, were the relative rights of the parties different the next day or the next month? Did the fact of assignment itself, apart from any alleged effect of acquiescence on her part, in any way change those rights? The circumstances of the case may suggest some vague idea of res adjudicata. As the debtor has the right to but one homestead while he may have many debts, and as it would be unreasonable to require him to have his homestead laid off as many times as he has his creditors, an impression is apt to arise that the assignment is, in some way, a proceeding in rem, or of administration, and that, when made, it must be regarded as done once for all, and that every creditor is somehow bound thereby. The principles of res adjudicata are very extensive and effective. The judgment of a court of competent jurisdiction embraces all parties, whether they choose to be heard or not, and is conclusive until reversed on appeal, whether the decision be right or wrong. But it pre-supposes a tribunal and jurisdiction of the subject matter, and it is indispensable that there should be parties notified who have the right to be heard. No element of the principle of res adjudicata appears in this proceeding. Sarah Watt had not obtained judgment when the assignment was made, and she was not before the persons who assigned the homestead. The act of 1868 provides no tribunal

to decide the question of right of homestead, for the obvious reason that, according to the view upon which the act proceeded, there was no right to decide. The exemption was allowed against all claims whatever, except for taxes and the purchase money of the homestead, and as to these it did provide the means to decide the right in the section which requires the court to certify thereon the consideration for which it was rendered. We suppose that no homestead could stand which was assigned against a process which had endorsed on it the certificate that the consideration was for the purchase money of the homestead. The process of Sarah Watt had not on it the judicial certificate that her debt originated before the constitution—only for the reason that the law, proceeding on another view, had made no provision for that case. We think that a careful reading of the act will show that it never contemplated any such issue; it provides no tribunal, no

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judge, for no case and no notice *to the parties. We are not informed whether the practice is to notify other judgment creditors. It is not necessary that any one should know of the assignment but the levying creditor, the sheriff and the appraisers, who are commanded to do certain acts specifically prescribed. The act does direct that the assignment shall be "returned for record in court, and if no complaint shall be made by either party, no further proceeding shall be had against the homestead." This manifestly means the parties to the proceeding, viz., the acting creditor and the claimant, for the words are "either party," and the proviso is, "that upon good cause shown, the court, out of which the process issued, may order a re-appraisement and re-assignment of the homestead, either by the same appraisers or others appointed by the court." Complaint could reach no further than that. The act cannot fairly be construed to provide a means for the determination of rights which, by its terms, did not exist—the right in question was declared after the act was passed and in direct opposition to its terms, spirit and intent. The question of right was never submitted to a tribunal before which Sarah Watt was a party, in such a way as to impose upon her the consequences of failing to appear, or the duty of lodging a "complaint" for the purpose merely of a "re-assignment." The assignment was not recorded; it was only found after a search filed in the clerk's office with the records. We are obliged to say Sarah Watt's rights were never adjudicated, and she should not be bound by the ex parte ministerial proceedings under which Rowe's homestead was laid off, which did not and could not embrace her debt. No person can be made a party in a case except by process of law or by his own consent. Story's Eq. Pl., § 207–8; Marshall v. Drayton, 2 N. & McC. 26; Williams v. Von Valkenburg, 16 How. Pr. 144; Buckly v. Buckly, 6 Abb. 307; Booden v. Fitch, 15 Johns. 220; Sollee v. Croft, 7 Rich. Eq. 43.

The law upon this subject is condensed by "Thompson on Homestead and Exemptions," Section 230, as follows: "It is scarcely necessary to state, as a general rule, that a dedication of homestead, in whatever form, does not have the effect of withdrawing it from liability on account of any pre-existing debt, liens, conveyances or charges which

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otherwise would have bound *the land;" and again, Section 291: "Every debt created by contract prior to the passage of any homestead or exemption law, is privileged from the operation of such law. To this rule, as the writer understands it, the court can now admit no exceptions." It is said in Newton v. Summey, 59 Ga. 399: "It has been often ruled by this court, in effect, that in the assignment of a homestead there is no magic by which superior liens can be thrown off or deficient titles made perfect. Those whose claims outrank the constitution, may stay out of the Ordinary's Court, and nothing there done will be in their way." [In Georgia, homestead is assigned in Ordinary's Court.]

After the assignment there may be a presumption that it is valid. This, however, does not make it "voidable," good until set aside by a direct proceeding for that purpose, but good until the important fact is shown. As soon as it appears that there was a privileged debt, the "prima facie" is removed, and the whole proceeding quo ad hoc is void. This fact may appear in any proceeding, direct or collateral, for what is absolutely void may be disregarded as nullity whenever and wherever it is encountered. Hill v. Robertson, 1 Strob. 1; Singleterry v. Carter, 1 Bail. 467 [21 Am. Dec. 480]; Williamson v. Farrow, 1 Bail. 611 [21 Am. Dec. 492]; Thompson v. Tolmie, 2 Pet. 169 [7 L. Ed. 381]; 1 Tidd's Pr. 937.

We see no reason why Bull, the purchaser, may not maintain his direct action for the land. Our court has held that when the assignment of homestead has not been "returned for record in court," under the act of 1868, it is not exempt from levy and sale, and the purchaser at sheriff's sale may disregard it and recover the land from the defendant in execution notwithstanding his claim of homestead. Ryan v. Pettigrew, 7 S. C. 146; Choice v. Charles, 7 S. C. 171. This case is much stronger, for here, as to this creditor, the whole proceeding is void.

It may seem that this view is in conflict with the case of McKeown v. Carrol, 5 S. C. 75, but if that case is carefully examined it will be found that the point decided is not inconsistent with what is here declared to be the law. In that case the creditor had a judgment older than the constitution. Homestead was allowed and he did not complain

but levied and sold what he assumed to be the remainder in the property assigned as

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*homestead. At that sale McKeown purchased and took sheriff's deed, reciting the homestead, sale of the remainder and purchase by him. Claiming to be remainderman under this deed, he instituted proceedings against those in possession for an order to restrain them from committing waste. The application was refused. The purchaser had no higher right than the plaintiff in execution under which homestead had been assigned and which was acknowledged in his deed and title taken subject to it. The case turned upon the force of the word "exempt," and without regard to the doctrine and dicta of the case, the ruling was right; as stated in the judgment of the court, "the plaintiff did not put himself in a proper position to question the nature of the defendant's right of possession."

Assuming that defendant Rowe had no right to homestead as against the debt of Sarah Watt, and that the mere ministerial act of assignment gave no additional rights and was void as to her, does the evidence show that she did or omitted to do anything to bar her right to proceed against the land? The doctrine of estoppel applies to constitutional as well as other rights and to proceedings absolutely void as well as those merely voidable. The assignment as a fact was made. Rowe retained possession of the land assigned while his other property was sold to pay his debts. Sarah Watt was probably aware of this assertion of claim adverse to her right, and she took no step to controvert it from 1869 until 1877. Should this non-action enure to the benefit of the defendant and now estop her or her alienee? The law does not require one to contest for his rights, but if he omits to do so for a certain time, it imposes the penalty, in the form of the statute of limitations, of withholding the means of enforcing them. The statute of limitations is not pleaded and does not apply here. But without reference to the statute, one may undoubtedly waive his rights either by voluntarily yielding them or by doing certain acts which will be held, by force of law, to have that effect.

It is not easy to lay down any general rule as to what acts shall constitute a waiver. That must depend largely upon the circumstances of each particular case. There are, however, principles upon which estoppels pro-

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ceed. The doctrine is not *shifting and uncertain according to the caprice of the judge, but rests upon well-defined and fixed rules. Thus understood estoppels no longer deserve the epithet of "odious" but are most useful agencies in the administration of justice. As we understand it, estoppel by conduct is where one party has been induced by the conduct of the other to do or forbear doing something which he would not or would have done but for such conduct of the other party. Bigelow on Estoppel 480. The conduct which is claimed to operate as an estoppel must have induced action, the disavowal of which would be inequitable, and which, therefore, the party who holds out the inducements is estopped from disavowing. There is no estoppel without fault to the injury of another. There was, in this case certainly, no intentional waiver on the part of Sarah Watt, for that would imply knowledge of the existence of her right, which she did not have. Was there anything done or omitted which would estop her? Can we say the assignment of homestead or anything connected with it was induced by the conduct of Sarah Watt, either by concealment, silence, non-action, acquiescence or declarations? She did not take any part in the assignment of homestead, for she then did not have judgment. The whole proceedings as to her was "per force." She made no misrepresentations which it is now inequitable to disregard; and so far as we can see, she did not say or do anything in reference to the matter, but was simply silent and inactive. She held no relation of trust to Rowe which made it her duty to speak or act, and she therefore had the right without injury to him and without fraud to be silent and inactive. All that can be said is, that she did not disturb the proceeding for a time, during which Rowe enjoyed the homestead, and of this, certainly, he has no right to complain. This delay was probably induced by ignorance of her rights, and was, therefore, without one of the indispensable ingredients of laches—willful negligence. As was said by Judge McIver, in the case of the State v. Moseley, 10 S. C. 1: "Though that act, having been decided to be unconstitutional, cannot be regarded as ever having had any legal force or effect, yet in questions involving good faith or laches, it may perhaps be

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worthy of consideration that such a *law was not only spread upon the statute book, but was universally acquiesced in until the question of its constitutionality was decided." But be that as it may, we cannot resist the conclusion that the mere non-action of Sarah Watt for a period short of the time necessary to bar her right to levy and sell was not a waiver of her rights, and should not estop her or the purchaser at sheriff's sale.

There should be a new trial, and it is so ordered.

WILLARD, C. J., and McIVER, A. J., concurred.

13 S. C. 371

(Case No. 856.)

DOUGLASS v. CRAIG.

ARMSTRONG v. CRAIG.

(November Term, 1879.)

[1. *Homestead* ⇐7.]

An assignment of homestead under an execution in a case where the debt was contracted before the adoption of the constitution of 1868, is void.

[Ed. Note.—Cited in Bradley v. Rodelsperger, 17 S. C. 12; Fowler v. Wood, 31 S. C. 403, 10 S. E. 93, 5 L. R. A. 721.

For other cases, see Homestead, Cent. Dig. § 9; Dec. Dig. ⇐7.]

[2. *Estoppel* ⇐56.]

The definition of estoppel in Bull v. Rowe, (7) ante p. 355, approved.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. ⇐56.]

[3. *Estoppel* ⇐95.]

Judgments were obtained upon debts contracted before 1868; and the lands of the debtor were levied upon in 1872 in the possession of his administratrix and widow, who claimed a homestead: the homestead was admeasured to her, and the remainder of the lands were sold, and the proceeds applied to the executions in these cases; but the assignment of the homestead was not returned to the clerk's office until 1878, during which interval, these execution creditors were quiescent. *Held*, that they were not estopped from subjecting this homestead to levy and sale under their executions.

[Ed. Note.—Cited in Bradley v. Rodelsperger, 17 S. C. 13; Myers v. Ham, 20 S. C. 527; Hosford v. Wynn, 26 S. C. 133, 1 S. E. 497.

For other cases, see Estoppel, Cent. Dig. §§ 285–287; Dec. Dig. ⇐95.]

[4. *Homestead* ⇐200.]

[The fact that a judgment creditor has accepted the proceeds of a sale of all of his debtor's property except a homestead does not estop him from objecting to the validity of the assignment of the homestead, which was void as against his debt.]

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 376; Dec. Dig. ⇐200.]

Before Aldrich, J., Fairfield, September, 1878.

The two cases are sufficiently stated in the opinion of the court. The judgment in the Douglass case was obtained November 4th, 1867, as stated in the opinion, but in the Armstrong case the judgment bears date November 12th, 1869.

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*These cases were heard at April Term, 1879, and the cases were ordered to be reargued, special attention being directed to the following questions:

1. Can the lien of a judgment obtained prior to the adoption of the constitution of 1868 be affected by the failure of the party holding such lien to except to any proceedings provided for by the acts of the legislature in reference to the mode of assigning a homestead to the judgment debtor?

2. Are not the acts to be construed as relating only to those cases in which, under the constitution, the judgment debtor is entitled to a homestead as against such judgment?

Mr. W. H. Lyles, for appellant.

Mr. Henry Obear, contra.

First question—Cited Bigelow on Estoppel, 500, 578; 46 N. Y. 354; 3 Johns. Ch. 416; Sedg. on Const. & Stat. Law, 111; Cooley on Const. Lim. 181; 74 N. Y. 386; 46 N. H. 363; Thomp. on Home., § 711.

Second question—3 Pet. 411; Story's Const. 256; 26 Wend. 42.

April 20th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. Some time previous to November, 1867, J. F. Craig died intestate, leaving a widow, Harriet C. Craig, who administered upon the estate and continued to reside upon the lands of her deceased husband. It does not appear that the intestate died insolvent, but we assume that he did, for the two cases named in the caption were sued on obligations of the intestate and judgment recovered against the respondent as administratrix, November 4th, 1867. February 8th, 1872, the sheriff of Fairfield county levied upon a tract of land of eight hundred and forty-eight acres as the property of the deceased intestate at the suit of "Margaret Armstrong and others." The respondent claimed "homestead" out of her husband's lands so levied, and March 22d, 1872, the appraisers (how appointed does not appear) made a sworn statement that they had "set aside a homestead from the real estate

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of J. F. Craig, deceased—*the house and two hundred and fifty acres of land adjoining," &c.—which paper is marked by the clerk as "filed and recorded April 10th, 1878." Soon after the said paper was signed, viz., March 4th, 1872, the sheriff, leaving unsold two hundred and fifty acres assigned as homestead, sold the remainder of the lands and the proceeds were distributed among the judgment creditors according to their priorities, including the two cases herein named of William Douglass and Margaret Armstrong.

June 24th, 1878, proceedings were commenced in the case of Douglass by service on the sheriff of notice that he would be ruled to show cause why he would not make the money on the execution of plaintiff. The sheriff answered that there was no other property of the deceased debtor out of which he could make the money but the land which had been assigned for a homestead as above-stated, and that he could not, under pain of criminal proceedings, levy and sell that.

July 7th, 1878, the plaintiff, in the case of Harriet Armstrong, second above-stated, served upon the respondents "exceptions to the assignment of homestead." The motions

in both cases were heard together upon the merits. The Circuit judge sustained the assignment of homestead, discharged the rule against the sheriff in the first case, and in the second overruled "the exceptions to the assignment of homestead," and from that ruling the judgment creditors appealed to this court.

This court, at the present term, has decided that the assignment of a homestead as against a debt contracted before the adoption of the constitution is without authority and void "ab initio," and such assignment may be disregarded whenever that fact appears in any proceeding, direct or otherwise. Bull v. Rowe, ante p. 355; Hill v. Robertson, 1 Strob. 1; Thompson v. Tolmie, 2 Pet. 169 [7 L. Ed. 381].

The case of Hill v. Robertson was an action for land which had been sold by order of the judge of Probate under petition of guardian of plaintiff, who after he came of age, sued for the land and recovered it. Judge Evans, in delivering the judgment of the court, says: "It would be a waste of words to attempt to prove the proceedings of a court of limited jurisdiction in a case clearly without its jurisdiction, are absolute-

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ly void *and may be so declared wherever the question is presented, whether directly or collaterally."

In the case of Thompson v. Tolmie, the court says: "We agree that if the court had jurisdiction it has a right to decide every question that occurs in the cause, and whether its decision be correct or not, its judgment, until reversed, is regarded as binding in every court. But if it acts without authority, its judgment and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought in opposition to them even prior to a reversal."

The intestate debtor, J. F. Craig, died before the constitution allowing homestead was adopted, and therefore it is clear that all his debts were in existence at that time, that his widow was not entitled to homestead, Cochran v. Darcy, 5 S. C. 125, and the assignment of homestead to her was simply void.

But it is earnestly argued that the plaintiffs in both the cases under consideration are estopped by their own acts from now moving to set aside this homestead exemption. It is said that under the executions the respondent applied for and had homestead assigned to her; that their execution creditors were parties to the proceeding and they did not appeal, but accepted their "pro rata" of the proceeds of the other lands sold, and acquiesced for six years—from 1872 to 1879. All the parties at the time were ignorant of the true state of the law. According to the terms of the constitution and our decided cases, the respondent seemed to be entitled to the homestead, but it now appears that she was not so entitled. What effect should the conduct of the parties under these circumstances have upon their rights respectively? It is a new case and not free from difficulty; but, however painful it may be, the law, as we understand it, must be declared. The statute of limitations is not pleaded and manifestly has no application to the case. By the law of that time, the judgments had a lien for twenty years. The plea of "res adjudicata" cannot prevail, for several reasons, but it is only necessary to state that the whole proceedings were without jurisdiction and void.

We are unable to discover in the conduct of these execution creditors any element of

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the principle of estoppel. As was said *in the case of Bull v. Rowe: "An estoppel is where one party has been induced by the conduct of another party to do or forbear doing something, which he would not or would have done but for such conduct of the other party." Such conduct must have induced action which it would be inequitable to disavow and which the party holding out such inducements will be estopped from disavowing. No estoppel will be declared without fault to the injury of another. The plaintiffs had liens upon the property before the constitution allowing homestead was adopted. We cannot perceive on their part either concealment, guilty silence or misrepresentations, but simply non-action and delay without fraudulent intent. But it is said that the plaintiffs accepted their "pro rata" of the proceeds of sale of the other property, based on the allowance of homestead. That is true, but that did not necessarily involve assent to the homestead. They had a right to what they got and more besides. They accepted no benefit under the unconstitutional act, but were deprived by it of what they had a right to claim. To accept half their right does not imply an abandonment of the other half. This case is not analogous to that of Clay v. Smith, 3 Pet. 412 [7 L. Ed. 723], where a citizen of Kentucky, not bound by an insolvent law of Louisiana, voluntarily came in and received a dividend under the state law; or to the case of Van Hook v. Whitlock, 26 Wend. 42, where a creditor of a corporation before the passage of an unconstitutional act authorizing the corporation to make an assignment in discharge of their liabilities voluntarily came in and accepted a dividend under such assignment. In these cases what was received was the fruits of the unconstitutional act. Not so here. The plaintiffs received nothing but what they would have received if homestead had not been assigned, and they received nothing under that proceeding, but entirely outside of it.

It has been further urged for the respondent that the right to homestead involves the

question of title to lands and cannot be decided without a jury and regular sworn testimony upon a mere rule upon the plaintiffs. We have held at the present term, in the case of Charles v. Charles, post No. 859, that the

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right of homestead is a *mere "exemption from levy or sale," and as the sheriff is the officer appointed by the law to levy and sell property under execution, that the legal question of right to homestead may be made upon rule on the sheriff to levy and sell the property claimed as homestead. The court will not hear upon rule a case which is complex and involves conflicting testimony; but where the facts are simple or admitted, or the question is one of law as to the duty of the sheriff himself, we see no reason why it may not be heard upon rule.

The order of the Circuit judge is reversed, and the case remanded for further proceedings according to the principles herein announced.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 376

(Case No. 857.)

CARRIGAN v. BOZEMAN.

(November Term, 1879.)

[1. *Homestead* ⟸7.]

The assignment of homestead as against a debt contracted before the adoption of the constitution of 1868, is without authority and void, and may be disregarded as a nullity whenever that fact appears in any proceeding direct or collateral. Bull v. Rowe, ante p. 355.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 9; Dec. Dig. ⟸7.]

[2. *Homestead* ⟸200.]

A debtor having had assigned to him a homestead which was invalid as against a certain judgment under which it was afterwards sold, the purchaser is not estopped from denying the validity as to him of the homestead assignment, because, that in his deed from the sheriff, the property is described as "the land set off to defendant as a homestead."

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 376; Dec. Dig. ⟸200.]

[3. *Trial* ⟸136.]

Where only questions of law are involved, the judge may direct a verdict.

[Ed. Note.—Cited in Hillhouse v. Jennings, 60 S. C. 401, 38 S. E. 596.

For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323–327; Dec. Dig. ⟸136.]

Before Wallace, J., Darlington, March, 1879.

The case is fully stated in the opinion of the court.

Mr. R. K. Charles, for appellant.

Mr. J. J. Ward, contra.

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*April 20th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. Berryman W. Edwards, administrator, recovered judgment against Jesse Bozeman, November 14th, 1868, upon a cause of action bearing date March, 1862, under which the sheriff of Darlington, in February, 1877, sold a tract of land of the defendant Bozeman. At that sale the plaintiff, W. A. Carrigan, purchased the land and received sheriff's title, which described the land as "as all that tract of land set off to defendant as a homestead, containing three hundred and forty acres, more or less." This action was brought by him as purchaser at sheriff's sale to recover the land from Bozeman, who made defence that the land had been assigned to him as a homestead in 1869, under a levy in the case of "A. Smoot and others." It appeared that the paper or warrant authorizing the assignment of homestead and appointing appraisers for that purpose, was not signed by Sheriff Cox himself, but by the clerk in his name, and that the return of the appraisers remained in the sheriff's office from the time of its execution until some time after the sale, when the sheriff was requested by defendant's attorney to return it with the execution for record in court. The judge charged the jury that the assignment of homestead was not perfected according to law; that if they believed that the signature of the sheriff had not been made by himself or his deputy, but by a clerk in his office; that it had no witness and that the paper had not been recorded, that of itself would avoid the homestead. He instructed the jury to bring in a verdict for the plaintiff, and the verdict being so returned the appeal comes to this court upon several grounds:

First. That the homestead was properly assigned and set off.

Second. That plaintiff in execution waived his right to object to the assignment of homestead by acquiescence and participation therein.

Third. That no questions were left to the jury, although there were questions of fact in the case.

Fourth. That plaintiff is estopped from asserting that no homestead was laid off to defendant.

We have, at the present term of this court, in the case of Bull v. Rowe, ante p. 355, decided that "the assignment of homestead

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*as against a debt contracted before the adoption of the constitution, is without authority and void, and that such assignments as to such debt may be disregarded as a nullity whenever that fact appears in any proceeding, direct or collateral." That disposes of the first and second exceptions.

The sheriff's deed to the plaintiff describes the land as "all that tract of land set off to defendant as homestead, containing three hundred and forty acres, more or less." This

does not amount to an estoppel of the plaintiff. It is the statement of the sheriff, and cannot be properly construed to be the conclusive admission of the donee Carrigan. He had no connection with Bozeman or his claim of homestead until he purchased at sheriff's sale, and that purchase itself negatives the idea that at the same moment he admitted that he purchased nothing.

Besides, it might be true, as matter of fact, that the land had been "set off to defendant as homestead" as against other debts, and yet be no homestead as to the execution of Edwards, under which Carrigan purchased. Even if the land had been "set off to defendant as homestead," that did not necessarily involve the admission—in contradiction to the very act of purchasing, and against the law as it is now declared—that it was a legal and valid homestead, and as such a bar to his rights, secured to him by that very deed. The expression in the deed was not intended to be more than a description of the property conveyed.

Under the view which this court takes, that the assignment of homestead, as to the execution of Edwards, under which the land was sold, was utterly void, there was in the case nothing but questions of law, and we find no error in the charge of the judge instructing the jury to find for the plaintiff.

The appeal is dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. *379

*(Case No. 858.)

BEATTIE v. POOL.

(November Term, 1879.)

[1. *Limitation of Actions* ⟸100.]

An action by a creditor to set aside as fraudulent a confession of judgment made by his debtor, is not barred by the statute of limitations, where the creditor for the statutory period has not had notice of facts which go to make up a fraud, but only a suspicion that there was something wrong about it.

[Ed. Note.—Cited in Hart v. Bates, 17 S. C. 45; Richardson v. Mounce, 19 S. C. 482; Harrell v. Kea, 37 S. C. 375, 16 S. E. 42; Garvin v. Garvin, 40 S. C. 443, 19 S. E. 79; Smith v. Linder, 77 S. C. 541, 58 S. E. 610.

For other cases, see Limitation of Actions, Cent. Dig. § 480; Dec. Dig. ⟸100.]

[2. *Fraudulent Conveyances* ⟸30.]

A judgment confessed for the purpose of defeating other creditors, is fraudulent and void as to them, although based upon a valuable consideration.

[Ed. Note.—Cited in McSween v. McCown, 23 S. C. 353.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 73; Dec. Dig. ⟸30.]

Before Fraser, J., Greenville, April, 1879.

The case is fully stated in the Circuit decree, which is as follows:

This case was heard by me at the regular term of the Court of Common Pleas for Greenville county, held by me in April, 1879.

Certain issues of fact involved in the case were submitted to a jury who failed to agree on a verdict.

The case was then, without objection from either side, heard by the court—the evidence submitted to the jury being taken without objection on the trial before the presiding judge.

There was much conflicting testimony. I find, however, that the weight of the evidence is in favor of the following state of facts: On November 11th, 1856, John P. Pool, one of the defendants, gave his note to Amelia Hudson for $1020, with Jordan P. Pool and Peter Cauble as sureties, the consideration of which was slaves. This note was under seal. On this note suit was commenced against all three makers, September 13th, 1866, and the case stood for trial on the issue docket, March 25th, 1867—suit in the name of Esli W. Hudson, administrator. On March 23d, 1867, two days before a trial could have been brought on on the above-described note, a confession of judgment was made by John P. Pool, one of the defendants, to James H. Pool, his son, the other defendant, for the sum of $2000, and interest from March 1st, 1861, and costs. This judgment was founded

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*on a note dated March 1st, 1861, for $2000, given by John P. Pool to James H. Pool. Some time after this confession of judgment, the first case above-mentioned was "stricken" from the docket, in accordance with a practice which then prevailed in the courts of the Eighth Circuit, in contracts for the purchase of slaves.

Esli W. Hudson died and was succeeded in the administration of Amelia Hudson's estate by Hamlin Beattie, plaintiff in this case. Hamlin Beattie, as administrator de bonis non, commenced suit again on the note for $1020, on May 9th, 1874, and obtained judgment for $1679.25 and costs, on June 16th, 1874.

Proceedings were commenced to set aside the confession of John P. Pool to James H. Pool, May 14th, 1875, and either by non-suit or discontinuance came to an end without a trial, February 3d, 1877.

On April 3d, 1877, the tract of land described in the proceedings was sold under the judgment of James H. Pool v. John P. Pool, was bid off by and conveyed by the sheriff to James H. Pool.

This action was commenced February 26th, 1878. The costs of the first action having been paid since the commencement of this, it was held that this case could proceed.

The complaint charges fraud in the note and confession of judgment made thereon. The answers deny the fraud and plead the statute of limitations. It is unfortunate that

this note could not be produced on the trial: and it would have been better if the incapacity of John P. Pool for coming to court and giving his testimony had been more clearly established.

The consideration of the note for $2000 was as follows: James H. Pool, then a minor, had, for some years, been allowed by his father to use his wood ready cut, his servant, his carts, oxen and mules in hauling wood for sale, and appropriate the money thus collected to the amount of $600 to his own use: to this amount was added $1400, the proceeds of jeans woven and sold, eggs and butter sold, the materials and labor used being all the property of the father—there being no evidence of any trust deed or other special circumstance which prevented the marital rights from attaching. These facts are ac-

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cepted because they are sworn to, *and there is no conflicting testimony and the witnesses not impeached, and are, therefore, found to be true.

Four of the witnesses testify that James H. Pool said on several occasions that the judgment confessed by his father was a fraud, and two of them say that he mentioned the debt set up by the plaintiff in this case as the debt the judgment was intended to "defeat;" and one of them says that he was requested to say nothing about what had been said to him about it. The testimony of these witnesses, together with the fact that the confession of judgment was made while another suit was pending, and the creditor kept at bay by litigation, (which was not renewed on the second suit,) lead me to accept it as a fact that the confession of judgment was made for the purpose of defeating the bona fide creditors of John P. Pool.

The testimony of Mr. Wells does not go any further than to show that Esli W. Hudson had anything more than a suspicion that there was something wrong about the judgment of John P. Pool to James H. Pool.

There is no evidence that he had any notice of facts which go to make up a case of fraud. Shannon v. White, 6 Rich. Eq. 101 [60 Am. Dec. 115].

It is held that there is no sufficient evidence of such notice to sustain the plea of the statute of limitations.

That even admitting that the note was based on a sufficient consideration to make it a valid debt, so far as the rights of other creditors are concerned, the intent to use even such a debt to defeat other creditors, makes the confession of judgment fraudulent and void as to them. Hipp v. Sawyer, Rich. Eq. Cas. 417; Richardson v. Rhodus, 14 Rich. 100.

The allegation of insolvency in the sixth clause of the complaint, and the failure to deny it in the answer, make it sufficient to establish the insolvency of John P. Pool, and that the individual and security debts stand, so far as this case is concerned, on the same footing.

It is therefore ordered and adjudged that the tract of land mentioned in the complaint be sold by the master, &c.

Defendants appealed.

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*Messrs. J. P. Moore and Earle & Wells, for appellant.

Messrs. Perry & Perry and Whitner & Symmes, contra.

April 20th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This action was brought by the plaintiff as administrator de bonis non of Amelia Hudson, deceased, a junior judgment creditor of the defendant John P. Pool, to set aside as fraudulent and void as to creditors a judgment confessed by the said defendant to his co-defendants and son, James H. Pool.

The complaint alleges want of consideration in the note on which the judgment was confessed—charges that the judgment was confessed for the purpose of hindering, delaying or defeating the other creditors of the defendant John P. Pool, and alleges want of notice or knowledge of the fraud until within six years before the commencement of this action.

The defendants' answer denies the fraud, alleges the bona fides of both the note and the confessed judgment, and pleads the statute of limitations.

The Circuit judge, to whom the cause, after a mistrial upon certain issues of fact referred to a jury, was submitted by consent of parties, found as matters of fact—first, that the judgment of John P. Pool to his son James H. Pool, was confessed for the purpose of defeating the bona fide creditors of John P. Pool; and, second, that there was no evidence that Esli W. Hudson, plaintiff's predecessor as administrator, had any notice of facts which go to make up a case of fraud, but that he had a suspicion that something was wrong about the judgment; and upon these findings of fact he overruled the plea of the statute of limitations and set aside the judgment as to the bona fide creditors of John P. Pool.

The defendants appeal to this court upon the following grounds:

"1. It is respectfully submitted that his Honor erred in finding, as matter of law, that plaintiff's action was not barred by the statute of limitations.

"2. That his Honor erred in finding, as

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matter of law, that *the confession of judgment from John P. Pool to James H. Pool was fraudulent as against the creditors of the said John P. Pool.

"3. That his Honor erred in his conclusions

of the law, the same not being warranted by the facts as found by him."

There is no exception to the findings of fact, and, therefore, they must be taken to be true. The only question submitted is, whether there is error of law in the Circuit decree, as to which it is insisted—

First. That the plea of the statute of limitations should have been sustained upon the proof that Esli W. Hudson, first administrator, "had no notice of facts which go to make up a fraud, but nothing more than a suspicion that there was something wrong about the judgment of John P. Pool to James H. Pool."

The code of procedure (Gen. Stat. 591, § 114,) provides as follows: "An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the Court of Chancery, the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

The terms of this provision would seem to exclude the idea that the proof in this case was sufficient to put into operation the statute of limitations against the first administrator, Esli W. Hudson, who "had no notice of facts which go to make up a fraud." Although frauds are generally committed in the dark, we have no doubt that in most cases of fraudulent confessions of judgment third persons have their suspicions, but to hold that such suspicions alone amount to a discovery of the fraud, would be to give aid in protecting such frauds; and to exclude that very result seems to have been the purpose in using the terms of the code "until the discovery of the facts constituting the fraud."

This provision of the code is but the embodiment of an equitable principle which has long been recognized in the state. It has been placed upon the ground "that it would be against conscience for a party to avail himself of the statute where, by his own fraud, he has prevented the other party from knowing or asserting his rights within the period prescribed by the statute." This principle is so well settled that it is not necessary to do more than make a general reference to

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some of the decided cases. *Hudnal v. Teasdall, 1 McC. 228 [10 Am. Dec. 671]; Prescott v. Hubbell, 1 Hill's Eq. 214; Shannon v. White, 6 Rich. Eq. 101 [60 Am. Dec. 115]; Parham v. McCravy, 6 Rich. Eq. 145; McClure v. Ashby, 7 Rich. Eq. 444.

We are satisfied with the statement of the doctrine made by Chancellor Dargan in the case of Shannon v. White: "The ground upon which the court of equity applies the statute of limitations is the laches of the plaintiff, but how can laches be imputed to him who is ignorant of the fraud? * * * On the trial it was incumbent upon the defendants to prove that the plaintiff had notice of the fraud more than four years prior to the filing of the bill. And here it is to be remarked that it would not be sufficient to prove that the plaintiff had a suspicion of the fraud. But it is necessary to bring home to him a knowledge of the facts constituting the fraud. Suppose some one were to tell him that a fraud had been committed? It would not be sufficient unless he were informed of the facts constituting the fraud, or put in possession of a clue by which, with proper diligence, he might come to a knowledge of the facts."

As to the second exception, we see no error in the decree. It is admitted that the judgment was confessed by the father to the son with intent to defeat, delay and hinder other creditors, but it is insisted that it was not fraudulent, because it was based upon what purported to be a valuable consideration. Upon the question of fact, whether a judgment or conveyance was made to defeat and hinder other creditors, many nice distinctions are made as to what is and what is not a badge, and what is and what is not conclusive, of such purpose. But when such intention is proved or admitted, we agree with the Circuit judge, that "even admitting the note was based on a sufficient consideration, the intent to use it to defeat other creditors makes the confession of judgment fraudulent and void as to them." 13 Eliz.; Gen. Stat. 425; Hipp v. Sawyer, Rich. Eq. Cas. 417; Smith v. Henry, 1 Hill 16; Thomas & Ashby v. Jeter & Abney, 1 Hill 380; Lowry v. Pinson, 2 Bail. 324 [23 Am. Dec. 140]; Brown v. McDonald, 1 Hill's Eq. 297; Smith v. Culbertson, 9 Rich. 106; Guignard v. Aldrich, 10 Rich. Eq. 256.

The Circuit decree is affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. *385

*(Case No. 859.)

CHARLES v. CHARLES.

(November Term, 1879.)

[1. *Homestead* ⇐7.]

The assignment of a homestead is without authority and void as against a debt contracted before the adoption of the constitution of 1868, and may be disregarded whenever that fact appears in any proceeding, direct or collateral. Bull v. Rowe, ante p. 355.

[Ed. Note.—Cited in Corry v. Tate, 48 S. C. 552, 26 S. E. 794.

For other cases, see Homestead, Cent. Dig. § 9; Dec. Dig. ⇐7.]

[2. *Executors and Administrators* ⇐53.]

The right of an administrator to proceed against his debtor's homestead is not affected by his acceptance in his own right of a div-

idend from the sale of the debtor's land, in excess of the homestead assignment.

[Ed. Note.—Cited in Hart v. Bates, 17 S. C. 41.

For other cases, see Exemptions, Cent. Dig. § 34; Executors and Administrators, Dec. Dig. ⇐53.]

[3. *Judgment* ⇐570.]

The right of homestead is not adjudicated by an order discharging a rule which was moved against the sheriff to require him to sell, where the discharge was granted upon the ground that a rule was not the proper proceeding.

[Ed. Note.—Cited in Carrigan v. Evans, 31 S. C. 265, 9 S. E. 852.

For other cases, see Judgment, Cent. Dig. § 1028; Dec. Dig. ⇐570.]

[4. *Homestead* ⇐207.]

The question of right of homestead may be determined under proceedings by rule against the sheriff.

[Ed. Note.—Cited in Douglass v. Craig, 13 S. C. 375; In re Voorhies, 46 S. C. 123, 24 S. E. 170; Corry v. Tate, 48 S. C. 553, 26 S. E. 794.

For other cases, see Homestead, Cent. Dig. § 388; Dec. Dig. ⇐207.]

5. This case distinguished from Kirby v. Woods, 5 S. C. 4.

Before Fraser, J., April, 1879, and Aldrich, J., July, 1879, Greenville.

This case is stated in the opinion of the court.

Mr. W. E. Earle, for appellant.

Mr. J. P. Moore, contra.

April 20th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. Some time during the late war, (1865,) James O. Charles died, leaving a will, of which his widow, Martha A. Charles is executrix. It does not appear that James O. Charles died insolvent, but we assume that he did, for the appellant was sued and judgments recovered against her as executrix by T. L. Hedrick and W. W. Tarrant & Co. The sheriff of Greenville made a levy, in the case of W. W. Tarrant & Co., upon the lands of the testator. The appellant, as his widow, claimed homestead, and one hundred and twenty-five acres of her late husband's lands were assigned to her as

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home*stead, and the return of appraisers made May 23d, 1871. The remainder of the land was afterwards sold, April, 1873, and the proceeds distributed among the judgment creditors according to their priorities, the pro rata share of the executions above-named being paid to R. H. Jacobs, who, we infer, had become the owner and assignee thereof.

In the meantime, in March, 1872, after the homestead was assigned as stated, John Charles, as administrator, obtained judgment against Martha A. Charles, as executrix, upon a note given by her testator in 1858. In April, 1872, John Charles was removed as administrator, and R. H. Jacobs appointed administrator de bonis non in his place. In September, 1872, the then acting administrator had the execution levied upon the land set off as homestead to the appellant, but the sheriff refused to sell, and he was twice ruled and each time the rule was discharged. The administrator "de bonis non" then commenced action against the appellant, and obtained a temporary injunction to stay waste, but a demurrer was sustained on the ground that "the complaint did not state facts sufficient to constitute a cause of action." He then again ruled the sheriff to require him to levy and sell the homestead. Judge Fraser heard the case and made the rule absolute. Notice of appeal was given, but not being prosecuted, another rule upon the sheriff was obtained, being the fourth in the case, which was heard by Judge Aldrich, and again made absolute; and from both these orders the appeal comes to this court.

We have at the present term decided, in the case of Bull v. Rowe, ante p. 355, that the assignment of homestead as against a debt contracted before the adoption of the constitution is without authority and void, and that such assignment may be disregarded as a nullity whenever that fact appears in any proceeding, direct or collateral. The testator of appellant died before the constitution was adopted, and, therefore, it is clear that she was not entitled to homestead in his lands as against any of his debts. The whole proceeding was void, and in such case there can be no res adjudicata. The appraisers have no jurisdiction as to the right of homestead, and judgment in the case of John Charles had not been rendered at the time

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the assignment was *made. The fact that R. H. Jacobs, in his individual capacity, received in other cases the proceeds of the other property sold outside of the homestead cannot affect the rights of the parties interested in the judgment in this case, which he is controlling as administrator de bonis non. It would seem that there has been no blamable negligence in this case, as this is the fifth effort to make the money. But it is urged that, admitting the assignment of homestead to be utterly void, and that it was error to discharge the first rule, the execution creditor should have appealed, and not having done so, the matter is adjudged, and he could not renew the effort to make the sheriff sell the land. The question was not determined on its merits in such a way as to impose the consequences of not appealing. The rule was discharged upon the ground that a rule was not the proper proceeding. It was like a nonsuit ordered in an action improperly conceived.

We do not see why the question of appellant's right to homestead cannot be decided upon a rule on the sheriff. No question as to the title to property is involved. The right

to homestead is not a new estate given by the law, but a negation of the ordinary rights of the creditor as to certain property for certain purposes—an "exemption," dealing merely with the process for enforcing the contract but leaving the title to the property untouched. As the sheriff is the officer appointed by law to levy and sell property under execution, it would seem that the question of "exemption from levy and sale" could be made upon a rule on the sheriff requiring him to do his duty. Indeed, that seems the appropriate way in all cases where the assignment of homestead is absolutely void. The leading case on the subject in the United States Court, Gunn v. Barry, 15 Wall. 610 [21 L. Ed. 212], was decided on motion for rule and mandamus, requiring the sheriff of Randolph county, Georgia, to levy and sell the land which had been set off as homestead under the unconstitutional state law. Many of our cases upon the subject have been decided on rule requiring the sheriff to enforce the process. Keller v. Myers, 5 S. C. 11; Cochran v. Darcey, 5 S. C. 125; Garaty & Armstrong v. Du Bose, 5 S. C. 493; De La Howe v. Harper, 5 S. C. 470.

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*It is true, that in the case of Kirby v. Woods, 5 S. C. 4, which was a rule upon the sheriff to sell land which had been set off as a homestead, it was held that "under the circumstances set forth in the return the sheriff was not in contempt and the rule was discharged." In that case the merits were not considered. One Kirby recovered a judgment against Woods, as administrator of Hickson, in 1868, upon a debt older than the constitution, and John M. Tindal, sheriff of Sumter, was ruled to sell the land of which Hickson died seized. The sheriff made return that he levied on the land, but that it had been assigned as homestead to Mrs. Hickson; that Kirby had filed objections and "thereupon it was agreed that the residue of the land should not be sold until the right to the homestead exemption had been decided by the court." Before it was decided by the court, he ruled the sheriff for not selling, and the rule was properly discharged. The court say "Kirby should have consummated the proceedings he had initiated. There is not such a willful and culpable disobedience as shows a contempt of the authority under which the process to the sheriff issued, which should subject him to this summary mode of proceeding. The rules which bind the ministerial officers of the court to a strict and proper performance of all duties enjoined by law are not to be relaxed, but at the same time they are not to be so harshly construed as to provoke punishment where it is clear that there is no wrongful disobedience." The court was right in holding Kirby to his agreement, and that is the point of the case.

Very often the object of the rule is not to punish the sheriff, but to enforce a claim of right. Our law imposes penalties upon the sheriff for violating the homestead. It is not his duty to decide conflicting rights, and until the question is decided he is not culpable or in default, and the court will see to it that he is not punished. He is not required to run the risk of punishment, but to do as the sheriff is this case did, give notice to the person claiming homestead and refer the question of his duty to the court, which may decide it, or if necessary, order an issue. Taylor v. Easterling, 1 Rich. 316; Cannady v. Odum & Matheny, 2 Rich. 527; Brown v. Furze, 2 Rich. 531; Thomas v. Aitken, Dud. 293.

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*What is here said is not intended to conflict with any of the decided cases in our books, which hold that the court will not in a summary way upon mere rule decide any matter in which there is conflicting testimony, but leave the party to his action. That is a safe rule of practice and necessary for the proper administration of the law, but it has no application where the facts are simple or admitted, or it is a question of law—especially one in reference to the duty of the officer who is ruled in regard to the enforcement of the process of the court.

We agree with the Circuit judge, that in this case "the sheriff stands in the same position that he does in all other cases where he has the process of the court in his hands, and no sufficient excuse for not enforcing the same."

The orders below for making the rule absolute are affirmed, the appeal dismissed and the case remanded for such orders as may be necessary to carry out the principles herein announced.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 389

(Case No. 862.)

STATE v. BRANHAM.

(November Term, 1879.)

[1. *Criminal Law* ⇐894.]

An exception in the words "that the verdict is contrary to the law and the evidence," charges no specific error, and will not be considered.

[Ed. Note.—Cited in Covar v. Sallat, 22 S. C. 270.

For other cases, see Criminal Law, Cent. Dig. § 2115; Dec. Dig. ⇐894.]

[2. *Criminal Law* ⇐1032.]

Where an alleged misnomer of the owner's name in an indictment for burglary, has not been objected to in the court below, nor made a ground of appeal, this court cannot consider it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642; Dec. Dig. ⇐1032.]

[3. *Indictment and Information* ⟸176.]
It is not necessary to prove the precise day or year of the commission of the offence as laid in the indictment, except when time enters into the nature of the offence, or is made a part of the description of it.

[Ed. Note.—Cited in State v. Howard, 32 S. C. 94, 10 S. E. 831; State v. Reynolds, 48 S. C. 385, 26 S. E. 679; State v. Green, 61 S. C. 15, 39 S. E. 185; State v. Dewees, 76 S. C. 76, 56 S. E. 674.

For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. ⟸176.]

[4. *Burglary* ⟸2.]
The act of 1866 (13 Stat. 405), enlarging the limits within which burglary and arson may be committed, did not repeal burglary at common law; and the act of 1878 (16 Stat. 631), increasing the punishment for burglary at common law, did not repeal the act of 1866, (Gen. Stat., ch. CXXIX., § 32,) nor the common law offence.

[Ed. Note.—Cited in State v. Evans, 18 S. C. 139.

For other cases, see Burglary, Cent. Dig. § 2; Dec. Dig. ⟸2.]

[5. *Criminal Law* ⟸519.]
The Circuit judge having permitted evidence of a confession of guilt made by a prisoner to the committing magistrate to go to the jury, this court refused to interfere upon that
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ground, although the manner of the officer *was rude and his caution to the prisoner not as explicit as it should have been.

[Ed. Note.—Cited in State v. Howard, 32 S. C. 95, 10 S. E. 831; State v. Henderson, 74 S. C. 478, 55 S. E. 117.

For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174; Dec. Dig. ⟸519.]

[6. *Criminal Law* ⟸547.]
Where the confessions of a prisoner made to a trial justice at the preliminary examination are reduced to writing and signed by the prisoner, and such written statement is within reach of the court, it is error to admit parol testimony of the confession.

[Ed. Note.—Cited in State v. Jones, 29 S. C. 227, 7 S. E. 296; State v. Winter, 83 S. C. 155, 65 S. E. 209.

For other cases, see Criminal Law, Cent. Dig. § 1241; Dec. Dig. ⟸547.]

[7. *Criminal Law* ⟸521.]
[Confessions made at a preliminary examination before a trial justice, who has asked the defendants what they had to say for themselves, and warned them that whatever they said would be taken for or against them, are admissible as evidence.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1186; Dec. Dig. ⟸521.]

[8. *Criminal Law* ⟸519, 532.]
[Cited in State v. Rogers, 99 S. C. 504, 83 S. E. 971, to the point that a confession must be voluntary, and such question must be first determined by the court, but the jury are the final arbiters of such fact.]

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163–1174, 1218; Dec. Dig. ⟸519, 532.]

[This case is also cited in Scurry v. Coleman, 14 S. C. 169, as to the principles governing repeal by implication.]

Before Wallace, J., Richland, July, 1879.

Indictment against Hannibal Branham and March Harris, for burglary. The facts are stated in the opinion of the court.

Mr. Allen J. Green, for appellants.

Parol evidence of the confessions were inadmissible, as they had been reduced to writing. Pressley's Law of Mag. 208, 209; Roscoe's Cr. Ev., tit. "Confessions;" 4 C. & P. 548; McNally's Ev. 45; 1 Leach 240, 310; 1 Busbee's (N. C.) R. 239. The confessions, as proved, should not have gone to the jury, the circumstances surrounding them making them inadmissible. Roscoe's Cr. Ev. 38, 50; 1 Leach 263; Whart. Am. Cr. Law, §§ 687, 695; 1 Strob. 155; 12 Eng. L. & E. 583; 2 East P. C. 648. There is fatal variance between time laid and time proved. Before 1866 there was only burglary at common law, which could be committed only in a dwelling-house. 1 N. & McC. 583. The act of 1866 repealed the common law definition, and the punishment of burglary, as thus newly defined, was regulated by act of 1869. 14 Stat. 175. Burglary at common law was then revived by act of 1878, which went into effect May 21st, 1878. Time is thus essential here. Statutory burglary being repealed before trial, and common law burglary not re-enacted until after the offence was committed, the judgment must be arrested. 1 Leach 306; 22 N. Y. 95, 155. The verdict is contrary to law and evidence, of which the court will take notice. 11 S. C. 319; 12 S. C. 89. The misnomer is fatal. 2 Russ. on Cr. 789, 795; 4 Strob. 32. Confession of a prisoner is only evidence against himself. 2 Russ. on Cr. 864. Confessions show that they were only accessories. 2 Bish. on Cr. Proc., § 9; 49 Me. 588; 2 Vr. 65; Gen. Stat. 742, § 2.

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*Mr. Solicitor Abney, contra.

April 21st, 1880. The opinion of the court was delivered by

McGOWAN, A. J. The defendants were convicted upon an indictment for burglary and larceny, at July Term of the court for Richland county, 1879, and sentenced to confinement in the penitentiary at hard labor for the term of six years. The indictment charged that the offence was committed by taking seventeen pieces of bacon from the smoke-house of Nick C. Joiner, February 9th, 1879. The proof was, that the taking was a year before, February, 1878, and the owner of the property was N. G. Joiner. The defendants were arrested April, 1879, and carried before a trial justice, and a preliminary examination was held at Eastover. One of the witnesses for the state was caught by the trial justice in a "crooked tale," and the trial justice spoke angrily to him and threatened "if he did not stop shenanegan and tell the truth, he would send him right up to jail." Defendants were asked what they had to say for themselves, and were told that "if they desired to make a statement it was their privilege to do so, and they were warned

that whatever they said would be taken for them or against them, as it might be." Defendants then made confession, each charging the other and one Tempe Brown, with the crime. Harris said he stopped in a low, wet place and Branham and Tempe Brown went to the smoke-house and brought the meat down to him and he helped to carry it off. [A low wet place is about three hundred and seventy-five yards from the smoke-house. The track of three persons led from the smoke-house to the low, wet place.] Branham said he went with them and stopped under a wagon shed; that Harris and Brown came to him and told him "the house had been dug under," and to come and get the meat. He said he refused to go and they went and got the meat, and that he helped them to carry it off. These statements were reduced to writing by the trial justice, read over to and signed by the respective defendants and the trial justice, which paper was in court. Parol testimony was received to prove the confessions. [Defendants excepted.] Defendants then moved to strike out the confessions, on the ground that they were

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improperly obtained, which motion was *refused and defendants excepted. No evidence was introduced on the part of the defence.

Defendants made motions for a new trial and in arrest of judgment, and failing therein appealed to this court on the following grounds:

1. "That the presiding judge erred in receiving parol testimony of the alleged confession of defendants, the rule being when prisoners confess before examining magistrates it is the duty of the latter to take the confessions in writing, and the writing alone is evidence of the confessions, unless it appears that the writing is lost or destroyed.

2. "That his Honor erred in allowing the confessions, the circumstances surrounding the confessions being such as to make them inadmissible.

3. "That there is fatal variance between the allegations of the indictment and the proof, in this: the indictment alleges the offence on February 9th, 1879, and the proof is that the offence was committed February 9th, 1878, and the indictment should have so charged.

4. "That the verdict is contrary to the law and the evidence."

The last exception, that the verdict is "contrary to the law and the evidence," does not charge any specific error, and, therefore, cannot be considered. The sufficiency of the proof to charge the prisoners as principals was properly addressed to the Circuit judge upon a motion for a new trial. The alleged misnomer as to the owner of the property, Nick C. Joiner for N. G. Joiner, does not appear to have been objected to in the court below, or brought to the attention of the judge, either in the pleadings or orally. No reference is made to it in the grounds of appeal, and the matter is not before this court in such form that we can consider it. The other grounds of appeal will be considered in the inverse order in which they are stated.

As to the variance between the indictment and the proof as to the time the offence was committed. No statute of limitations is in the case, but simply a question of pleading. It is not necessary to prove the precise day or even year laid in the indictment, except where time enters into the nature of the offence, or is made part of the description of it. State v. Anderson, 3 Rich. 176; State v. Porter, 10 Rich. 148.

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*But it is ingeniously argued that as there is a time limited in the act of 1878 (16 Stat. 631) to go into effect, to wit, "sixty days from its passage," time becomes essential to an indictment under that act. It does not appear that this indictment is under the act of 1878. It reads, "against the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the state," &c. But no particular act is referred to, and we conclude that it was not under the act of 1878, for the reason that the punishment under that act is "imprisonment during the life of the prisoner," and these defendants were imprisoned only for "six years." We assume that the indictment was under Section 32, Chapter CXXIX., (Gen. Stat. 720,) being substantially the re-enactment of the act of 1866. If this indictment were under the act of March 22d, 1878, the judgment would have to be arrested, for the reason that the act was not passed until the offence was committed, February 8th, 1878. The criminal law is so tender of the rights of the citizen that it will not allow him to be tried and punished under a law which was not in existence at the time the offence was committed, especially if the subsequent law increases the punishment. That would be unconstitutional because ex post facto.

Accepting this view, it is then argued that the defendants could not be indicted and punished under the aforesaid section of the general statutes, for the reason that the act of 1878, being on the same subject, was a substitute for and a repeal of that law. That the defendants could not be tried and punished under the act of 1878, because it was passed after the offence, nor under the aforesaid section of the general statute, because that was repealed by the act of 1878, and there being no law under which they could be punished, consequently they must go free —as did the defendant convicted for cow-stealing, in the case of State v. Thomas, 14 Rich. 164. We do not think the cases are analogous. In the case of Thomas, as here, the offence was committed before and tried after the change of the law, and there was no authority under which he could be punished, for the reason that it was held that the act of 1866, upon the subject of cow-

stealing, operated as a repeal of the act of 1789, upon the same subject. But no such result can happen in this case. The act of

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1878 *does not operate as a repeal of so much of the aforesaid section of the statutes as relates to burglary. Nor did the said section repeal the offence of burglary at common law. The act of 1878 does not expressly repeal anything. It contains no repealing clause, but simply increases the punishment of one convicted of "the crime of burglary at common law." That, itself, is an express legislative declaration that the offence of burglary at common law had not been repealed. If the act of 1878 operates as a repeal, it must be by implication. Such repeals are possible, but they are not favored. To have that effect the new law must cover the whole subject exhaustively and be absolutely inconsistent with the old law. Acts upon the same subject, which can stand together, are construed in pari materia. If they are consistent, they both stand—the last as an amendment. If part is consistent and part not, the repeal only operates upon the inconsistent part. State v. Major, 14 Rich. 76; State v. Alexander, Ib. 247; Goddard v. Boston, 20 Pick. 407; State v. Corley, ante p. 1.

The act of 1866, re-enacted in the general statutes, shows, by its terms, that it is not inconsistent with burglary at common law, but, on the contrary, assuming its existence, is based upon it and only supplements it by enlarging the field within which an analogous statutory offence could be committed. The terms are: "With respect to the crimes of burglary and arson, and to all criminal offences, which are constituted or aggravated by being committed in a dwelling-house, any house, &c., * * * in which there sleeps a proprietor, &c., * * * with a view to the protection of the property, shall be deemed a dwelling-house," &c. 13 Stat. 405. No repeal of burglary at common law was intended by this act—none is necessarily involved in its terms and none can be implied. Nor does the act of 1878 operate as a repeal, either of burglary at common law or of the additional statutory offence provided for in the section aforesaid. The latter it does not touch at all, and only increases the punishment of the former, in the view, doubtless, that burglary at common law is more heinous than the statutory offence created by the section aforesaid. We can discover no error in the judge's charge on the subject of the third exception.

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*It was further urged for a new trial that the Circuit judge erred in admitting as evidence the statements of the defendants made at the preliminary examination before the trial justice, upon the ground that they were not voluntary; that the defendants were ignorant; that they were without counsel and alarmed by the presence of the officer of the law, who was rude to the witnesses, and were betrayed into making statements which were not true. The rule upon this subject of confessions has been often stated, but no where better than in 2 Russell on Crimes: "The highest authorities have now established that a confession, if clearly made and satisfactorily proved, is sufficient alone to warrant a conviction without any corroborating evidence aliunde, but a confession, in order to be admissible, must be free and voluntary. That it must not be extorted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." The rule requiring that the confessions must be perfectly voluntary, is founded on the great principle of the common law, that the guilt of a prisoner must be discovered by other testimony than his own confession. "Nemo tenebatur prodere ipsissime." It is proper in the administration of the criminal law that the rule should be preserved in all its integrity.

It is especially necessary to guard with jealousy all confessions made by prisoners in arrest in the presence of the officers of the law; but it is impossible to lay down any rule that will determine every case. As is said in some of our cases, there is no difficulty about the principle itself, but its application is beset with difficulties. In practice, what is and what is not a violation of the principle, must of necessity be left, in the first instance, to be determined by the Circuit judge, whose situation best enables him to decide in each case whether the confessions are voluntary. The judge below, familiar with all the facts, ruled that the confessions were voluntary in this case, and, upon review, refused a motion for a new trial, and it is difficult to say, as matter of law, that he was in error. The manner of the officer was peremptory, but no inducements were held out and there was some corroborating testimony. Some of the earliest cases held that all confessions of one in arrest,

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made to an officer in authority, were *assumed to be induced and were inadmissible, but that rule, if ever established, has certainly been modified. When the trial justice said to the prisoners that if they desired to make a statement it was their privilege to do so, he should have added it was also their privilege to remain silent, which would have excluded the possible inference that they were bound to speak. We would have been better satisfied if he had so warned them, but we cannot say the confessions were not voluntary. This subject was much discussed in the case of State v. Kirby, which was twice in the Appeal Court, and is reported in 1 Strob. 155, 388. The opinion on the last occasion was delivered by Judge Withers, who, after full consideration, in a capital case announced the law in terms which cover this case. "A confession is admissible," says Mr. Greenleaf in the first vol-

ume of his Evidence, Section 239, "though it is elicited by questions, whether put to the prisoner by a magistrate, officer or private person; and the form of the question is immaterial to its admissibility, though it assumes the prisoner's guilt. In all these cases the evidence may be laid before the jury, however little it may weigh under the circumstances, and, however reprehensible may be the mode in which, in some of them, it may be obtained. According to recent decisions by some of the English judges, a knowledge by the prisoner that the government itself has offered a pardon and a reward, will not exclude his confession, unless it appears that it was made under the influence of a hope of pardon held out by authorized parties, and though, when that is urged, the judge may exclude the confession when such influence is manifest, it is unquestionably for the jury when the facts are doubtful." Regina v. Boswell et al., 41 E. C. L. R. 584; Regina v. Dingby et al., 47 Ib. 637.

Upon a preliminary examination the accused parties have the right to be present and cross-examine witnesses, but they are not required to make any statement themselves. Gen. Stat. 197. It is not the duty of a trial justice to examine accused parties or to take their statements in writing, unless they are sworn as witnesses on behalf of the state by their own consent, and if he does so it is not an official act; but he is not prohibited from doing so, and a respectable authority recommends that the ancient

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*course of taking such statements should still be pursued. Be that as it may, when confessions are taken by a trial justice, in writing, signed by the parties, such evidence is the best evidence upon the subject, and if such confessions are relied upon against them, the defendants are entitled to have them produced in the very terms in which they were made. From the infirmity of memory there is always more or less uncertainty about parol testimony, especially in reference to declarations—mere spoken words. Even in civil cases the rule is that parol testimony is not admissible to explain, vary or add to written instruments, which must speak for themselves. In criminal proceedings there is even more reason that only the best and most reliable evidence should be allowed. There may have been in the written confessions some qualifications or explanations, and, we think, when demanded by the defendants, they should have been offered. It was error to receive parol testimony of confessions made in writing where there was no obstacle in the way of the written confessions being offered.

The judgment is set aside and a new trial ordered.

WILLARD, C. J., and McIVER, A. J., concurred.

13 S. C. 397

(Case No. 863.)

CLEVELAND v. COHRS.

(November Term, 1879.)

A case was remitted to the Circuit Court with leave to plaintiffs to amend by adding new parties; the plaintiffs made their amendments and served them upon all the defendants, and answers were put in; the Circuit Court held the amended complaint insufficient, but upon the call of the docket, gave plaintiffs leave to further amend, and upon such further amendments, which differed materially from former allegations, and which were not served, gave judgment for plaintiffs two days afterwards. *Held*—

[1. *Appeal and Error* ⇐1201.]

That the Circuit Court could grant the order allowing a second amendment.

[Ed. Note.—Cited in Coleman v. Heller, 13 S. C. 495; Pickett v. Southern Ry.—Carolina Division, 74 S. C. 242, 54 S. E. 375.

For other cases, see Appeal and Error, Cent. Dig. § 4679; Dec. Dig. ⇐1201.]

[2. *Pleading* ⇐239.]

That the Circuit Court erred in rendering judgment upon the second amendment without time given to defendants to answer or demur.

[Ed. Note.—Cited in Dunsford v. Brown, 19 S. C. 566; Crane, Boylston & Co. v. Lipscomb, 24 S. C. 438; Hall v. Woodward, 30 S. C. 575, 9 S. E. 684; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 541, 33 S. E. 787; Cauthen v. Cauthen, 70 S. C. 171, 49 S. E. 321.

For other cases, see Pleading, Cent. Dig. § 629; Dec. Dig. ⇐239.]

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[3. *Costs* ⇐238.]

*When a defendant prevails in his appeal, which was rendered necessary by defective pleadings of plaintiffs, he is entitled to the costs of such appeal.

[Ed. Note.—Cited in Huff v. Watkins, 25 S. C. 244, 246; Murray v. Aiken Mining & Porcelain Mfg. Co., 39 S. C. 465, 18 S. E. 5; Stepp v. National &c. Ass'n, 41 S. C. 208, 19 S. E. 490; Sullivan v. Latimer, 43 S. C. 263, 21 S. E. 3; Cunningham v. Cauthen, 47 S. C. 163, 25 S. E. 87.

For other cases, see Costs, Cent. Dig. § 911; Dec. Dig. ⇐238.]

Before Hudson, J., Charleston, March, 1879.

See this case previously reported in 10 S. C. 224. After the case was returned from the Supreme Court to the Circuit Court, the plaintiffs served the following paper upon the defendant Cohrs, and also upon F. E. McKenzie and Sarah E. Alexander.

"Take notice, that under the leave to amend granted by the Supreme Court, the plaintiffs amend their complaint by making F. E. McKenzie and Sarah E. Alexander parties defendant, and by adding to said complaint the following paragraph, to wit:

"6. That the defendant, F. E. McKenzie, had, before the commencement of this action, parted with all his interest in and to the debt secured by the bond and mortgage herein described, and that Sarah E. Alexander, the widow of ——— Alexander, formerly Sarah E. McKenzie, and called Sarah Ann

McKenzie, in the opinion of the Supreme Court, had likewise, before the commencement of this action, parted with all her right, title and interest in and to the debt secured by the bond and mortgage aforesaid."

F. E. McKenzie answered that he had held the bond and mortgage as guardian for his two daughters, and that upon settlement with them he transferred the bond and mortgage to Mrs. Florence Cleveland, who is now sole owner; that Mrs. Alexander was otherwise settled with and has no interest whatever in these securities. Mrs. Alexander answered: "That she has no interest, either legal or equitable, in the bond and mortgage sought to be collected in this suit."

The other facts of the case are sufficiently stated in the opinion of the court.

Defendant Cohrs appealed.

[For subsequent opinion, see 18 S. C. 599.]

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*Mr. L. De B. McCrady, for appellant.

Mr. B. J. Whaley, contra, upon the first point decided by this court, cited Voorh. Code, 346, note d and 355 note f; and upon second point, Code, § 192; 3 S. C. 401.

April 22d, 1880. The opinion of the court was delivered by

McIVER, A. J. This was an action for the foreclosure of a mortgage of real estate. Originally the plaintiffs claimed to be assignees of the bond and mortgage, which was the cause of action, but failing to establish the assignment of the bond, the Circuit Court, nevertheless, rendered judgment in their favor, upon the ground that the plaintiff, Florence, had shown herself to be the equitable owner of the bond. From this judgment an appeal was taken to this court and it was set aside, but leave was granted to the plaintiffs to amend by making the sister of the plaintiff, Florence—Mrs. Sarah E. Alexander, (erroneously called in the opinion of this court Sarah Ann McKenzie, as we are now informed,) who seemed to have the same interest in the bond and mortgage as the plaintiff, Mrs. Cleveland—a party, as well as the legal owner of the bond, F. E. McKenzie, if they shall be so advised. In pursuance of the permission thus granted, the plaintiffs, on June 6th, 1879, served a notice of amendment, which it was conceded, on the argument of this appeal, though not appearing in the "case," was held by the Circuit judge to be insufficient, and that he thereupon allowed the plaintiffs to make another amendment, by an order passed March 15th, 1879. No notice of this last amendment was given to or served upon any of the parties, so far as we can discover, but was simply an order granted in open court, probably on the call of the case for trial, granting leave to the plaintiffs to amend their complaint—first, by striking out the fourth paragraph, in which the assignment of the bond and mortgage had been alleged, and inserting in lieu thereof allegations; that the bond in question was given for money in the hands of F. E. McKenzie, as guardian of the plaintiff, Florence, and her sister, Mrs. Alexander; that before the commencement of this action the title of said bond had been transferred by F. E. McKenzie to the plaintiff Florence,

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on a *settlement of his guardianship accounts; that the mortgage was duly assigned, but the bond having been lost was not assigned in writing, but that by virtue of such settlement the plaintiff Florence became the sole equitable owner of said bond and mortgage. Second, by adding to the prayer of the complaint a demand that the said Sarah E. Alexander and F. E. McKenzie may be debarred from all interest in said bond, and the plaintiffs decreed to be sole owners thereof. To this last amendment no answer or demurrer was put in by any of the parties, and no time allowed therefor, as the Circuit Court, two days thereafter, granted the judgment of foreclosure from which the appeal is now taken. It does appear that on January 28th, 1879, the said F. E. McKenzie and Sarah E. Alexander did file what purport to be answers to the complaint as first amended, though these answers were verified before the service of such amendment; but this amendment, as has been stated, was held to be insufficient, and these answers cannot be regarded as answers to the last amendment, which differs very materially from the first, and which was not authorized, and, of course, not filed until near two months after these so-called answers purport to have been filed.

Numerous grounds of appeal have been presented, but in the view which we take of the case it will not be necessary, and perhaps not proper, for us to consider more than two of them, for, as the case must be remanded to the Circuit Court for the purpose of enabling the defendants, if they shall be so advised, to plead to the complaint as amended, when new issues may arise, or those already presented may assume a different form, any remark which we might now make upon the other questions presented might prove to be inapplicable and possibly prejudicial to the case as it may then be presented.

The first ground of appeal questions the right of the Circuit judge, after holding the amendment of January 6th, 1879, to be insufficient, to grant leave to plaintiffs to make another amendment. We think there was no error in this respect. The manifest object of this court, in sending the case back before, was to enable the plaintiffs to amend their proceedings by bringing before the court all the parties necessary to a complete determination of the controversy, so that, if judg-

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ment should eventually *be rendered against the defendant, Cohrs, in favor of the plaintiffs, it would be a complete bar and protec-

tion to him against the claims of others, who, as the case was then presented, seemed to have an interest in the subject matter. It is very clear that the first amendment was altogether insufficient for that purpose, and the Circuit judge was unquestionably right in granting leave to the plaintiffs to make such an amendment as would, in his judgment, be necessary to effect the purpose for which the cause was sent back to the Circuit Court.

The next ground taken is that the Circuit judge erred in rendering judgment upon the complaint as amended, without allowing time to the defendants to answer or demur to the complaint as thus amended. This ground, we think, is well taken. The case made by the amended complaint is undoubtedly very different from that made by the original complaint, and the defendants had, therefore, a right to demand time to answer or demur, as they might be advised. In the original complaint the plaintiffs claim to be the legal assignees of a bond, while in the amended complaint they allege the very opposite, and say that the bond was never legally assigned, but that, by virtue of certain transactions there set out, they claim to be the equitable owners of the bond, and, as such, entitled to maintain an action thereon. An answer to the one claim might, and probably would, be a very different answer to that which would be interposed to the other; and when the plaintiffs are permitted to change, and, in fact, reverse the title by which they claim the cause of action upon which they sue, the defendants ought, certainly, to be allowed the privilege of putting in answers to the new aspect in which the plaintiffs' claim is presented. In addition to this, aside from the answers of F. E. McKenzie and Sarah E. Alexander, (if, indeed, they can be considered as answers), which certainly are not evidence against the defendant, Cohrs, there does not seem to be any evidence showing how the plaintiff, Florence, came to be the sole equitable owner of the bond. On the contrary, all the testimony would seem to show that she and her sister were the joint owners of the bond. The referee does find that "on March 23d, 1870, F. E. McKenzie came to a settlement, in whole or in part, with his ward Florence and her husband, and on that

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day, in *consideration of a receipt from them in the amount of $2950, assigned to them the mortgage made by the defendant," but on what evidence the material part of this finding, viz., that McKenzie came to a settlement with his ward, is based, we are unable to discover. F. E. McKenzie, in his testimony, makes no allusion to any such settlement, but, on the contrary, he says that the money secured by the bond in question belonged to his two daughters, and there is an entire absence of any testimony showing by what authority he undertook to transfer the bond to one of them.

When plaintiffs obtain leave to amend their proceedings by making new parties, it should appear upon the record that such parties have been brought in by the service of a summons, or the acknowledgment of such service; and when an amendment of a complaint is allowed which calls for or warrants an answer or demurrer from one or all of the defendants, the records should show that a copy of such amendment has been duly served, and that the time for answering has expired, before this can be considered on its merits. In this case, the papers purporting to be answers of F. E. McKenzie and Mrs. Alexander, might be regarded as a sufficient acknowledgment of services so as to make them parties to the case, but having been filed before the second amendment was authorized, they certainly cannot be regarded as any acknowledgment of the service of such amendment, and as this amendment made such very material changes in the allegations of the complaint as warranted answers from the defendants, copies of it should have been served upon all the defendants, and time allowed for answering before the case could properly be heard by the Circuit Court.

As there is no exception to that portion of the Circuit decree which imposes all the costs upon the defendant Cohrs, and the question is only raised in the argument here, we would not be at liberty to disturb the judgment of the Circuit Court upon that ground; but as that judgment must be set aside upon another ground, which is properly taken, and the question of costs will, therefore, be necessarily opened, it may be as well to say that we think that the defendant, Cohrs, having been the prevailing party in both appeals, which were rendered neces-

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sary by the de*fective pleading on the part of the plaintiffs, is entitled to have the costs incurred in such appeals taxed against them.

The judgment of the Circuit Court is set aside, and the case is remanded to that court for such further proceedings as may be necessary.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 403

(Case No. 864.)

JOHNSTONE v. MANIGAULT.

(November Term, 1879.)

[1. *Appeal and Error* ⊂⊃41.]

An appeal lies from a judgment rendered in a special proceeding.

[Ed. Note.—Cited in Sease v. Dobson, 36 S. C. 557, 15 S. E. 703, 704.

For other cases, see Appeal and Error, Cent. Dig. § 134; Dec. Dig. ⊂⊃41.]

[2. *Landlord and Tenant* ⟸261.]

A tenant, whose crop had been sold under proceedings authorized by the agricultural lien act of 1878, (16 Stat. 410) gave the notice to the sheriff prescribed in Section 3 of the act. *Held*, that he had thereby elected to seek the only remedy which this act afforded to the tenant, and that was an issue to determine whether the amount claimed was justly due.

[Ed. Note.—Cited in Garlington v. Gilliam, 31 S. C. 337, 9 S. E. 1037; Sease v. Dobson, 33 S. C. 237, 11 S. E. 728; Georgia, etc., Railway Co. v. Ridlehuber, 38 S. C. 318, 17 S. E. 24.

For other cases, see Landlord and Tenant, Cent. Dig. § 1059; Dec. Dig. ⟸261.]

[3. *Landlord and Tenant* ⟸261.]

The tenant gave to the sheriff the notice and affidavit required by the statute, and the landlord filed in the clerk's office a statement of the issue raised by such affidavit, and had it set down for trial at the next succeeding term of the Circuit Court. *Held*, that it was not necessary to serve upon the tenant notice of such filing, nor to have the issues framed by an order of the court.

[Ed. Note.—Cited in Ex parte Ellis, 20 S. C. 346; Sease v. Dobson, 34 S. C. 355, 13 S. E. 530.

For other cases, see Landlord and Tenant, Cent. Dig. § 1059; Dec. Dig. ⟸261.]

Before Mackey, J., Georgetown, April, 1879.

Special proceeding under the agricultural lien act of 1878. The case is stated in the opinion of the court. The affidavit and notice of Manigault were as follows:

To T. W. Dickinson, Esq., Sheriff, Georgetown county:

Dear Sir—You will please take notice under the provisions of Section 3 of "An act entitled an act to secure landlords and persons making advances," approved March 4th, 1878, that the amount claimed by Mrs. A. L. Johnstone as due by me to her for rent, and for which claim you have seized and sold a portion of my crop, is not justly due to her, and that the proceeds of such sale are to be held by you as provided in said act.

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*Herewith is served upon you the affidavit required by said section.

A. M. Manigault, Jr.

December 20th, 1878.

Personally appeared before me, Arthur M. Manigault, Jr., and made oath, (being first duly sworn,) that on December 3d, A. D. 1878, T. W. Dickinson, sheriff of Georgetown county, levied upon, seized, and on December 16th, 1878, sold a portion of deponent's crop of rice, on Estherville Plantation; in Georgetown county, upon a claim of Mrs. A. L. Johnstone, that the sum of $700 was due by this deponent to her for rent of the said plantation, and, upon affidavit, that deponent was about to sell or dispose of his said crop, or in some other way was about to defeat the lien of the amount so alleged to be due for rent; that the amount so claimed is not justly due from deponent to the said Mrs. Alice L. Johnstone, and that she is not entitled to the same; and, further, that deponent was not about to sell or dispose of his crop, or in any other way to defeat the lien of any amount that might be due by him for rent to any one soever.

A. M. Manigault, Jr.

Sworn to, December 18th, A. D. 1878.

The paper called issue was as follows:

Alice L. Johnstone v. Arthur M. Manigault, Jr.—Issue.

Be it remembered that on December 3d, 1878, under and by virtue of proceedings in that behalf had and obtained by the above-named Alice L. Johnstone, according to the requirements of the statutes in such case made and provided, a certain quantity of rice grown upon Estherville Plantation, in the county and state aforesaid, by Arthur M. Manigault, Jr., the tenant of said plantation, was seized and sold by the sheriff of Georgetown, to pay the sum of $700, the rent of said plantation for the year 1878, to the said Alice L. Johnstone, the landlord of the said Arthur M. Manigault, Jr., and the assignee of said rent. That upon such sale the said rice brought the sum of $747.40, which is now in the hands of the sheriff.

That the said sheriff ought to pay over the said proceeds of sale, or so much as might be

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necessary to extinguish the said *rent to the said Alice L. Johnstone, but he refuses to do so, alleging that said Arthur M. Manigault, Jr., did, within thirty days after such sale, give him notice in writing, accompanied by an affidavit, to the effect that the amount claimed is not due, and that he holds the proceeds of said sale subject to the decision of the court, upon the issue thus raised between the said Alice L. Johnstone and the said Arthur M. Manigault, Jr. And the said Alice L. Johnstone, in fact, says that under the seizure and sale aforesaid, and the statutes in such case made and provided, she is entitled to the net proceeds of said sale, or so much thereof as will be necessary to extinguish the said rent, notwithstanding the said notice and affidavit of said Arthur M. Manigault, Jr.

Wherefore she demands the decision of the court, that the said sum of money, or so much as may be necessary to extinguish the said rent, be paid over to her, together with her costs.

Mr. H. A. M. Smith, for appellant.

There was no issue upon which defendant could be forced to trial. 16 Stat. 410, §§ 2, 3, 5. What is an issue? Bouv. L. Dict.; Jacob's L. Dict.; Code, §§ 271, 273. Issue can thus only arise by allegations and counter allegations; or by order of court defining the issue. Here we have neither; only notice to sheriff to stay his hand. This, like attachment, should have been followed by complaint. Affidavit is insufficient, as the plaintiff here was not the landlord who made the contract, but

only an assignee; and facts are not stated upon which the deponent formed his belief. 17 How. Pr. 559; 22 Ib. 272; 6 S. C. 169. There could be no indictment for perjury here, and tenants and their character would be at the mercy of him who held the lien. Proceedings should be in analogy to existing methods of procedure; and that required an issue. If plaintiff's affidavit was insufficient, there was no traversible fact, whereby an issue could be raised. Act of 1878 was passed after lease was made, and act of June, 1877, (16 Stat. 265,) repealed all former lien laws.

Mr. R. Dozier, contra.

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*April 23d, 1880. The opinion of the court was delivered by

McIVER, A. J. Under the view taken in this case the preliminary question raised by the respondent as to whether the appellant could appeal in a case of this character, is of no practical importance and need not, therefore, be considered; but it may be as well to say that the position taken by respondent cannot be sustained. This, it is true, was a special proceeding and not an action, but it is a mistake to suppose that there is no appeal from the judgments or orders of the Circuit Court in special proceedings. On the contrary, sub-division 3 of Section 11, of the code of procedure, expressly provides for an appeal in such cases. See also Cureton v. Hutchinson, 3 S. C. 607.

The facts out of which the controversy in this case arose, are briefly, as follows: At the beginning of the year 1878, the appellant held a lease of a plantation, in Georgetown county, then belonging to one William C. Johnstone, which expired on December 31st, 1878. At some time during the year, precisely when does not appear, the plantation was sold to the respondent and the rents assigned to her. On December 2d, 1878, on an affidavit made by said William C. Johnstone that he was the duly authorized agent of respondent; that $700 remained due and unpaid on the rent; and "that deponent is informed and believes that the said Arthur M. Manigault, Jr., is removing and selling the crop made on said plantation and is about to defeat the lien which the said Mrs. Alice L. Johnstone has, by law thereon," a warrant was issued by the clerk of the Court of Common Pleas, directed to the sheriff, commanding him to seize the crop of the appellant raised on said plantation for the purpose of satisfying respondent's demand for rent. Under this warrant the sheriff seized and sold five hundred bushels of rough rice on December 16th, 1878, and within thirty days thereafter, the appellant made the affidavit and gave the notice to the sheriff, contemplated by the proviso to the third section of the act of March 4th, 1878, (16 Stat. 410,) copies of which affidavit and notice may be found in the "case" as prepared for this court. At the next succeeding term of the Court of Common Pleas for Georgetown county, the respondent, by his attorney, filed in said court the "paper called

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issue," (a copy of which will be found *in the "case,") which, however, was not served either upon the appellant or his attorneys, and the case was docketed on Calendar No. 1, but "no notice was served either on the appellant or his attorneys, further than the mere fact of docketing the case, but the fact of its having been filed was known to one of his attorneys from seeing the paper in the clerk's office and having a copy made." At the call of the case for trial the appellant moved to strike the case from the docket and to dismiss the proceedings and that the sheriff be directed to pay over the proceeds of the sale of the rice to appellant, on the following grounds:

1. That the affidavit upon which the warrant was issued was insufficient and irregular, inasmuch as it was made upon information and belief only.

2. That the affidavit was not made by the proper person.

3. That the seizure of the crop could only be made by the actual lessor and not by his assignees.

4. That no issue had been made up for trial in the manner required by law, and there was no issue between the parties for trial.

The Circuit judge held that the affidavit was insufficient, but that appellant "by coming in under the statute and serving his affidavit upon the sheriff, waived his objection to the insufficiency of the affidavit, and that the issue between the parties consisted of the allegation in the affidavit of Mrs. Johnstone that so much rent was due to her, and the denial in the affidavit of Manigault that so much was justly due to her, and that the cause should proceed to trial on the issue so raised, and that the paper filed by the attorney of Mrs. Johnstone was a correct statement of the issue, and directed the trial to proceed." After testimony in behalf of the respondent had been introduced, the appellant offering none, the jury found a verdict in favor of the respondent. The appellant having duly excepted, brings this appeal upon the same grounds as were urged in support of the motion before the Circuit judge.

According to the view taken of this case, the questions raised as to the sufficiency of the affidavit, and to the right of respondent as assignee to the remedy provided by the

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act in *question, cannot properly arise and need not, therefore, be considered. The action taken by the appellant, avowedly, was under the proviso to the third section of the act of March 4th, 1878. 16 Stat. 410. Having elected to seek the remedy provided for

by that proviso, he must be confined to the relief which that remedy was designed to afford, and that was the privilege of having an issue tried by the court to determine whether the amount claimed was justly due. This privilege the appellant has enjoyed, and, therefore, has no reason to complain, as he has obtained the only relief which the remedy he chose to adopt was competent to afford him. That the relief afforded by the proviso in question was intended to be confined solely to the opportunity given to the tenant or person to whom advances should be made, to contest before a judicial tribunal the justice of the claim, under which his property has been seized and sold, is clear from the very terms used. The language is that if the tenant or person to whom supplies have been furnished, "shall, within thirty days after such sale has been made, give notice in writing to the sheriff, accompanied with an affidavit to this effect, that the amount claimed is not justly due, that then," &c. The very fact that the remedy is only provided for after the sale shows that it was not designed to be used as a protection against an illegal seizure or sale of the party's property, and the nature of the affidavit required, "that the amount claimed is not justly due," shows that the sole purpose was to afford the means of having the amount claimed to be due judicially ascertained. Indeed, there was no necessity for making any special provision to protect the person to whom supplies were advanced, or the tenant from an illegal seizure or sale of his property under the provisions of the second section of the act, as the general provisions of law already afforded ample means for the protection of parties whose property was about to be seized without due warrant of law, or for the recovery of damages from those who might trespass upon their rights; but there was eminent propriety, if not an absolute necessity, that an act giving a summary mode of relief to a creditor should contain some provision whereby the debtor could have the justness and amount of the claim thus summarily to be enforced inquired into.

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*It is said, however, that while all this may be true, still the proceedings in this case cannot be sustained because there was no order of court framing the issue and no notice to appellant that such issue had been framed or filed and would be set down for trial. A sufficient answer to this objection is that the statute, which in every line of it shows that the intention was that the whole proceeding should be of the most summary character, does not require or contemplate any such notice, and as no advantage could be acquired by the one party or disadvantage suffered by the other from the want of such an order or notice, there is no practical necessity for either. The appellant when he made the affidavit and gave the notice to the sheriff, himself made up the issue by traversing the allegation in the affidavit upon which the warrant was issued, that a certain amount was justly due; and any formal statement of the issue so raised, which should be filed in court, upon which the question could be tried, would be a sufficient compliance with the requirements of the act, which prescribes no particular formality as to notice; none, certainly, was necessary. The act requires none, and so far as the appellant is concerned, he certainly cannot complain of want of notice of a proceeding which he himself has inaugurated, and which the very act under which he commenced his proceedings not only informed him must terminate in an issue, the nature of which is fixed by the act—whether the amount claimed was justly due—but also informed him when such issue would be set down for trial—"shall be made up and set down for trial at the next succeeding term of the court."

The judgment of the Circuit Court should be affirmed, and it is so ordered.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 409

(Case No. 865.)

CURETON v. MILLS.

(November Term, 1879.)

[1. *Executors and Administrators* ⟸519.]

Where the administrators, in this state, of an intestate, whose domicil was here, also administered in North Carolina, and brought per-

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sonal property *there found into this state and sold it, they must account here for the proceeds of such sale.

[Ed. Note.—Cited in Graveley v. Graveley, 25 S. C. 20, 60 Am. Rep. 478; Stevenson v. Dunlap, 33 S. C. 352, 11 S. E. 1017; Jones v. Jones, 39 S. C. 256, 17 S. E. 287, 802; Hamilton v. Levy, 41 S. C. 383, 19 S. E. 610.

For other cases, see Executors and Administrators, Cent. Dig. §§ 2310–2322; Dec. Dig. ⟸519.]

[2. *Executors and Administrators* ⟸518.]

The rights and liabilities of original and ancillary administrators, and their relation to each other, in such case, determined, and cases reviewed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2299–2309; Dec. Dig. ⟸518.]

[3. *Executors and Administrators* ⟸523, 526.]

Such assets must be accounted for and distributed in this state, as it regards North Carolina debts, according to the laws of the state of North Carolina.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2329, 2352; Dec. Dig. ⟸523, 526.]

[4. *Executors and Administrators* ⟸506.]

An aggregate of expenditure for a calendar year will not be allowed administrators on

their accounts, in the absence of evidence showing that the items were proper credits.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2169–2177; Dec. Dig. ⟸506.]

[5. *Appeal and Error* ⟸266.]

This court will not notice a ground of appeal based upon a confirmation by the Circuit decree of the referee's report in a particular to which no exception had been taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1552; Dec. Dig. ⟸266.]

Before Pressley, J., Spartanburg, June, 1879.

This was a bill filed in the court of equity for Spartanburg county, in May, 1868, by Thomas K. Cureton and Nancy R. Mills, as administrators of Govan Mills, and Mary S. Cureton against R. H. Mills, J. C. Mills, J. B. Davis and William Ballenger, for a settlement of the estate of Govan Mills, who died intestate in 1862, in South Carolina, in which state he was domiciled. The administrators here were also administrators in North Carolina. Nancy R. Mills was the widow, and R. H. Mills, J. C. Mills, and M. S. Cureton were the children of intestate. Davis and Ballenger were creditors, citizens of this state. They answering demanded an accounting, and all creditors were called in to establish their demands. R. H. Mills, J. C. Mills and Nancy R. Mills died before the hearing in the Circuit Court.

Govan Mills owned lands and personal property in both North Carolina and South Carolina. Negroes and other personalty were appraised on the North Carolina plantation, under the order of the Ordinary of Spartanburg district, by South Carolina appraisers. This property was then brought into this state and sold.

F. M. Trimmier, Esq., clerk of court, to whom it was referred as referee to state the accounts, found as a matter of fact, that there were creditors in both states; that the administrators had not kept separate accounts of their two administrations; that they had sold in this state personal property

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brought here from North *Carolina to the amount of $20,803.28. As a matter of law, the referee gave the administrators credit for this sum, as not chargeable against them in this state; and refused them credit for payments made to creditors residing in North Carolina. In the statement accompanying his report, no credit was allowed the administrators for two items, proven by the attorney for the administrators in words following:

Since the last return, to wit, in 1871, the administrators received $253, and amounts paid out $325. Also, from 1862 to 1866 the administrator paid to witness, as attorney's fees and for collections and expenses, $1217.-25 in confederate money.

To the report of the referee the plaintiff filed the following exceptions:

3. Because the referee, in the accounting, failed to allow a credit of $325, paid out in 1871.

5. For that referee reported that none of the payments of claims belonging to residents of North Carolina are proper credits in the accounting here of the administrators.

6. For that referee failed to report that the estate in South Carolina had been fully administered.

And the creditors of the estate filed the following exceptions to this report:

1. That the referee allowed the administrators credit for the sum of $20,803.28, the amount of sales of personal property sold in South Carolina under the order of the Court of Ordinary for Spartanburg county, South Carolina, as assets belonging to the administration in North Carolina.

2. That the referee failed to charge the administrators with the surplus of the estate after administration in North Carolina.

The Circuit decree is as follows:

The domicil of the intestate, Govan Mills, was in this state, but he owned property also in North Carolina, and plaintiffs are his administrators in both states.

Some of his slaves, which, at the time of his death, were on his plantation in North Carolina, were brought by plaintiffs into this state, where they were appraised and sold by order of the Ordinary of Spartanburg in 1862. From that time until this suit, the assets of intestate in both states were

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administered in the *payment of debts, without regard to the residence of the creditors; some debts in each state remain unpaid and the assets are insufficient to pay all.

Plaintiffs now claim that the proceeds of the slaves which were in North Carolina when intestate died, should be omitted from the account in this state, and the referee sustains that claim. He also refuses to allow plaintiffs credit on their accounts here for their payments to creditors residing in North Carolina.

To these and other rulings of the referee both sides have filed exceptions which I will not notice in detail, because I prefer to recommit the case for further inquiry and report according to the following rulings, to wit:

1. I hold that the proceeds of said slaves are assets in this state, it being the domicil of the intestate, and the property having been appraised and sold here by legal authority. Collins v. Bankhead, 1 Strob. 25; Wilkins v. Ellett, 9 Wall. 740 [19 L. Ed. 586].

2. That this estate being insolvent, all its assets in both states are to be applied so as to equalize all the creditors according to their legal priorities, but with due regard to the priority law of each state as to the assets within its limits. Dawes v. Head, 3 Pick. 128; Tucker v. Condy, 10 Rich. Eq. 12.

3. That the payments to North Carolina creditors are to be charged to the assets in that state, and if the same be insufficient to equalize the creditors there with those in this state, they are to be made equal out of the assets here, and a like equalization is to be sought in North Carolina by creditors residing in this state if the assets here are not sufficient for that purpose.

4. In taking the accounts of defendants, all confederate money received and not heretofore paid out by them, is to be reduced to its value according to our statute.

It is ordered and adjudged that the rulings above-stated stand as my judgment and decree, that the case be re-committed to referee to take and report a full account of the assets and debts in each state, and what amounts are yet due in each by the defendants and to what debts, according to priority, the balance in this state, if any, should be applied; that he also report what amount, if any, of the assets in this state, should be paid to creditors, and what creditors, in North Carolina, in order

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to equalize *them according to the rank of their debts with like creditors in this state.

From this decree T. K. Cureton appealed to this court.

Mr. J. S. R. Thomson, for appellant.

Appeal lies—Code, § 11; 15 Stat. 495; Voorh. Code, 349; 4 S. C. 115. The case in 8 S. C. 112, is not in point. Credits should have been allowed for the $325.90, and the $1217.15; they were doubtless oversights. The proceeds of the sale of the personal property brought from North Carolina are not properly chargeable in the account of the administrators in this state. The Circuit judge errs in saying it was appraised in this state. 7 S. C. 63; 1 Rich. 116; 5 Ired. Eq. 367; 2 Bail. 438; Story on Confl. Laws, §§ 513–518, 529, b, c, d; 3 Redf. on Wills 27; Freem. on Void Jud. Sales, § 4; 2 Wms. on Ex'rs 982; 14 Rich. Eq. 105; 16 Wall. 610; 15 Pet. 6; 6 How. 59; Pend. v. Cooke, (Conn. 1877,) 6 Reporter 518; Rorer on Inter-State Laws 251. Payments to the North Carolina creditors are proper credits in the appellant's administration account here. 11 N. H. 95; 45 Iowa 221; 2 Kent 434; 10 Rich. Eq. 16; 44 Texas 497; 3 Pick. 128; 4 McC. 28.

Mr. J. B. Cleveland, contra.

The order is not appealable. Dud. Eq. 24; 8 S. C. 112. To the authorities cited by the Circuit judge to sustain his propositions, we add the following: 2 Bail. 436; 5 Pet. 518; 45 Iowa 221; 3 Pick. 128; 1 Strob. 25; 1 Rich. 116; 10 Rich. Eq. 12; 9 Wall. 740; 7 S. C. 60; 4 McC. 28; 4 McC. 278; 1 Mills' Const. R. 292; 5 Cranch 289.

April 24th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This case involves the accounting of the administrators of G. Mills. The leading question arises out of the following facts: G. Mills was domiciled, at his death, in this state, and died intestate, leaving property and debts in both this state and North Carolina. T. K. Cureton and N. Mills took out letters of administration in both states. Personal property of the intestate, situated in North Carolina at his death, was reduced to possession there by the adminis-

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trators and brought *into this state and sold by order of the Ordinary of Spartanburg. There appear to be debts of the intestate due to citizens of both states unsatisfied, and it is claimed that as it regards North Carolina debts the North Carolina assets should be applied by the administrators in accordance with the laws of that state, and not according to the priorities existing under the laws of this state. The only appellant here is the administrator, T. K. Cureton. His principal objection to this Circuit decree is that it decreed that the proceeds of sales of slaves brought from North Carolina and sold here are chargeable to the administrator's account here, and that it directed the application of the North Carolina assets, instead of holding, "that the whole of the North Carolina property should be accounted for there, and this plaintiff chargeable here as to North Carolina assets only with any surplus that might be found in his hands after a full accounting had and decree made in North Carolina."

The proposition embodied in the appellant's objection, just stated, is that the administrator ought not to be held to account for so much of the assets as came from the sale of the property of the intestate situated in North Carolina, at his death, and brought within this state by the administrators, but, if accountable therefor, under any circumstances it would only be after the North Carolina debts had been paid, and then only as it regarded the surplus of the North Carolina estate remaining undisposed of after the payment of the debts there due.

It will be observed that no North Carolina creditor is before this court as an appellant, and we are at liberty to infer from the record before us that no such creditor appeared in the action or was represented otherwise than by the administrators, one of whom is appellant here. The objection comes wholly from the administrator himself. The objection that would exclude the authority of the courts of this state from control over assets subjected to the authority of the Ordinary of Spartanburg, by the voluntary act of the administrators themselves, would seem, in itself, anomalous; but the question will be considered and disposed of on more general grounds. The questions then to be considered are, first: Have the courts of this state jurisdiction to compel a domestic administra-

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tor, representing an intestate, dom*iciled at his death in this state, to account for assets of such intestate held in this state, and received by such administrator under letters of administration issued to him by a foreign state, when such assets were situated in such foreign state at the death of the intestate, and were of a personal character? And, second, if such assets may be distributed by such domestic jurisdiction, must they be so distributed according to the laws of the state where they were so situated at the death of the intestate, or according to the laws of the domicil of the intestate?

In considering the first in order of these questions, it is material to notice the circumstance that the same persons were administrators in both states. This fact renders it necessary to consider the question of jurisdiction under two aspects. Suppose that the plaintiffs had been administrators in this state alone, and other persons had administered in North Carolina, and had collected the assets there situated, and had turned over such assets into the hands of the plaintiffs as the administrators of the domicil of the intestate for administration here? Could the courts of this state have assumed control over such assets in a proceeding in this state to compel the domestic administrator to account? This constitutes one of the two aspects above-noticed. The other may be illustrated by supposing that the present plaintiffs were North Carolina administrators alone, and not entitled to represent the intestate's estate in this state, would they, being citizens of this state, found here, and having had North Carolina assets, brought here by them, be held accountable here for the administration of such North Carolina assets?

Looking at the question under immediate consideration in the first of these aspects, it assumes the following form: Can the administrator of the domicil of the intestate be compelled to account for assets of his intestate found in his hands in such state, notwithstanding such assets may have been situated at the death of decedent in a foreign state, and there reduced to possession under administration granted by such state? The principles from which the solution of this question would naturally flow are well established by abundant authority, and free from dispute. All the authorities concur in the conclusion that according to the principles of

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international law, universally *adopted, the administration had, at the domicil of the decedent, whether dying testate or intestate, is to be regarded as the principal administration, to which all foreign administrations, granted by reason of personal assets being found at the death of the decedent in a state foreign to that of the domicil, are, in some sense, a degree subordinate. The exact relations subsisting between this original and the ancillary administrations are differently estimated by different states, but all recognize some degree of subservience on the part of the ancillary administration to the administration of the domicil. For instance, all agree that where the purposes of the ancillary administration are accomplished, according to the law of such ancillary administration, and a residuum remains, that such residuum is subject to the purposes of the original administration, to be distributed according to the law of the domicil of the decedent. There is a difference of opinion as to whether that residuum should be transmitted to the domicil of the decedent for distribution, notwithstanding there may be legatees or distributees residents of the state of such ancillary administration; some authorities holding that opinion, and others sustaining the view that when the legatees or distributees reside within the place of the ancillary administration that distribution may be made by the court of such state of assets under their control, though following the law of the domicil as it regards the order of that distribution. Harvey v. Richards, 1 Mason 381 [Fed. Cas. No. 6,184].

It will not be necessary for our immediate purpose to attempt to state the doctrine that appears to be supported by the best reasons and authority as it regards the authority of the courts of the place of the ancillary administration over assets found at the death of the decedent in such place, for, as has been already said, the validity of this principle, to which the solution of the present question is to be referred, is not involved in such discussion, but stands conceded by all.

It is one of the necessary deductions from the general character ascribed to this administration at the domicil of the decedent, by the authorities, that such administration is, in its nature, general and unlimited, while the ancillary administration is both special and limited. The nature of the ad-

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ministration had at *the domicil of the decedent depends on the universally received doctrine that personal property follows the person of its owner. This principle, doubtless, had its origin in the enlarged spirit that flows from commercial intercourse among nations. It may well be conceived that there was an older notion, more agreeable to the conceptions of states living in isolation, and, therefore, jealous of their authority, by which property, either personal or real, within such state, claimed by a citizen of a foreign state, could only be controlled and disposed of in such manner as would be admissible if the foreign owner were present and subject to the laws prevailing where such authority was to be exercised. With the development of international commerce would arise a necessity that movable property, the special subject of that com-

merce, should, wherever located, be immediately under the control of its owner, to the end that its transmission may be facilitated, as it would be where the owner, in its disposition, was compelled only to consult the law to which he was personably amenable, and not bound to act as a subject, sub modo, of every state where his property chanced to be located for the time being. Immovable property, such as lands and houses, not being within the sphere of the general operations of commerce, would remain under the more primitive rule, and that is its condition at the present day. The fact that the rule that personal property follows the person of the owner in the sense that the law that binds the person is the law that governs the transmission of his personal effects has been universally ascribed to the international law and not to municipal regulations, seems to justify the conclusions just drawn as to its origin and the nature of the rule antecedent to it. It will not be necessary to add that the force of this rule of international law depends upon local acceptance, and that many exceptions to its universality are recognized by all states; indeed, it is competent for any state to deny the rule altogether and transfer the interchange of personal property by applying the rules commonly confined to immovable property alone.

This rule of the international law looks to the power of control over movables as the essential feature of the idea of property, and to the subject of property as the adjunct, and localizes such property for the purpose of

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disposition where the dispensing *will may be found. It would follow that according to this idea the authority of the owner of movable property must be regarded as in its nature general and unlimited; general, because it covers all his movables, under whatever local sovereignty they may chance to be placed, and, unlimited, because he is not constrained as it regards the objects in regard to which he may exercise that power of control or disposition. In saying that the power of the owner over his goods is general and unlimited in its nature, it is not affirmed that that power is necessarily absolute, or, in its exercise, free from limitations imposed by the various sovereignties where his property of that class is situated, for that is not true of his domicil and cannot be absolutely true of any other jurisdiction within which his movables may be situated. Such limitations, in the exercise of the rights of ownership, do not result from the operation of any such principle as that the owner of property can only exercise such authority as is permitted by the laws but from a conflict between the rights of the individual and the community, in which case the former must give way.

Such being the character ascribed by our laws to the authority of the owner of chattels, whatever may be their situs, it would seem to follow that when that authority comes to be represented in the hands of a personal representative of a deceased owner it would possess the same nature, although that authority cannot exist to the same extent as it did in the owner while living, for the reason that the personal representative is bound either by the testamentary disposition of his testator or by the law of distribution, which did not bind the decedent. The terms general and unlimited, as applied then to the representative of the decedent, must be taken in a sense more restricted than when applicable to the living owner. It may be said to be general in the sense that it extends to all the personal effects of the decedent wherever situated, and unlimited in the sense that all the objects contemplated by the law of testamentary disposition, or of distribution of the domicil, are competent and proper objects to be had in view in the administration of the estate.

The distinction that has been pointed out between the characters of the original and of

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the ancillary administration will be *better understood when the restricted character of the latter is fully presented.

The ancillary administration, we have said, is special and limited. The sense in which these terms are used is the same as that just applied to the original administration. That administration is special, because it extends merely to such personal effects of the decedent as may be found at his death in the place of ancillary administration, while, as we have seen, the scope of the original administration is commensurate with the whole personal estate of the decedent wherever situated. The ancillary administration is limited in the sense that the objects to which that administration looks do not comprehend all that are appropriate to the original administration. The ancillary administrator is primarily concerned only with the debts of the decedent at the place of ancillary administration, and with the administration of the assets only to the extent requisite to pay such debts. In some instances the courts of the ancillary administration have undertaken to distribute the estate of a foreign decedent; but this is an exceptional jurisdiction, depending upon special circumstances, such as the fact that all the distributees, legatees or creditors are residents of the state where the assets of a foreign decedent were found, and the ancillary administration personally amenable to that jurisdiction. No authority appears to sanction the idea that the ancillary administration could make distribution in favor of foreign creditors except by the aid of the decree of a court of competent jurisdiction.

Before looking into the authorities to see how far the views already expressed have their sanction, it is proper to observe that it

is only in a potential sense that the original administration embraces all the effects of the decedent where part of these effects are situated in a foreign state. The laws of that state may prevent that claim from being actually asserted until the debts of the decedent then due are paid. But this is merely a limitation of a recognized general authority in the original administration, for the moment the objects of the ancillary administration are accomplished, the general right of the administrator of the domicil is respected by all foreign states, and the residuum subjected to that control, thus evinc-

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ing a general *recognition of the fact that the ancillary administration is special and limited, and the original administration general and unlimited.

The most conclusive proof that the original administrator has that general character which has been stated is the fact that all the creditors, whether domestic or foreign, are embraced within the rule of disposition that binds the original administrator. Cameron v. Wurtz, 4 McC. 278; Dawes v. Head, 3 Pick. 128. Some states and countries give preferences as among different classes of creditors, and in some instances preferences to their own citizens over foreign creditors, but none exclude foreign creditors from distribution, even though, by the law of the countries where they reside, the effects of the decedent, found in such countries at his death, may be subject to a preference in behalf of its own citizens who may be creditors. It is obvious that if all creditors wherever residing, are within the scope of the original administration, that all assets, wherever situated, must equally be within that scope. It is hardly to be supposed that the one would be included and the other excluded. Indeed, where a creditor who had availed himself of the laws of New Jersey to obtain part payment through an ancillary administration in that state, applied to come in with other creditors in New York, the place of original administration, all that the court did in view of the advantage gained in New Jersey was to equalize the other creditors with the one who had obtained part payment in New Jersey, allowing him to come in on equal terms with all others as it regarded the totality of assets, foreign and domestic, deducting the amount he had received. Lawrence v. Elmendorf, 5 Barb. 73.

We come, now, to the authorities bearing on the question.

Conover v. Chapman, 2 Bail. 436. The intestate was domiciled in South Carolina. The South Carolina administrator was also administrator in Maryland, where assets of the intestate estate were situated at the death of the intestate. The administrator was sued in this state on a debt of his intestate, and pleaded "plene administravit of assets which had come to defendant's hands in this state." The plea was adjudged bad on demurrer, on the ground that it was to

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be assumed that by the laws of *Maryland, the administrator was bound, after paying debts there due, to apply the residuum to the purposes of the original administration in South Carolina, and, therefore, there was at least a conditional obligation on the part of the administrator to account for the Maryland assets. Judge Butler holds that the administrator was not indeed chargeable with the Maryland assets to such extent as to render him amenable to account in this state for the disposition made of the Maryland administration, but that he was under a more limited obligation to account therefor, and that his plea of plene administravit should have been general and not limited to the assets found in this state. He recognizes the principle that the South Carolina administrator and the Maryland administrator must be legally considered distinct persons as it regards the separate offices held by the same person. This case fully recognizes that the primary authority of the administrator, at the domicil of the intestate, extends to all his effects, wherever situated, although, as it regards foreign assets, he may ordinarily account for them by showing that they are subject to another jurisdiction, to which, as a general rule, he is alone responsible for their disposition. It is consistent, therefore, with the proposition that the authority of the original administrator is general and unlimited in its nature, and his liability commensurate therewith.

Carmichael v. Ray, 1 Rich. 116. The administrator of an intestate, domiciled in South Carolina, sought to recover, upon his title as administrator, personal property of his intestate that was situated in North Carolina at his death. It was held that the South Carolina administrator acquired no title under his letters of administration to property of the intestate beyond the territorial jurisdiction of this state. This case may seem to militate against the conclusions, to the support of which it is cited, but that is apparent merely, and not real. It is one thing to say that the scope of administration is general and extends to all assets of the intestate wherever situated, and another to say that, under the circumstances of its location, his title cannot be asserted over a particular chattel that appertained to his intestate's estate. It is obvious that the conclusion of the court was correct. The defendant claimed the property under the

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opera*tion of the laws of North Carolina during the time that the property was subjected to that jurisdiction. It was clearly competent for the laws of that state, operating upon a subject of property subjected to them, to create a right of ownership that would be respected everywhere. To assert

title in the administrator, under such circumstances, would be equivalent to denying to the laws of North Carolina that force which is everywhere accredited to the laws of a sovereign state over all persons and property subjected to them. Suppose, however, that the administrator in that case had obtained rightful possession of the North Carolina property, and had brought it within this state, there is nothing in the case that would preclude the idea of his being accountable therefor as proper to be applied in a due course of administration here. Indeed, Judge Butler instances, in the opinion in that case, the payment of a foreign debt to a domestic administrator, recognizing the principle that where such payment is made, the sum paid would be assets rightfully in the hands of the administrator for administration, but he correctly holds that that principle is not applicable to the case he had in hand. Unless foreign assets are within the general scope of the administration how could the administrator be chargeable with such assets coming into his hands under such circumstances?

Wilkins v. Ellett, 9 Wall. 740 [19 L. Ed. 586]. It was held that a payment of a debt due by a citizen of one state to the administrator under the laws of another state, where the intestate was domiciled at his death, there being, at the time of such payment, no administration in the state of the debtor, was a valid payment and discharged the debt. It has been questioned whether this is not allowing the debtor to subvert the laws of his state by voluntarily contributing to remove therefrom assets, that, by those laws, are devoted to debts due within the state. However this may be, the recognition of the general nature of the authority of the administrator of the domicil involved in this case does not appear to have been at any time brought into question, and it does not appear to be questionable.

It will not be necessary to go further in the examination of the authorities, domestic and foreign, on this point, as none are found that militate against the proposition ad-

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vanced, while *throughout the whole the fundamental principles on which that proposition rests are abundantly illustrated.

If the original administrator has a general right as to all effects wherever situated, his obligation is commensurate with that right and extends to accountability for all assets reduced and reducible at home, and all actually reduced abroad. It would follow that when this administrator of the domicil of the intestate holds possession of personal effects of his intestate, within the jurisdiction from which he derives his authority as administrator, he is bound to account therefor, even though such effects at the death of the intestate were situated within a foreign jurisdiction. It would also follow that the domestic administrator is bound to account for all assets reduced to possession, wherever situated at the death of the intestate, but that such assets are properly accounted for, as a general rule, when it appears that they were, at the death of the intestate, in a foreign jurisdiction, and still so remain, and that his possession thereof was obtained as administrator under the authority of such foreign state, and that the purposes of such ancillary administration have not been fulfilled. For any devastavit of the foreign assets in the course of the ancillary administration, he would be subject to the jurisdiction of the domicil, at least to as great an extent as an ancillary administrator would be who was not accredited as the administrator of the domicil, which liability will be hereafter considered.

We come now to the second aspect of the general question, that proceeds on the supposition that the administrator had been sued in this state solely in his character of a North Carolina administrator. Could such a suit be maintained? If a citizen of this state is appointed under the laws of another state administrator of one domiciled in this state at his death, having assets in such foreign state, and such administrator bring such assets within this state, can the parties interested as creditors or distributees, compel such foreign administrator to account for such assets here?

As a general rule, rights of property matured and perfected under the laws of a state having jurisdiction of the person and property involved, are respected and pro-

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tected everywhere. The *obligations incurred as a consequence of the perfecting of such a right and the credit thereto, according to its nature, must stand on the same footing as the right itself, and be enforced everywhere where jurisdiction for that purpose can be obtained.

It is true that when public powers and authority are executory, such powers belonging to the sovereign under whom they are exercised, cannot be put in execution by any other jurisdiction than that of such sovereign. Hence it is that the powers of an administrator, being in their nature public powers, cannot, while executing, be enforced in any other jurisdiction than his own. But when rights are matured or perfected in pursuance of such power, they should be respected everywhere. Judge Butler, in Carmichael v. Ray, 1 Rich. 116, fully states the principle in the following language: "If a foreign administrator has, in virtue of his administration, reduced the personal property of the deceased there situated into his possession, so that he has acquired the legal title thereto according to the laws of that country, if that property should afterward be found in another country or be carried away and converted against his will, he may maintain a suit for it there in his own name, for he is, to all intents and purposes,

the owner thereof." If, then, the title acquired through his administration when perfected by reducing to possession be respected, and can be protected everywhere, surely the obligations imposed upon him as the consequence of obtaining such title, must accompany the right wherever it goes, and if the one can be vindicated the other can be enforced.

There are, indeed, many instances where, on grounds of public policy, one state will not enforce rights of a particular class matured under the laws of another state, but no means appear for drawing the case of the duty of an administrator to apply the assets received by him in the due course of administration within this class of exceptions. What ground there exists for saying that an administrator may come into the courts of the state to vindicate his title matured under the laws of another state, and yet cannot be brought before the courts of the state to answer for the proper disposition of said property under the laws by means of which it was acquired? It may and should be conceded on the principles already stated, that a foreign administrator

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cannot be *held to account for foreign assets that he has never reduced to possession, on the ground that his conduct was in violation of the laws of the state under which he derived his administration, for that would be to put in exercise those laws which can only be accomplished by the jurisdiction to which they appertain; but where he has reduced assets to possession, and his duty springs out of and is commensurate with his title, no good reason appears why he may not be compelled to account for such assets in any state that may chance to have jurisdiction of the proper parties and the assets the subject of controversy.

On the other hand, to deny under such circumstances a remedy in the courts of a foreign state, might amount to the loss of all remedy whatever. When the intestate was domiciled in the state where such remedy is sought, and the assets and the person of the foreign administrator are there present, and the distributees are residents thereof, unless the remedy can be there obtained it may be impossible to obtain it anywhere.

McNamara v. Dwyer, 7 Paige 239, a case decided by Chancellor Walworth, fully sustains these principles, although in that case the remedy was sought at the place of an ancillary administrator, and not, as in the present case, at the domicil of the intestate. The reasoning of that case is irresistible. Unfortunately, the conclusion of that case is misstated in the head note of its report.

Conover v. Chapman, 2 Bail. 436. In looking into this case for another purpose, we found that it was said that the ancillary administrator could not be held accountable, except in the courts of that jurisdiction. It does not appear that any person interested in the ancillary administration as a creditor entitled to be paid thereunder, was a party to that case. It is only one entitled to a remedy in the courts of the ancillary state against the administrator there localized who could claim such a remedy in any foreign state, by reason of the presence in such state of the parties and the subject of controversy. It follows that as no one of the parties had a right to complain of the manner in which the ancillary administration in Maryland had been conducted, that the court merely intended to say that the proper jurisdiction of that question was in Maryland, and not to ex-

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clude the idea that a *demand primarily cognizable in the courts of Maryland could become, under possible circumstances, cognizable in the courts of South Carolina.

Collins v. Bankhead, 1 Strob. 25. It is said in this case that there is a general liability on the part of the ancillary administration to account to the original administrator for the ancillary administration. This statement should doubtless be qualified in the manner already indicated, but it certainly covers the general idea that such an accountability is possible, and, such being the case, where the ancillary administrator and the domestic administrator are one person, clearly that liability could be inferred under the limitations already stated at the demand of domestic creditors or distributees in the domestic forum.

Carmichael v. Ray, 1 Rich. 116, while recognizing the responsibility of an ancillary administrator in respect of foreign assets reduced to possession there, properly holds that the courts of the domicil cannot aid such ancillary administrator to reduce such foreign assets to possession, even though such assets may be found at the place of domicil. This conclusion is in accordance with the principle that public powers, such as the case holds the powers of an administrator to be, cannot, while executory be enforced by a foreign jurisdiction.

Campbell v. Tousey, 7 Cow. 64. A Pennsylvania executor was, in this case, held responsible to account in New York for Pennsylvania assets, received in that character. The court held that he could not be charged as executor as he had no such authority in New York, but that he was liable to account therefor as executor, de son tort, for such Pennsylvania assets. The difficulty in the explanation of this ground of accountability was noticed by Chancellor Walworth in McNamara v. Dwyer, already commented upon, but he did not undertake to develop his objection. It is obvious that to charge one as executor, de son tort, it must appear that he obtained assets by an act of wrong; but this cannot be affirmed of one who, by the laws of a country to which he was at the time amenable, and

having jurisdiction of such assets, is clothed with authority over the same. The conclusion that such action should be maintained against the defendants as executor, de son

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tort, appears to have been forced out *of respect to the principle that a foreign executor has, as such, no standing in the domestic forum to enforce his powers as such. That is, indeed, true, but does not interfere with his accountability, based on his duty by reason of assets reduced to possession, to properly apply them in the course of administration, for the remedy in that case is upon his individual duty. When he is before the court for such a purpose, it is his powers and obligations, consummate through his authority as an executor, that is the subject of controversy.

Boston v. Boylston, 2 Mass. 384, was decided upon a Massachusetts statute, and is not recognized as a general authority.

Dawes v. Boylston, 9 Mass. 337, denies, in general terms, the right of the legatees in that case to pursue distribution in that ancillary jurisdiction, but places the conclusion on the ground that only a partial distribution could be effected in Massachusetts, and full administration only could be had at the domicil, which was England. This principle is not confined to the case of a foreign administration, but equally affects the right of seeking distribution in a case of purely domestic administration. This case cannot be regarded as going beyond the statement of an exception to the right of legatees to call the original executors to account within an ancillary jurisdiction, and is clearly no authority for the proposition that an ancillary administrator cannot be made to account for foreign assets in the jurisdiction of the domicil.

Richards v. Dutch, 8 Mass. 506. A Massachusetts administrator of a testator, domiciled in India, sued on a debt due to his testator in Massachusetts. The defendant attempted to show that the subject of the debt, namely, property of the testator in his possession, had been left as a legacy to him by the testator. The court treated the defence as if it had been an action by a legatee for a legacy, and, as such, denied that it could be maintained against an ancillary administrator. Nothing is said in the case about any assent of the foreign executor, and such assent does not appear to have been a matter at all considered. It may well be doubted whether the assent of the ancillary administrator could entitle the legatee to sue in a court of law. The real difficulties of the case appear not to have been developed, and it

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*cannot properly be regarded as an authority upon the matters under present consideration, as they were not involved in it.

Dawes v. Head, 3 Pick. 128. The only point actually decided was that it was not a breach of the condition of the ancillary administrator's bond; that he had failed to pay a debt due to a foreign creditor, a resident of the country of the domicil of the foreign testator. It, therefore, can be regarded as no more than an exposition of the law of Massachusetts as it regards the extent of the objects to which ancillary administration, had in that state, primarily extends. The general discussion in that case does not profess to be material to the question then before the court; but, even if carrying authoritative weight, the conclusion arrived at that it is the duty of the ancillary administrator, after satisfying local debts, to transmit the residuum, does not even exclude the idea that the courts of that state obtaining jurisdiction over the foreign executor, and, having the assets in their jurisdiction, might proceed to make distribution according to the law of the domicil of the testator or intestate. Much less would it exclude the idea that the courts of the domicil, having jurisdiction of the person of an ancillary administrator and control of the assets, might proceed to adjust the accountability of each ancillary administrator at least to the extent of the assets within its control.

Fay v. Haven, 3 Metc. 109. The defendant was both administrator of the domicil and ancillary administrator in Massachusetts, and it was held that he was not bound to account in the latter place for assets received in Louisiana, the place of domicil. This case is consistent with the proposition already stated, that when an ancillary administrator is sued in his own jurisdiction, he sufficiently accounts for foreign assets received in the character of a foreign administrator by showing that these assets are in the course of administration in the proper jurisdiction to which they appertain. It was not a case where the court was proceeding with reference to assets within its control.

Harvey v. Richards, 1 Mason 381 [Fed. Cas. No. 6,184], decided by Judge Story in the United States Circuit Court, must be regarded as an exposition of the laws of Massachusetts, and that case holds that where there was ancillary administration in Massachu-

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setts of the *estate of one domiciled, at his death, in Calcutta, and leaving a will there, under which executors had qualified, such ancillary administrator could be compelled to distribute the Massachusetts assets there, when the necessary parties were all before it, and the circumstances of the case were such that complete distribution could be made. If the ancillary jurisdiction could be extended thus far, clearly a similar exercise of authority would be competent on the part of the jurisdiction of this domicil having the legatees or distributees and the foreign ancillary administrator and the assets before it.

Goodall v. Marshall, 11 N. H. 88 This

case did not involve the present question but gave deliberate consideration to the general question. Chief Justice Parker recognizes that special circumstances may warrant the assumption of jurisdiction by the courts of the ancillary administration in decreeing distribution, citing for that purpose Harvey v. Richards, and various other cases.

Pipon v. Pipon, Amb. 25, holds that distributees have no right to file a bill for a partial settlement of the estate merely, and this conclusion is placed upon the language of an English statute.

Tourton v. Flower, 3 P. Wms. 369, was decided upon a ground that appears to imply that a bill might properly be filed in England against an ancillary administrator there for the distribution of the estate of one domiciled in France, at his death, who left a will under which executors qualified.

It must be concluded that the proposition that an ancillary administrator, resident within the jurisdiction of the domicil of the decedent, and having there assets of the decedent, may be compelled to account there for his administration of all assets under the control of that jurisdiction, is sustained by the authorities. It follows that the administrators in the present case were bound to account for the North Carolina assets in their possession, and it remains to consider under what law the distribution of such North Carolina assets must take place.

It is well settled that the assets of a decedent, found in any state or country, whether the domicil of such decedent or otherwise, are to be applied in a course of adminis-

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tration, under the *laws of such state, to the extent of the payment of all debts provided for by the laws of such state, and that all preferences allowed by such laws are to be respected. It is also well settled that where a residuum remains, after satisfying the purposes of ancillary administration, it must be distributed according to the law of the domicil of the decedent. It is only necessary to make a general reference to a few of the cases. Tucker v. Condy, 10 Rich. Eq. 16; Smith v. Bank, 5 Pet. 518 [8 L. Ed. 212]; Lawrence v. Elmendorf, 5 Barb. 73; Goodall v. Marshall, 11 N. H. 85.

The assets brought into this state by the administrators must be accounted for and distributed in this action as it regards North Carolina debts, according to the laws of the State of North Carolina.

The exceptions to the decree, so far they relate to the rule of administration, must be overruled.

The appellant excepted to the decree on the ground that a credit to the amount $325 was not allowed. No evidence appears showing that the objects for which that amount was paid were proper for such payment. Without such proof the item could not be allowed. The exception as to the item of $1217.25 does not appear in the exceptions to the report of the referee, and cannot, therefore, be noticed; and in addition to this there is no evidence that the amount thus paid was applied to proper objects.

The decree must be affirmed and the appeal dismissed.

McIVER, A. J., concurred.

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13 S. C. 430

(Case No. 866.)

CARROLL v. STILL.

(November Term, 1879.)

[*Bills and Notes* ⟸456.]

Where a sealed note, payable to A, as administrator, &c., has been transferred to B, who thereby became the legal owner and holder of it, an action on the note may be maintained in the name of "A, as administrator, &c., who sues for the sole use and benefit of B."

[Ed. Note.—Cited in Hill v. Hill, 51 S. C. 139, 28 S. E. 309; Barnwell v. Marion, 54 S. C. 228, 32 S. E. 313.

For other cases, see Bills and Notes, Cent. Dig. § 1418; Dec. Dig. ⟸456.]

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*Before Townsend, J., Edgefield, October, 1877.

The case is fully stated in the opinion of the court.

Mr. A. J. Norris, for appellant, cited Code, § 134; 6 S. C. 184; 25 N. Y. 625; 6 Wall. 134.

Mr. J. L. Addison, contra, cited Code, § 136; 6 S. C. 119.

April 24th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This action was brought by James P. Carroll, administrator of Preston S. Brooks, deceased, who sues in this behalf for the sole use and benefit of Robert G. M. Dunovant against Elijah Still, upon a note under seal, given to James P. Carroll, as administrator. The defendant filed what was styled a demurrer, in these words: "That if R. G. M. Dunovant is the holder and owner of said note, the action should have been in his name; and if J. P. Carroll, as administrator, is the holder and owner of said note, then the action should have been brought in his name." This demurrer was overruled, and the defendant appeals to this court.

The demurrer does not "distinctly specify the grounds of objection to the complaint," but states them hypothetically, and might have been disregarded. Code, § 168. We will, however, consider it as if it specified distinctly the ground of objection to the complaint under sub-division 2 of the Chapter on Demurrers, viz.: "That the plaintiff has not

legal capacity to sue." Demurrers upon purely technical grounds are not favored, and the real question in the case is, not who ought to have brought the action, but whether, as it has been brought, it can be sustained upon principle and authority.

From the earliest history of this state down to the year 1870, when the code of procedure was adopted, the payee of a bond or note under seal, not being negotiable and not assigned under the act of 1798, was held to have the legal interest and to be the proper person to sue upon it, whether it had been transferred or not. That was not only the universal practice, but the only way in which such an obligation could be enforced in a law court.

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*The code of procedure made the following provisions on the subject: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section 136." Code, § 134; Gen. Stat. 594. The section referred to as making exceptions provides as follows: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

The latter provision expressly covers the case of a bond given to an administrator, and why may not this action, in accordance therewith, be prosecuted in the name of James P. Carroll, as administrator, without reference as to who is the real party in interest? It was insisted that the exception does not include this case, for the reason that "Dunovant is a stranger to the administration of the estate of Brooks, and that the action is not brought by J. P. Carroll for any purpose connected with his trust as administrator," but it was stated on the other side with equal confidence, "that the note was turned over to Dunovant, as guardian for the eldest daughter of P. S. Brooks, deceased, as part of her distributive share of her father's estate, and that the note was never the private property of Dunovant." These statements are decidedly conflicting, but the court cannot accept either as affecting the judgment. The demurrer admits the truth of the statements in the complaint, and these are the only facts which are before us.

The complaint states that the instrument sued on is a note under seal; that it was given to James P. Carroll, as administrator of P. S. Brooks, deceased; and that it had been transferred for a valuable consideration to Dunovant, who is now the legal owner and holder of the same, whose name is also on the record as beneficiary plaintiff. In this state of facts, we do not see why the plaintiff, James P. Carroll, may not maintain the suit as administrator. The exception in the code contains no qualification limiting the right to "purposes connected with the trust of administration," and we are not

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to assume any such thing. The *defendant does not deny his obligation to pay the note. No substantial right is involved. The case of Sullivan v. Hellams, 6 S. C. 184, is not analogous, for there the note was given to G. W. Sullivan in his individual capacity, and, therefore, never came within the exception. The case of Billings v. Williamson, 6 S. C. 119, is in point. That was the case of a bond given to Billings, as commissioner in equity, who had no interest in it except as a trustee of an express trust, and the bond had been transferred by operation of law to the clerk; yet the court sustained the action in the name of Billings, the payee, even after his office of commissioner had been abolished. In that case the court say: "It is possible that a strict compliance with mere technical form would have been better fulfilled if the complaint had been brought in the name of the clerk." So we may say in this case, that it is possible it would have been more technically correct if the action had been brought in the name of Dunovant; but the code declares, without qualification or limitation, that in such a case the administrator "may sue," and we are not to narrow, by construction, the express statutory provision, whether the administrator has or has not transferred the equitable interest in the single bill so made payable to him, and on that account falling within the exception.

The order below is affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 433

(Case No. 867.)

WATSON v. COLUMBIA BRIDGE COMPANY.

(November Term, 1879.)

[*Mechanics' Liens* ⟸292.]

A, having purchased all the shares of an incorporated bridge company, hypothecated the stock and mortgaged the property to secure certain notes, and, after that, contracted with a builder to repair the bridge. For a balance due for such repairs, the builder, within the time required by statute, filed the notice and petition necessary to secure a mechanics' lien, and obtained judgment thereon against A in his own name, with a decree for the sale of the bridge to satisfy the lien. The shares of stock

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were after*wards sold under a power given by A at the time of their hypothecation, and the purchasers, claiming to be the corporators, resisted payment of the decree. Upon action brought a year afterwards against the corporation in their corporate name to have this decree enforced against the bridge property—

Held, that a decree in this action directing its sale for the satisfaction of the lien, was proper.

[Ed. Note.—Cited in Ex parte Roberts, 19 S. C. 157; Green v. Iredell, 31 S. C. 595, 10 S. E. 545.

For other cases, see Mechanics' Liens, Cent. Dig. §§ 599 605, 607, 610; Dec. Dig. ⟸292.]

Before Wallace, J., Richland, July, 1879.

This case is fully stated in the opinion of the court.

Messrs. Melton & Clark, for appellant.

Mr. J. D. Pope, contra.

April 26th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. The Columbia Bridge Company was incorporated, and, up to the close of the war, owned the bridge across the Congaree river at the foot of Gervais street, and known as the "Columbia Bridge." In the month of February, the bridge was burned, and the stock became almost worthless. In 1872, John L. Neagle purchased all the shares of stock in the company, and then, having full control as the only stockholder, rebuilt the bridge on the old site.

In the spring of 1873, he hypothecated with the receiver of the bank of the state two hundred shares of the stock as collateral security for a loan of $10,000, and in the summer of the same year, he executed a mortgage to L. D. Childs, as trustee, under his own hand and in his individual name, of the entire bridge property, and by the said deed hypothecated nine hundred and twenty-two and one-half shares of the stock to secure a loan from the Carolina National Bank of $30,000. In 1875, Neagle contracted with Mayhew & Co., mechanics, to repair the western abutment of the bridge, which had been damaged. The work was completed in August, and within thirty days thereafter Mayhew & Co. filed a notice for the purpose of securing a mechanics' lien on the bridge property upon which the work was done.

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*Within six months after the completion of the work, they filed their petition to enforce the lien against "J. L. Neagle," who did not resist the claim, and February, 1876, Judge Carpenter gave judgment for $424.20, and in May thereafter, Judge Cooke, sitting for Richland county, decreed that the bridge property should be sold in satisfaction of the lien established as stated. Afterwards, the sheriff advertised the property for sale, but for some reason he did not sell it. In November, 1877, the shares of stock pledged to the bank, and Childs, were sold under powers in the transfer, and purchased by Johnson and others, who now claim, by virtue of the ownership of these shares, to be the company, and in the name of the charter title, the "Columbia Bridge Company," resist the sale under the decree aforesaid. This and the judgment have been assigned to John L. Watson, and he, as assignee, brought this action to enforce the decree against the "Columbia Bridge Company," and to have the bridge property sold. The Circuit judge decreed for the plaintiff, and ordered the bridge sold in satisfaction of the lien. From that decree the "Columbia Bridge Company" appeals to this court upon the following grounds:

1. "Because the complaint states no cause of action against the defendant.

2. "Because the plaintiff has no right which can be enforced by this form of action.

3. "Because, if the said John L. Neagle so represented the corporation as that it should have become bound by a judgment rendered in an action in which the said Neagle, in his own person, was defendant, the authority of the latter would certainly be sufficient to bind the corporation by his deed, and the mortgage to Childs, trustee, carried the entire estate of the corporation."

As to this last exception, the proposition stated is correct, but we do not see its application. We do not understand that any one is before the court setting up the mortgage executed to L. D. Childs, trustee. If so, that would present no good ground against the sale of the property, but as to the disposition of the proceeds of sale it would raise a nice question of priorities under the ninth section of the mechanics' act. Gen. Stat. 550.

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*The brief contains nothing on the subject, but it was stated at the bar that the Childs' mortgage was paid in full by the sale of the stock hypothecated. That being the case, the mortgage is discharged and we need not further consider the third exception; the purchaser cannot take the stock, and at the same time set up the mortgage which was paid by the sale of the stock. The plaintiff is assignee of Mayhew & Co., and as such is entitled to all the rights which his assignors had at the time of the assignment and no more. The defendant has the right to ask that the case shall be considered as if the action were brought in the name of Mayhew & Co., and there is no question of counterclaim in the case, we will so consider it. As to the point made by the first exception that "the complaint states no cause of action against the defendants." As we understand it, this is not an original petition to enforce lien under the mechanics' act before cited; if so, it would be too late as that act declares that "unless the suit for enforcing the lien is commenced within six months, &c., the lien shall be dissolved." The petition required by that act was filed and the lien established and sale of the property ordered. That order was analogous to a decree of foreclosure of a mortgage, and as there was no appeal, all the points now made as to alleged irregularities in the lien must be regarded as adjudged, if the cause of action was substantially the same in that action as in this. "The rule in these cases is that a point once adjudged by a court of competent jurisdiction, however erroneous the adjudication,

may be relied upon as an estoppel in any subsequent suit in the same or any other court at law or in chancery when either parties or the privies of either allege anything inconsistent with it, and this, too, whether the suit is upon the same or a different cause of action." Bigelow on Estop., 45.

It is manifest that the cause of action sued upon in the case against Neagle is substantially the same as stated in this. The court does not see that any obstacle has been interposed to the enforcement of the decree already rendered so as to make an actual case, and there is no propriety in giving judgment in a matter which has been already adjudged. But it does appear that the enforcement of the order of sale in the first case is resisted on the ground that the property of the cor-

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poration can*not be sold under an order rendered in a case against "J. L. Neagle" individually. This may be equivalent to a complaint on the part of the defendants to enjoin the sale of the bridge property under the decree, and in order to end the litigation, we will consider that actual issue as made. That decree may be enforced against the bridge property precisely as if the name of the "Columbia Bridge Company" instead of "J. L. Neagle" had been used as defendant. To establish a mechanics' lien it is not necessary that the contract for the work should be made with the owner of the property. It is sufficient if it is made "with any one rightfully acting for such owner," and where the work is done under such authority, the lien arises not ex contractu, but from doing the work. The claim is against the property in the nature of a proceeding in rem. After the petition is filed, the court, under the act, takes measures to have the proper parties notified. In this case Neagle was the owner, and was the only person who could be notified at the time the proceeding was instituted.

Neither the hypothecation of the stock nor the mortgage of the property by Neagle divested his title until the stock was sold in 1877. He made the contract and was in possession; the right party was notified, and the objection is reduced to this, that he should have been sued as the "Columbia Bridge Company." Considering substance and disregarding mere form, the decree of sale in the case of Neagle may be enforced as if the defendant named had been the "Columbia Bridge Company." That is the truth of the matter, and the court can look to the real facts in the case. As Mr. Justice Miller says in the case of Miles v. Caldwell, 2 Wall. 35 [17 L. Ed. 755]: "Courts of equity are not restrained by technicalities but can look past the nominal parties to the real ones." Who are nominal and who are real parties have often been considered in questions of res adjudicata. The very point was decided in the case of Tate v. Hunter, 3 Strob. Eq. 136. Tate sued Cobb, sheriff, for money in his hands, and Cobb defended on the ground that the money was applicable to an execution of A. Hunter, and that issue was decided for the sheriff, and afterwards Tate sued Hunter himself, and the court held that the cause of action was the same, and that

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in the first suit, *Cobb was the technical, but Hunter the real party in interest, Chancellor Dargan says: "The general rule certainly is that the judgment of a competent court is binding and conclusive upon the parties, and will not be reviewed or reversed by any court possessing jurisdiction. * * * The subject matter and the issue are precisely the same with those in the former trial. The complaints are the same and the defendant is substantially the same. The only question worthy to be considered is whether this is a case between the same parties as those in the case of Tate v. Cobb, sheriff, tried at law. Upon this point, as already intimated, I have a very decided opinion. The sheriff, in that case, was merely a nominal party, and the defendant in this case was the real party in interest. The sheriff is the agent of the plaintiff in execution. As was said in the Duchess of Kingston's case, the court will take notice of the real parties to the suit. Such also was the doctrine held in the King's Bench in Kernerly v. Orsse, 2 Doug. 517."

There is another view. If we look behind the corporate title, which is a mere name to the real litigations, we find that the defendants are the successors of Neagle and his privies. Neagle owned all the stock. He was in possession of the bridge which he had built. He had the repairs made, and a lien for their value had been established during his ownership. He owned all the shares, including the very shares which the defendants subsequently purchased at a sale authorized by him, and, therefore, from him as sole owner. They are in under him as stockholders—as his privies—and are estopped from denying his acts or a decree founded on them. "If the subject of the former action is the title to land, a decision thereon would conclude all parties having purchased after judgment from parties bound by that judgment." State, ex rel. Brown, v. C. & L. R. R. Co., ante p. 290. There is a difference between the stock of the company and its property. The title of the property is in the corporation and not in the stockholders individually, whose right to control it is through action of the corporators.

The stock may change hands and bring in new members, but they take their interest subject to lien placed upon the property by their predecessors. The present defendants

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purchased the stock *of J. L. Neagle, and they cannot repudiate by using the corporate

title, a lien placed upon the property through him.

The Circuit decree is affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

13 S. C. 439

STATE v. McKETTRICK.

(April Term, 1880.)

[*Criminal Law* ⟸1023.]

The sentence of the prisoner in the Court of General Sessions is the final judgment, from which alone an appeal may be taken.

[Ed. Note.—Cited in State v. Prater, 27 S. C. 600, 4 S. E. 562; Archer v. Long, 46 S. C. 295, 24 S. E. 83; State v. Burbage, 51 S. C. 286, 28 S. E. 937; State v. Stephenson, 54 S. C. 239, 32 S. E. 305; State v. Hughes, 56 S. C. 543, 35 S. E. 214; State v. Byars, 79 S. C. 175, 60 S. E. 448.

For other cases, see Criminal Law, Cent. Dig. § 2596; Dec. Dig. ⟸1023.]

[For subsequent opinion, see 14 S. C. 346.]

Upon the call of this case upon the docket of the Supreme Court, it appeared that the appellant had been convicted of an assault and battery in the Court of General Sessions for Abbeville county, at September Term, 1879; but the presiding judge refused to sentence him, as an appeal was to be taken.

This court declined to hear the appeal, as there was no final judgment from which alone an appeal would lie; the sentence of the court being, in such cases, the final judgment.

13 S. C. 439

(Case No. 870.)

BALLE v. MOSELEY.

(April Term, 1880.)

[1. *Pleading* ⟸72.]

A complaint cannot be held on demurrer to be defective in not stating facts sufficient to constitute a cause of action, because that it contains no prayer for relief.

[Ed. Note.—Cited in Williams v. Irby, 16 S. C. 374; Butler v. Williams, 27 S. C. 225, 3 S. E. 211; Westlake v. Farrow, 34 S. C. 273, 13 S. E. 469; McMakin v. Fowler, 34 S. C. 289, 13 S. E. 534; Lassiter v. Okeetee Club, 70 S. C. 107, 49 S. E. 224.

For other cases, see Pleading, Cent. Dig. § 143; Dec. Dig. ⟸72.]

[2. *Pleading* ⟸199.]

[Cited in Kennerty v. Etiwan Phosphate Co., 17 S. C. 416, 43 Am. Rep. 607, to the point that an objection by demurrer may be made after issue joined.]

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 464–469; Dec. Dig. ⟸199.]

Before Wallace, J., Laurens, February, 1880.

The case is fully stated in the opinion of the court. Defendant appealed from the order of the Circuit judge, holding the complaint to be sufficient to sustain a judgment.

Messrs. Pope & Watts, for appellants, cited

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Code, § 165; 20 *How. Pr. 184; 24 Ib. 313; 19 Abb. 449; 1 Rob. 87; 2 Ib. 56; 15 Abb. 352.

Mr. James Farrow, contra.

The requisites of a complaint (Code, § 165,) as to demand for relief, is applicable only to cases in which a defendant does not answer. Sec. 299; 5 S. C. 8; 6 S. C. 130; 2 Abb. Forms 8, note. The demurrer here is not sustainable. 1 Abb. Forms 112, 113, note h. The relief awarded to plaintiff may be any consistent with the case made by the complaint and embraced within the issue. Code, § 299; 2 Wait's Pr. 306; Bliss' Code Pl., § 404. Whether demanded or not. Bliss' Code Pl., § 161; Voorh. Code 425, a. Liberality of code in furtherance of justice. Secs. 182, 192, 193, 196, 199; Bliss' Code Pl., § 442; 2 Wait's Pr. 312. If it is a defect, the objection should have been raised on motion and before answer. 6 S. C. 137; 2 Wait's Pr. 334; Voorh. Code 202; Bliss' Code Pl., §§ 420, 435, 436, 442. And if well raised by demurrer, plaintiff should have leave to amend. Code, §§ 192, 193; Voorh. Code 262, h.

May 3d, 1880. The opinion of the court was delivered by

McIVER, A. J. This action was brought to recover damages for a trespass alleged to have been committed by defendant in causing a bale of cotton to be taken from the possession of the plaintiff. The complaint, which is set out in the brief, alleges that the plaintiff was the owner and entitled to the immediate possession of the bale of cotton; that defendant caused the same to be seized and taken from the possession of the Laurens Railroad Company, with whom it had been deposited by the plaintiff, and concludes in these words: "That the defendant, having obtained the possession of the said bale of cotton, did cause the said sheriff to sell the same as under a lien warrant, and thereby said defendant unlawfully converted and disposed of the same to his own use, to the damage of the plaintiff one hundred dollars." The defendant "answered the complaint as to the merits," but whether by a general denial or by alleging matters justifying the seizure, does not appear, nor is it important.

At the trial the defendant interposed the

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objection, by way of *demurrer, that the complaint did not state facts sufficient to constitute a cause of action, the only omission claimed being that the complaint contained no demand for relief. Even conceding that the complaint is defective in not concluding with a formal demand for relief, the practical question in this case is, whether such defect rendered it amenable to the objection that the complaint does not state facts suffi-

cient to constitute a cause of action. The demand for relief is not part of the cause of action, (Pom. on Rem., § 580, p. 630,) and, therefore, any defect in the form of such demand does not constitute any ground for the demurrer interposed in this case. 2 Wait's Pr. 452–3. It does not appear that any fact is omitted which is necessary to constitute the plaintiff's cause of action, and until this does appear there is no ground upon which a demurrer under sub-division 6 of Section 167 of the code, could be sustained. If the complaint is defective in that it does not comply with the requisites prescribed by sub-divisions 1 and 3 of Section 165 of the code, such defects afford no grounds for the demurrer interposed here; for that is the appropriate remedy only where the defect complained of is the omission to state facts sufficient to constitute a cause of action.

In pursuance of these views the judgment of this court has already been entered, affirming the judgment of the Circuit Court.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 441

(Case No. 871.)

BARRETT v. WATTS.

(April Term, 1880.)

[1. *Executors and Administrators* ⇐333.]

An action was brought in the county of L, by the creditors of one deceased, to marshal assets, subject lands to the payment of debts, &c.; two tracts of the land lay in the county of L, and one of these tracts was claimed by one of the defendants, and another tract, which was claimed by other defendants, lay in the county of A. *Held*, that under an issue framed in this cause, the question of title to the lands in A might be tried in the county of L.

[Ed. Note.—Cited in New Home Sewing Machine Co. v. Wray, 28 S. C. 100, 5 S. E. 603; Wagener & Co. v. Swygert, 30 S. C. 302, 9 S. E. 107.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1372–1375; Dec. Dig. ⇐333.]

[2. *Executors and Administrators* ⇐356.]

Held, further, that there was no misjoinder of actions in the complaint. Suber v. Allen, ante p. 317, approved.

[Ed. Note.—Cited in Sheppard v. Green, 48 S. C. 174, 26 S. E. 224.

For other cases, see Executors and Administrators, Cent. Dig. §§ 1463–1467; Dec. Dig. ⇐356.]

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[3. *Courts* ⇐153.]

*The Court of Common Pleas is a court of general jurisdiction, and has power to try all cases, except such as are specially excluded from its jurisdiction.

[Ed. Note.—Cited in Ex parte Ware Furniture Co., 49 S. C. 28, 27 S. E. 9.

For other cases, see Courts, Cent. Dig. § 375; Dec. Dig. ⇐153.]

[This case is also cited in New Home Sewing Mach. Co. v. Wray, 28 S. C. 86, 5 S. E. 603, and distinguished therefrom.]

Before Wallace, J., Laurens, February, 1880.

Action commenced 1876 by Elizabeth C. Barrett in behalf of herself and all others, creditors of Richard Watts, deceased, against John B. Watts, in his own right, and as executor of Richard Watts, and other defendants. The appeal was taken by the plaintiff and one of the defendants. The other facts are stated in the opinion of the court.

Messrs. Pope & Watts, Caldwell, Ball, for appellants.

Messrs. J. R. Abney and James Farrow, contra.

May 3d, 1880. The opinion of the court was delivered by

McIVER, A. J. The object of this action was to marshal the assets of the estate of Richard Watts, obtain an order for the sale of his lands, call in his creditors and provide for the payment of such claims as might be established against his estate. The deceased, at the time of his death, was domiciled in Laurens county, and the complaint, which was filed in the Court of Common Pleas for Laurens county, alleged that he died seized and possessed of lands, both in Laurens and in Abbeville counties—two tracts in Laurens and one in Abbeville—as well as personal property alleged to be insufficient for the payment of his debts. Two of the defendants, devisees of the testator, by their answers set up title to the Abbeville tract under a parol gift from the testator perfected by adverse possession, and the executor, who was also a defendant and devisee, set up a similar claim to one of the Laurens tracts. The other tract in Laurens has been sold under an order heretofore granted in this cause, and all the other substantial matters in the case have been heretofore disposed of, except the question raised by some of the defendants as to the title to the Abbeville land, the claim to the remaining tract in Laurens, and the accounting by the

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executor *for the rents of the Laurens lands. At the last February Term of the Court of Common Pleas for Laurens county, the attorneys for the appellants "moved for a trial by the jury of that court of the issues of fact material to the question of title in controversy between the appellants and the respondent, as such issues should be agreed upon by counsel or settled by the presiding judge." The counsel for the parties who set up a claim to the Abbeville land "raised a question as to the jurisdiction of the court and moved to dismiss the complaint as to the Abbeville tract, on the ground that the land in controversy, being situate in Abbeville county, the title to the same could not, by law, be tried or determined by a jury of a court of Laurens county." The Circuit

judge held "that the Court of Common Pleas for Laurens county had no jurisdiction to try, by a jury or otherwise, the title to the lands in Abbeville county and refused either to refer issues to the jury or to dismiss the complaint as to the Abbeville land, and left the cause in statu quo, except so far as the adjudication of want of jurisdiction in that court was concerned." From such ruling this appeal is taken upon grounds stated in the brief, which it is not necessary to set out here, as the only point ruled by the court, which is questioned by the appeal, is, whether, in the case as made, the court in Laurens had jurisdiction, in any form, to determine the question raised as to the title to the Abbeville land.

The Court of Common Pleas being a court of general jurisdiction, it is incumbent upon those who deny its jurisdiction in any particular case to point out the constitutional or statutory provision which abridges such general jurisdiction. It is not pretended that there is any provision in the constitution which would have such an effect, and the only statutory provision relied upon for the purpose is that contained in Section 146 of the code of procedure, which is as follows: "Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, in the cases provided by Statute 1; for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest," &c. It will be observed that the language is where "the subject of the action,

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or some part *thereof, is situated," &c. So that the inquiries in this case, are: 1. What was the subject of this action. 2. Whether any part thereof was situated in Laurens county. It is very clear that the subject of this action is the property, both real and personal, of which it is alleged the deceased debtor died seized and possessed, and not merely that portion of it situated in Abbeville, and it is conceded that "some part thereof"—and much the larger part—is situated in Laurens county. It follows, therefore, that this provision of the code cannot have the effect claimed for it.

It may be, that, upon a proper showing, in a case like the one under consideration, it would be proper to order the trial of the issue raised as to title to be had in the county where the land lies, in analogy to the provision made for the change of the place of trial, but that is a matter which should be addressed to the discretion of the Circuit Court and is not before us for our consideration.

It may be, also, that before ordering a sale of the lands to which claims are set up by some of the devisees, that it would be proper, first, to exhaust the assets which have come, or should have come, into the hands of the executor, and that for this purpose the executor should first be required to account for the rents and profits of the Laurens land, but that, too, is a matter for the Circuit Court and is not before us for our consideration.

The position taken by respondents in the argument that two causes of action which cannot be properly united are really involved in this case, cannot be maintained. What constitutes the cause of action in cases of this kind has been so fully and clearly stated in the recent case of Suber v. Allen, ante p. 317, that it is not necessary to repeat it here; and from the principles there laid down, it is quite clear that two causes of action are not involved in this case.

The judgment of the Circuit Court is reversed, and the case remanded to the Court of Common Pleas for Laurens county for such further proceedings as may be necessary under the views herein announced.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. *445

*(Case No. 872.)

NIMMONS v. STEWART.

(April Term, 1880.)

[1. *Costs* ⇐103.]

Where an action is instituted in the court of equity for the benefit of persons unable to contract for themselves or by one of a class for the benefit of all, the fees and costs should be apportioned and paid out of funds which the litigation has brought under the control of the court.

[Ed. Note.—Cited in Westmoreland v. Martin, 24 S. C. 240; Buist v. Williams, 81 S. C. 499, 62 S. E. 859.

For other cases, see Costs, Cent. Dig. § 398; Dec. Dig. ⇐103.]

[2. *Equity* ⇐402.]

A reference to ascertain what would be a reasonable fee in such cases is only to inform the conscience of the judge, and parties in the cause have no right to notice of the reference.

[Ed. Note.—Cited in Hubbard v. Camperdown Mills, 25 S. C. 496, 505, 1 S. E. 5; State v. Port Royal & Augusta R. R. Co., 45 S. C. 467, 23 S. E. 380.

For other cases, see Equity, Cent. Dig. § 874; Dec. Dig. ⇐402.]

[3. *Attorney and Client* ⇐155.]

[The trustee of an idiot, for whom a charge of $2,000 was made upon land for her support, obtained a decree for the sale of the land, and the setting apart of $2,000 of the proceeds, the interest of which was to be appropriated to the support of the idiot. *Held*, that $200 should be allowed out of the $2,000, as a fee for the trustee's attorney.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 316; Dec. Dig. ⇐155.]

[4. *Attorney and Client* ⇐130.]

[Cited in Ex parte Fort, 36 S. C. 25, 15 S. E. 332; Park v. Laurens, 68 S. C. 218, 46 S.

E. 1012, to the point that a claim for professional services as between attorney and client rests upon contract express or implied.]

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 292, 293, 295, 296, 306, 307, 311; Dec. Dig. ⟸130.]

[This case is also cited in Westmoreland v. Martin, 24 S. C. 238, and distinguished therefrom.]

Before Aldrich, J., Pickens, June, 1879.

The case is fully stated in the opinion of the court.

Mr. W. E. Earle, for appellants, cited the code of procedure, Section 278 as amended, and Section 296.

May 3d, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This case was submitted without a word of argument of any kind whatever, and we know nothing of the circumstances except what we find in the brief.

It seems that Isaac Anderson executed to the son, John F. Anderson, a conveyance of a tract of land in Pickens county, containing fifteen hundred and sixty acres, more or less, not however, to take effect in possession during the lives of the donor and his wife, and also upon the further condition that his idiotic daughter, Mary, should have a support for life out of the said land; and if the donee, John F. Anderson, should fail to give a good and sufficient support to Mary, then the sum of $2000, charged upon the said land, was to be set apart to Hester Nimmons and Alpha Barton, as trustees, for the support of Mary. That Hester Nimmons, the plaintiff, alone accepted the trust, and the life tenants, as well as the donee, John F. Anderson, having died, she, in the double character of one of the heirs of Isaac Anderson and as trus-

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tee for the idiot daughter, Mary, in*stituted these proceedings, first, for the partition of the land; and, second, to raise the $2000 charged thereon for the support of Mary, "her cestui que trust."

The case was heard as a proceeding in equity by Judge Aldrich, who rendered a decree in which he ordered the lands sold for partition and the proceeds divided among those entitled, except as to the amount of $2000 of the purchase money, (less the counsel fee of $200, hereafter referred to, which was to be paid in cash,) which was directed to be secured by bond and mortgage of the purchaser, and the interest thereon, as it should accrue to be paid semi-annually to Hester Nimmons, as trustee of Mary, during her life, and after her death, the corpus, reduced to $1800 by the fee aforesaid, to be distributed among the parties in interest. The decree was equivalent to a sale of the land and the investment, under the orders of the court, of $1800 of the purchase money, the interest of which was to support Mary during her life, and at her death to be distributed among those entitled in remainder.

The decree contained an order referring it to the clerk of the court to inquire and report what would be a reasonable fee for the professional services of the attorney of Hester Nimmons, the plaintiff, which was directed, as before stated, to be paid out of $2000 set apart for Mary. At the time the decree was signed, the clerk's report, which was prepared in advance, was read, reporting the evidence and recommending a fee of $200, which was adopted, and that amount ordered to be paid the attorney of the plaintiff.

The defendants, who are entitled to the said fund at the death of Mary, appeal to this court upon the following grounds:

1. "Because the court erred in confirming the report of the referee allowing a fee of $200 to the plaintiff's attorney, the reference having been held and the report therein confirmed before any order of reference was made.

2. "Because the court erred in confirming said report, the reference having been held without any notice to the appellant or his attorney.

3. "Because the said fee is excessive.

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*4. "Because the court erred in allowing said fee out of the corpus of the trust fund, the remaining portion of the tract of land out of which the trust fund arises being left undisposed of in any manner."

The general rule certainly is, that a claim for professional services, as between attorney and client, like other claims for services, must rest on the contract of the parties, express or implied, and can only be established on proof of such contract against the party who makes the engagement; but there are exceptions to this rule on the equity side of the court. The well-established practice of the court of equity, as to costs and fees, differs, in several particulars, from the rule of law. In equity, costs, as between "party and party," are entirely within the discretion of the court, and as to fees between "solicitor and client," there are cases in which, from the character of the parties or the nature of the proceeding, the court will make provision for the payment of proper charges for professional services rendered in the proceedings which have taken place in the court, as where the parties for whose benefit the services are rendered are infants, lunatics, or from any other cause are not capable of contracting, or where the parties are numerous and have an interest in common, for the benefit of which professional services are rendered, at the instance of one or more of the parties interested. In such cases as this, the court generally deems it just and equitable that services rendered for the benefit of the common interest should, as upon a quantum meruit, be paid for out of the common fund, and will, upon a proper showing, so order, if

the fund or property, the subject of litigation, is under the control of the court, as, for example, in suits of trustees, agents, &c., in creditors' suits, for the administration of the estates of deceased debtors. The expenses of a suit for an account and distribution of estates, must be discharged out of the general estate. 2 Daniell's Ch. Pl. & Pr.; Minuse v. Cox, 5 Johns. Ch. 451.

The code of procedure repealed the laws in force at its adoption, upon the subject of costs, and changed the principle upon which they are allowed, but at the same time it provides "additional allowances in any action

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for the partition of real prop*erty." Gen. Stat. 651, § 334. The recent act altering the code as to costs, does not affect this question. It has been held that these provisions, in the New York code, do not affect the equitable power of the court to grant counsel fees out of a common fund belonging to the parties, as part of the relief which should be given on the final disposition of the cause. Hotaling v. Marsh, 14 Abb. 161; 3 Wait's Pr. 494.

This was a proceeding in equity. Whether regarded as instituted by Hester Nimmons, as trustee, to raise the fund charged on the land for the support of her cestui que trust, Mary, or as heir-at-law of Isaac Anderson, for partition of the land, she was successful in both aspects of the action, and her expenses in having the proceedings conducted should be reimbursed either out of the interest for the support of Mary, or the proceeds of the sale under the prayer for partition. Certainly the whole expenses should not be thrown upon the interest set apart for the support of Mary. Part was so charged, and the remainder upon the general fund in court, which was within the discretion and judgment of the Circuit judge, without making any reference upon the subject. He was familiar with the facts of the case. He had the right to decide what interest should be charged with the expenses in whole or in part, and he might also have fixed the amount of the fee without reference; but for his own satisfaction, he referred it to the clerk to "ascertain and report what would be a reasonable fee for the plaintiff's attorney." This was not one of those references of which the parties had a right to notice. It was really ex parte, and intended only to inform the conscience of the judge. The evidence reported satisfied him. He adopted it and made his decree that $200 should be paid to the plaintiff's attorney, who had conducted the proceedings, out of the corpus fund of the court, and we cannot say that this was error. The evidence reported by the referee is not in the brief, and we cannot consider the question whether the fee for the services rendered was excessive. Both the referee and Circuit judge concur as to the amount, and in that case it would require the strongest evidence to reverse the decree, if the question were before us. So far as we can

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judge *from the nature of the case and the amount involved, the fee does not seem to be excessive.

The decree is affirmed and the appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 449

(Case No. 873.)

VERNER v. DOWNS.

(April Term, 1880.)

[1. *Fraudulent Conveyances* ⇐241.]

A judgment creditor is not entitled to a decree adjudging a deed of conveyance made by his debtor to be fraudulent, until there has been return of nulla bona to an execution issued [upon] the judgment.

[Ed. Note.—Cited in Burch v. Brantley, 20 S. C. 508; National Bank of Newberry v. Kinard, 28 S. C. 111, 113, 5 S. E. 464; Compton v. Patterson, 28 S. C. 154, 5 S. E. 470.

For other cases, see Fraudulent Conveyances, Cent. Dig. § 720; Dec. Dig. ⇐241.]

[2. *Appeal and Error* ⇐1175.]

Plaintiffs not claiming that the deficient evidence could be supplied, this court reversed the Circuit decree and dismissed the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573–4587; Dec. Dig. ⇐1175.]

Before Mackey, J., Oconee, March, 1878.

This was an action commenced in 1876, by J. D. Verner and W. J. Stribling, constituting the firm of Verner & Stribling, against G. W. Downs, Sallie Downs, and W. T. Owens, to set aside as fraudulent a certain deed of conveyance of a tract of land, alleged to be the property of G. W. Downs, who was largely indebted to Verner & Stribling on notes and accounts, and upon which suit was then pending. That suit was instituted in 1875, and judgment was obtained in February, 1877, a year before the trial of this case. There was no proof of a return of nulla bona, or even of the issue of an execution, on this judgment. One of the plaintiffs testified that an attachment had been issued in the action on the money demand, and also that he had "failed to be able to make the money" on this judgment. The Circuit judge held that the deed was fraudulent and void, and ordered the land to be sold as the property of G. W. Downs. The defendants appealed, upon several grounds, only one of which has been considered by this court. It was as follows:

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*5. "Because the conclusion of his Honor, that the conveyance of the tract of land in question be, and the same is hereby declared fraudulent and void, is contrary to law and

the evidence submitted to his Honor, the Circuit judge, in writing, upon the trial had in this action."

The ground taken in the opinion of this court was not noticed in the court below, nor in the arguments first submitted on the appeal; but, upon the hearing of the appeal, this court raised the question, whether the plaintiffs had sufficiently exhausted their legal remedies to entitle them to a recovery in this action; upon this question the respondents filed a supplemental argument.

Mr. S. P. Dendy, for appellant.

Mr. J. J. Norton, contra.

This court should not have raised the question. 4 S. C. 356; 2 Hill's Ch. 121; Code, §§ 192, 193. The rules laid down in 2 McC. Ch. 416; 14 Rich. Eq. 155, and 1 S. C. 192, are not conclusive against us. They were dismissed upon the ground that it was not shown that there was no adequate remedy at law, and they admit that such inadequacy may originate from various causes. See 4 Rich. Eq. 197; 14 Rich. Eq. 154, note; 4 S. C. 293; 4 Johns. Ch. 619; Spears' Eq. 427. If objection is valid, we should be permitted to amend. 3 Strob. Eq. 330; 9 Rich. Eq. 337. The failure of the sheriff to make the money on attachment is as good as nulla bona to an execution. 2 Wait's A. & D. 414, 416, 417.

May 10th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This action is in the nature of a judgment creditor's bill to set aside a conveyance made to the defendant, S. Downs, the wife of the judgment debtor, on the ground that it was made to hinder, delay, and defraud the creditors of such judgment debtor. The decree appealed from adjudged the conveyance in question to be fraudulent and void. The fifth ground of appeal raised the objection that the decree, in adjudicating the conveyance fraudulent and void, "is contrary to law and the evidence." The objection renders it necessary

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for us to see *whether the evidence on which the decree was pronounced shows that the plaintiffs had an equity to demand the decree. It nowhere appears that an execution has been issued upon his judgment, and that it has been returned nulla bona in whole or in part. This is a fatal defect in showing that the plaintiff has a right to demand the aid of a court of equity in a creditor's bill inter vivos. Ragsdale v. Holmes, 1 S. C. 91. The proper remedy for a judgment creditor, for the enforcement of his judgment, is by execution in the court of law. It is only when he has exhausted that remedy without satisfying his debt, that he can demand the aid of a court of equity. The highest evidence of the exhaustion of such remedy is the record evidence offered by the returns of the sheriff upon the execution. The plaintiff, in producing such return of nulla bona, is not required to give independent proof of the solvency of his debtor. Enjoying the advantages arising from the simplicity and inexpensiveness of this means of exhibiting the condition of his debtor's estate, it is unreasonable to permit him to disregard these simple means of proof, and cast upon the court and the party the onerous issue of the insolvency of the defendant, upon general evidence. Hence it is that the courts of equity have held, as a rule of convenience, founded on the clearest reason and equity, that the plaintiff must issue his execution and procure its return, before applying to the court of equity for aid. Having failed to show, in the present case, that this step has been taken, the evidence shows no equity in the plaintiffs to demand the decree that has been pronounced, and it must be reversed.

It is not claimed, at bar, that the deficient evidence can be supplied at the Circuit, and the bill must be dismissed.

Decree reversed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. *452

*(Case No. 874.)

STATE v. McNINCH.

(April Term, 1880.)

[1. *Criminal Law* ⟸1023.]

A refusal by the Circuit judge to grant a continuance in a criminal case, is not appealable.

[Ed. Note.—Cited in Crawford v. Schmidt, 16 S. C. 634.

For other cases, see Criminal Law, Cent. Dig. § 2585; Dec. Dig. ⟸1023.]

[2. *Bail* ⟸94.]

A rule issued by the Court of General Sessions against a defendant under indictment in that court, and his sureties, to show cause why their recognizance should not be estreated, is not appealable.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 419; Dec. Dig. ⟸94.]

Before Aldrich, J., Laurens, February, 1879.

McNinch, Irby and Blackwell, were jointly indicted for murder. A severance was ordered, and McNinch was separately arraigned, tried and convicted. See 12 S. C. 89. The state then elected to proceed with the trial of Irby, who was out on bail, and thereupon his counsel moved for a continuance. Pending the discussion of this motion, the solicitor moved that the defendant be called, and urged that a motion for continuance could not be heard unless the defendant was in the power of the court instead of the custody of his bail. The court so ruled. The accused was called, but did not answer. At the same

term of the court, a rule to show cause was issued against the defendant and his bail.

From the refusal to grant a continuance, and from the rule to show cause, the defendant, Irby, appealed.

Messrs. Pope, Baxter and Caldwell, for appellant.

Mr. Solicitor Ball, contra.

May 10th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The first objection made by the appeal is that the Circuit judge refused a motion for a continuance on a ground alleged to be erroneous. The case was in the Court of General Sessions upon an indictment for murder. The motion for a continuance is one addressed purely to the dis-

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cretion of the *Circuit judge, and his decision on such motion is not subject to review in this court, even though his mind, in coming to this conclusion, may have been influenced by an erroneous view of the law. We cannot regard the alleged error of law before us for consideration.

The appellant has brought before us for reversal an order to show cause granted by the Circuit Court against the defendant, and his sureties, why his bond should not be estreated. The rule to show cause is in the nature of process to compel a party to answer to some matter cognizable before the court issuing it, and is presumed to be issued ex parte. Either of these circumstances are sufficient to preclude an appeal to this court as they show conclusively that no action of the Circuit Court prejudicial to the minds of the defence of the party called up to answer has been taken.

The appeal must be dismissed but without prejudice to the rights of the appellants to appear and answer to the rule in the Court of General Sessions.

McIVER and McGOWAN, A. J.'s, concurred.

13 S. C. 453

(Case No. 875.)

STATE v. WASHINGTON.

(April Term, 1880.)

[1. *Criminal Law* ⇐697.]

Alleged insufficiency of proof in a criminal case cannot be considered by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1649; Dec. Dig. ⇐697.]

[2. *Indictment and Information* ⇐75.]

The certainty of an indictment for murder is not affected by the omission of the word "wound" where it should first occur in the sentence charging the prisoner with giving to the deceased "one mortal, of the length of one-eighth of an inch, and of the depth of one inch, of which said mortal wound" the deceased died. State v. Schroder, 3 Hill 61, approved.

[Ed. Note.—Cited in State v. Brown, 24 S. C. 225.

For other cases, see Indictment and Information, Cent. Dig. § 204; Dec. Dig. ⇐75.]

[3. *Criminal Law* ⇐698.]

Incompetent testimony, not objected to at the time, becomes competent for that case.

[Ed. Note.—Cited in Emory v. Hazard Powder Co., 22 S. C. 482, 53 Am. Rep. 730.

For other cases, see Criminal Law, Cent. Dig. § 1651; Dec. Dig. ⇐698.]

[4. *Homicide* ⇐221.]

In a murder case it was properly left to the jury to determine whether the dying declarations of the deceased were statements of fact, or expressions of opinion, and what weight should be given to such testimony.

[Ed. Note.—Cited in State v. Nance, 25 S. W. 172.

For other cases, see Homicide, Cent. Dig. § 464; Dec. Dig. ⇐221.]

[5. *Indictment and Information* ⇐60.]

[The general rule in framing an indictment is that the offense shall be so described that the defendant may know how to answer it, the court what judgment to pronounce, and that a conviction or acquittal on it may be pleaded in bar to any other indictment for the same offense.]

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. ⇐60; Highways, Cent. Dig. § 182.]

[This case is also cited in State v. Green, 48 S. C. 148, 26 S. E. 234, as to the question of charging upon the facts.]

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*Before Fraser, J., Charleston, June, 1879.

To the statement of the case as given in the opinion of the court, it is only necessary to add that the indictment was in the usual form charging a murder committed with a gun, but in the following description, the word "wound," in brackets, was omitted:

"One mortal [wound] of the length of one-eighth of an inch, and of the depth of one inch, of which said mortal wound," &c. There was only one count in the indictment.

Mr. W. S. Montieth, for appellant, cited Wharton's Law of Homicide, §§ 835, 844; Archb. Cr. Pl. & Pr., tit. "Indictment."

Mr. Solicitor Jervey, contra.

Testimony not questioned as to competency at trial, cannot be objected to on appeal. 12 Abb. 227; 3 S. C. 448; 7 S. C. 290; 4 Strob. 58. The judgment cannot be arrested for insufficiency of proof. 1 S. C. 1. As to the dying declarations, see 15 Rich. 342. The indictment is sufficiently certain. 4 Bl. Com. 306; 1 Chitty on Cr. Law, 138; 2 Bail. 69; 1 T. R. 69; 5 East 260; 1 Green's Cr. R. 406; Riley 65; 5 T. R. 317; 3 McC. 190.

May 10th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. On the night of September 11th, 1877, Allen Collins, sitting in his

own house near the Ten Mile Hill, in Charleston county, was shot in the leg by some unknown person who was outside of the house, but so near that powder was found on the side of the door and cloth wadding in the wound. The deceased, was, that night, carried to the Roper Hospital, in Charleston, where he received every attention, but his leg had to be amputated, gangrene followed, and he died on the 23d of the same month. The prisoner, Daniel Washington, alias Charles Jamison, was charged with shooting the deceased, and convicted of murder. His counsel made motions before the Circuit judge in arrest of judgment and for a new trial, and failing therein, appealed to this court to reverse the order refusing his motions. The case was called at the last term

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of this *court, but the attorney of the prisoner was not present. By the rule of court, the appeal might have been dismissed, but the case being a serious one, involving life, the court appointed a competent member of the Richland bar to take charge of the defence, which he kindly consented to do, and has conducted the defence earnestly and faithfully without the hope of reward. The attorney in charge procured copies of the evidence and the judge's charge taken by the official stenographer, and reformed the exceptions taken below so as to enable the court to understand them. Objection is made that "additional exceptions cannot be now presented to this court as grounds in arrest of judgment and for a new trial which were not presented in the court below during trial, nor raised on hearing of motion in arrest of judgment and for a new trial." It is true that a motion in arrest of judgment cannot be made originally in this court. It must first be made to the Circuit judge, and can only come here on appeal from his order, (State v. Rankin, 3 S. C. 447 [16 Am. Rep. 737],) but the record shows that motion was made before the Circuit judge and refused. The case, then, is before the court, and we are at liberty to consider any question which may arise out of the record. As was said in the case of State v. McNinch, 12 S. C. 89: "This court is bound in a capital case to take notice in behalf of the accused of any error apparent upon the record by which the prisoner has been deprived of any of the substantial means of enjoying a fair and impartial trial." This is also a capital case. The prisoner is poor—without the means to print a brief or to employ counsel, and his regular attorney is not present. Certainly these are circumstances which appeal strongly for every indulgence which is allowable under the law.

The exceptions, as remodeled, are the following:

1. "Because his Honor erred when he permitted the witness, Theodore G. Boag, to state the declarations of the deceased made to him in conversation before he was shot and in the absence of the defendant.

2. "Because his Honor erred when he permitted the so-called dying declarations of Collins to go to the jury it being apparent that they were mere opinion and not statements of facts made from his own knowledge.

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*3. "Because his Honor erred when he admitted in evidence the record book of the hospital, and permitted a third party to read entries therein to the jury.

4. "Because his Honor erred when he assumed as a fact, conceded by the prisoner and the state, and so stated to the jury, that this was either a case of murder or nothing.

5. "Because his Honor erred when he overruled the motion for new trial and in arrest of judgment for want of certainty in the indictment.

6. "Because the said motion should have been granted and said indictment quashed, the word 'wound' omitted being fatal to it.

7. "Because the testimony does not support the conviction, it being a matter of grave doubt from what cause death ensued. It is apparent he was neglected by the physicians —Dr. Porcher testifying that on his departure he left deceased in charge of Dr. Michel, and Dr. Michel testifying that he only saw the patient after death."

The last exception does not charge error of law, but alleged insufficiency of proof. That was properly submitted to the Circuit judge upon a motion for a new trial, but cannot be considered here. By the constitution this is not an appellate tribunal in such cases as this, but a court constituted "for the correction of errors at law." It may, however, be proper to say that the whole of the testimony taken together shows plainly that the reporter made a mistake when Dr. Michel was represented as saying that "he did not see the deceased until after death." In his testimony further on he says: "I think Dr. Porcher performed the amputation; I was called in afterwards." And in his cross-examination, he says: "I did not see the patient until after amputation."

The fifth and sixth exceptions relate to the alleged uncertainty in the indictment in omitting at one place the word "wound." The certainty required in an indictment is well expressed in the case of State v. Schroder, 3 Hill 61: "The general rule in framing an indictment is that the offence should be so described that the defendant may know how to answer it, the court, what judgment to

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pronounce, and that a *conviction or acquittal on it may be pleaded in bar to any subsequent or other indictment for the same offence." Tested by this rule the indictment is sufficiently certain. The omission to insert at one place in the indictment the word "wound" does not affect its plain meaning. The context makes it clear that it was a mere omission to

fill a blank in an unimportant part. The whole clause in which the omission occurs might be struck out as surplusage without, in the least, obscuring the meaning. The object as the clause in which the omission occurs was to describe, by length and breadth, the wound, which had been both before and after distinctly alleged, which was unnecessary. We find no error in these exceptions. State v. Coleman, 8 S. C. 237; State v. Wimberly, 3 McC. 190.

The fourth exception is clearly founded on a misconception. A careful reading of the judge's charge will show that he affirmed nothing, but referred to a fact which was not disputed, when, in the commencement and by way of introduction to the issues to be considered, he said: "I think it seems to be admitted on both sides that this is either a case of murder or nothing."

The third exception charges error of law by admitting in evidence "the record books of the hospital." If this evidence was entitled to any weight, it was in favor of the defendant, and was not only not excepted to at the trial, but after it came out the defendant's attorney moved "to strike out all the medical testimony, except the record just read by Dr. Rhett. Incompetent testimony, not objected to at the proper time, becomes, for that case, competent. Any other rule would enable parties to prepare beforehand for a case in the Supreme Court and continue litigation indefinitely. As was said in the case of Burris v. Whitner, 3 S. C. 512: "The time to object to incompetent testimony is when it is offered. It would be unfair to allow a party to postpone his objection until after the testimony has been given, for in that case he would be enabled to retain the evidence if it inured to his advantage, and to exclude it if it made against him. Such speculative advantages are discountenanced by the courts." The same may be said as to the irrelevant testimony of Theodore G. Boag, detailing a conversation with deceased before he was shot, upon the subject of horse thieves

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and detectives. The tes*timony was irrelevant and could have been excluded at the moment by objection.

The only other objection is to the admissibility of the statement of the deceased as dying declarations, on the ground that it was merely the expression of opinion. It does not appear that the admissibility of this testimony was made a ground of objection at the trial, and this objection was not included in the first exceptions filed. But it appears in the record, and we have considered it. Theodore G. Boag testified as follows: "I think it was on the 23d of the same month—Sunday morning—that Collins said, 'I am going to die, and Daniel Washington killed me.' On Monday morning he was a dead man." To the question whether Collins was aware of his condition, he replied, "Yes; he fainted immediately after he said Washington shot him." Under the authority of the case of State v. Quick, 15 Rich. 342, in which the declaration under very similar circumstances was, "Leggett Quick killed me," it was properly left to the jury to determine what weight should be given to the declaration soberly made in extremis: "I am going to die, and Daniel Washington killed me." The whole of the judge's charge is before us, and we think he announced the law correctly when he said, "the dying declarations of a person who has been wounded are competent upon a trial for murder. The reason of it is that the dying person is supposed to be under the same solemn sense of obligation to speak the truth as when under oath. You are not bound to believe a dying declaration, however, because it was made. Mr. Boag, the witness for the state, said when first spoken to the deceased said that he thought the prisoner was the same man who shot him: and just before his death he said positively that Washington had killed him. Now you must be certain whether the deceased was speaking of facts which he knew or of conclusions which he had drawn. It is for you to consider that testimony just as it is, and give it its proper weight, whatever that may be."

We have not been able to discover any error of law charged in the exceptions.

The motions in arrest of judgment and for a new trial are refused and the appeal dismissed.

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*The case must, therefore, be remanded to the Circuit Court for the purpose of enabling that court to assign a new day for the execution of the sentence heretofore imposed.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 459

(Case No. 876.)

STATE v. BELCHER.

(April Term, 1880.)

[1. *Criminal Law* ⊂⊃697.]

Exceptions alleging insufficiency of proof to sustain a verdict of guilty in a criminal case, cannot be considered by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1649; Dec. Dig. ⊂⊃697.]

[2. *Criminal Law* ⊂⊃854.]

The Circuit judge permitted the jury in a capital case to disperse during the trial, without objection made on either side. *Held*, that it was within his discretion to do so.

[Ed. Note.—Cited in State v. Stewart, 26 S. C. 128, 1 S. E. 468.

For other cases, see Criminal Law, Cent. Dig. § 2040; Dec. Dig. ⊂⊃854.]

[3. *Criminal Law* ⊂⊃918.]

During an arraignment, the name of a juror, who had been temporarily excused, was

drawn, but the juror was not called and presented, to which no objection was made by the prisoner until after verdict. *Held*, that there was in this no ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2223; Dec. Dig. ⟸918.]

[4. *Homicide* ⟸213.]

The dying declarations of a wife are admissible against her husband upon his trial for the murder of such wife; and this rule is not affected by Section 415 of the code of procedure.

[Ed. Note.—Cited in State v. Reynolds, 48 S. C. 387, 26 S. E. 679.

For other cases, see Homicide, Cent. Dig. § 447; Dec. Dig. ⟸213.]

[5. *Homicide* ⟸204.]

Statements relating to her death—wound made by the deceased eighty-two days before her death, but not in the immediate apprehension of dissolution—are not admissible in evidence against her accused murderer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 438; Dec. Dig. ⟸204.]

[6. *Criminal Law* ⟸366.]

Statements of the deceased to her attending physician, detailing the cause of the injuries from which death ensued, made some time after the occurrence, are not admissible in evidence against the accused as part of the res gestæ, upon his trial for her murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. ⟸366.]

[7. *Criminal Law* ⟸364.]

The rule of res gestæ is this: where the inquiry is as to a certain transaction, not only what was done, but also what was said by those present during the transaction, is admissible, for the purpose of explaining its character.†

[Ed. Note.—Cited in State v. Arnold, 47 S. C. 13, 24 S. E. 926, 58 Am. St. Rep. 867.

For other cases, see Criminal Law, Cent. Dig. § 809; Dec. Dig. ⟸364.]

[8. *Homicide* ⟸200.]

[Cited in State v. Sullivan, 43 S. C. 209, 21 S. E. 4; Gosa v. Southern Ry., 67 S. C. 361, 45 S. E. 810; State v. McDaniel, 68 S. C. 309, 47 S. E. 384, 102 Am. St. Rep. 661; State v. Martin, 94 S. C. 95, 77 S. E. 721, to the point that dying declarations are admissible as part of the res gestæ, when they are contemporaneous with the main fact, but they need not be concurrent with the main fact in point of time.]

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 425–427; Dec. Dig. ⟸200.]

Before Thomson, J., Spartanburg, October, 1879.

The case is fully stated in the opinion of the court.

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*Mr. P. D. Hyler, for appellant.

Mr. Solicitor Ball, contra.

May 10th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. William Belcher was indicted for the murder of his wife, Elizabeth. The indictment contained two counts, one for murder by actual violence—beating and kicking—and the other by neglecting to provide necessaries for her when she was sick and helpless, from which neglect she died. The jury found him guilty on the first count, and he appeals to this court for a new trial, upon the following grounds:

1. "Because the Circuit judge erred in allowing the declarations of the deceased to come in evidence against her husband, contrary to Section 415 of the code of procedure.

2. "In allowing the declarations of the deceased to come in evidence against the accused, when the said declarations were made to Dr. W. A. Harrison, on April 21st, and the deceased did not die until July 12th, 1879.

3. "Because Guilford Mason, one of the petit jurors in attendance upon court, and whose name was drawn as one of the jurors to be presented to the prisoner, was not so presented.

4. "Because the members of the jury were separated at one time during the trial.

5. "Because there was no proof as to the time when the accused struck the blows, from the effects of which, as alleged in the indictment, Elizabeth Belcher afterwards died.

6. "Because there was no legal proof that Elizabeth Belcher died from the effects of the said blows.

7. "Because the verdict is contrary to the law and the evidence."

The fifth, sixth and seventh exceptions charge no error of law, but alleged insufficiency of proof, and might properly have been submitted to the Circuit judge, upon a motion for a new trial, but we are not at liberty to consider them here.

The fourth exception charges that the jurors were allowed to separate at one time during the trial. The Circuit judge reports "that there was no request to keep the jurors

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together, *which was composed of intelligent men, and no feeling being manifested in the case, the jury were allowed to disperse." The strictness of the old practice as to keeping juries together after being charged with a case, has long since been relaxed. This was no error. The judge has discretion to permit the jury to disperse during the trial, even in capital cases. State v. McKee, 1 Bail. 651 [21 Am. Dec. 499]; State v. Silas Anderson, 2 Bail. 565; Bishop's Cr. Proc. 996.

The third exception charges that Guilford Mason, one of the petit jurors, whose name was drawn, was not presented to the prisoner. Upon this point, the judge reports that "Guilford Mason had been excused, and when his name was drawn, it may have been pronounced by the clerk, but it was not called as that of a juror who was present, or who was expected to serve, but was put aside and another juror called and sworn. The view of the judge was, that the state selects the panel and presents the jurors to the prisoner, who

† See review of Bedingfield's case, (14 Cox's Crim. Cas. 341,) in the American Law Review for December, 1880, and January and February, 1881.

exercises not the right of selection, but of objection to the jurors presented. The prisoner freely exercised the right, and in the call of jurors, twelve were presented, to whom he made no objection. The action of the clerk in relation to the juror was not, at the time, excepted to." We find no error here. The absence of the juror was by authority of the court, and it was the same as if he had been detained at home by sickness. If the prisoner had any right to complain, he should have made the objection at the time. Gen. Stat. 523, ch. CXI., § 29; State v. Coleman, 8 S. C. 242.

The first and second exceptions relate to the admissibility of the statements of the deceased, as proved by Dr. Harrison, and will be considered together. The judge reports that "Dr. W. A. Harrison testified that he visited deceased as a physician, April 21st, 1879; was called in to see her at Dr. Nesbits'; she was in a wretched condition; made an examination; found her suffering pain, &c.; her general appearance indicated enemia; her appetite was good; she may have been in that condition for months. She said her condition was caused by her husband; he threw her down; jumped upon her on her womb, and there remained on her; beat her on her breast and sides. She had been in the condition in which he then saw her, ever since.

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She thought, *at that time, she would then die. The doctor then gave his opinion that the effects she exhibited would follow the treatment she said she had received. * * * This physician further said that the deceased was suffering from peritonitis (chronic), and had some symptons of cancer. He mentioned symptoms of both diseases, in detail, and concludes that, in his opinion as a medical man, the woman died from the treatment she received from her husband." The admission of this testimony was objected to, and the objection is renewed here upon several grounds. First. It is insisted that this statement of the deceased should not have been received, for the reason that the deceased was the wife of the accused, and if living, would not have been a competent witness against her husband, being excluded by Section 415 of the code. The preamble to the code declares that "the second part relates to civil actions in the courts of this state." The first sub-division of Section 415, provides, generally, that "the husband and wife shall be competent and compellable to give evidence, the same as any other witness, except as hereinafter stated." The second sub-division, manifestly for the purpose of excluding the inference that the provisions of the section might be construed as applying to criminal actions, declares that "nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding, except," &c. These provisions, taken together, leave the law of evidence in criminal proceedings unchanged, and by the common law, the declarations of the wife, "in articulo mortis," are admissible against the husband on trial for the murder of his wife. 1 Phil. on Ev. 251; Roscoe's Cr. Ev. 118.

The evidence is also objected to on the ground that they were not "dying declarations." Hearsay is evidence of facts with which the witness is not acquainted, but which he merely states from the relation of others, and is inadmissible for the double reason that the party originally stating the facts does not speak under oath, and the party against whom the evidence is offered has no opportunity to cross-examine the party making the statements. The only case in the whole range of the criminal law where evidence is admissible against the accused with-

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out an op*portunity of cross-examination, is that of "dying declarations" in cases of homicide, and they are only admissible from the necessity of the case, and when made in extremity—when the party is at the point of death, and is conscious of it—when every hope of this world is gone, and every motive to falsehood is silenced by the most powerful considerations to speak the truth. For the reason that the admission of such statement is exceptional, they ought always to be excluded unless they come within the rule in every respect. State v. Quick, 15 Rich. 342; State v. McEvoy, 9 S. C. 211; Roscoe's Cr. Ev. 31. The testimony of Dr. Harrison as to the statements of the deceased to him, does not come within the definition of dying declarations, and was mere hearsay. He did not witness the acts complained of, but only related what she told him had taken place. She was afflicted with a lingering disease. Her statement was made April 21st, and she did not die until July 12th, nearly three months after. It does not appear that the statement was made in extremity; she said she thought at the time the violence was inflicted that "she would then die," but she did not say that, at the time she made the statement, she considered herself in the very presence of death—soon to occur.

It was further suggested that the testimony was admissible as part of the res gestæ. The Circuit judge reports that it was admitted on that ground; but we think that it was equally inadmissible on that ground. We understand the rule of evidence as to res gestæ to be this: Where the inquiry is as to a certain transaction not only what was done, but also what was said by those present during the transaction, is admissible for the purpose of explaining its character. Thus, as an illustration, it was held in the prosecution of Lord George Gordon for high treason, that the cry of the mob which accompanied the prisoner was admissible as part of the transaction. Rex v. Lord George Gordon, 21 How. St. Tr. 534. Declarations which accompany

the act characterize it; but to do so the declarations must be by the persons engaged in the act, contemporaneous with it, if not precisely concurrent in point of time, and proved as other facts by witnesses. To make declarations a part of the res gestæ, they must be contemporaneous with the main fact, not,

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however, precisely con*current in point of time. If they spring out of the transaction, elucidate it, and are made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous. State v. Mitcham, 11 Ga. 615; Handy v. Johnson, 5 Md. 450; Roscoe's Cr. Ev. 24. In the case of Thomson et ux. v. Trevanian, which was an action of trespass and assault, Lord Chief Justice Holt allowed what the wife said immediately on receiving the hurt to be given in evidence. 1 Phil. on Ev. 252; 6 East 193. In this case the statement was made, not by the accused, but by the deceased; not at the time, or near it, but afterwards; how long after does not appear, as she did not state when the violence, of which she complained, was inflicted on her. No declarations of the accused, at the time or afterwards, were proved by Dr. Harrison, who only gave the statement of the deceased as to what had previously occurred. The account given by a person, in answer to questions of a medical man, is evidence of complaints and symptoms, and of what the person suffers from his bodily state when an inquiry into such particulars is material; but it is not evidence to charge another person as the cause of those sufferings, nor is such an account any evidence of the truth of the statement. 1 Phil. on Ev. 233.

The statement of the deceased to Dr. Harrison was not part of the transaction of which she complained, nor evidence of it, and his testimony as to that statement should have been excluded.

The judgment of the Circuit Court is set aside, and a new trial granted.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 464

(Case No. 880.)

STATE v. McGREER.

(April Term, 1880.)

[1. *Appeal and Error* ⇐784.]

In the preparation of cases for this court, it is important that the rules regulating appeals, should be observed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3126, 3127; Dec. Dig. ⇐784.]

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[2. *Homicide* ⇐300.]

*Upon the trial of one indicted for assault and battery with intent to kill, the Circuit judge refused to charge "that if the prisoner really thought his life was in danger, or that he was in danger of great bodily harm, he is not guilty, provided he did not negligently come to his conclusion." *Held*, that in such refusal there was no error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616–620, 622–630; Dec. Dig. ⇐300.]

[3. *Homicide* ⇐96.]

The Circuit judge charged the jury "that the prisoner was not to be the judge as to the necessity to inflict the battery, but that the jury was to judge of the necessity." *Held*, that in this there was no error.

[Ed. Note.—Cited in State v. Beckham, 24 S. C. 284; State v. Sullivan, 43 S. C. 212, 21 S. E. 4.

For other cases, see Homicide, Cent. Dig. § 125; Dec. Dig. ⇐96.]

[4. *Homicide* ⇐109.]

What is necessary to make out a case of self-defence—stated.

[Ed. Note.—Cited in State v. Jones, 29 S. C. 236, 7 S. E. 296; State v. Jackson, 32 S. C. 44, 10 S. E. 769; State v. Wyse, 33 S. C. 595, 12 S. E. 556; State v. Littlejohn, 33 S. C. 600, 11 S. E. 638; State v. McGraw, 35 S. C. 290, 14 S. E. 630; State v. Bowers, 65 S. C. 214, 43 S. E. 656, 95 Am. St. Rep. 795; State v. Hutto, 66 S. C. 452, 45 S. E. 13; State v. Foster, 66 S. C. 473, 45 S. E. 1; State v. Thompson, 68 S. C. 137, 46 S. E. 941; State v. Miller, 73 S. C. 278, 282, 53 S. E. 426, 114 Am. St. Rep. 82; State v. Thompson, 76 S. C. 124, 56 S. E. 789; State v. Stockman, 82 S. C. 400, 64 S. E. 595, 129 Am. St. Rep. 888; State v. Watson, 94 S. C. 461, 78 S. E. 324.

For other cases, see Homicide, Cent. Dig. §§ 138, 139; Dec. Dig. ⇐109.]

Before Thomson, J., Abbeville, February, 1880.

This is an appeal taken to this court by Sam McGreer, from a sentence based upon his conviction by the jury under an indictment for assault and battery with intent to kill. The exceptions are fully stated in the opinion of this court.

Mr. Eugene B. Gary, for appellant.

Mr. Solicitor Cothran, contra.

May 12th, 1880. The opinion of the court was delivered by

McIVER, A. J. This case is presented here merely on a statement signed by the counsel for the appellant, which does not contain any legal evidence of having been served upon the counsel on the other side, or having been assented to by him; nor does it show that it had ever been submitted to the Circuit judge, and the case settled by him; for while it does state that a copy was served upon the solicitor, and no amendments proposed by him, this is no more than the assertion of counsel in the case, and though, doubtless, entitled to the highest credence, does not furnish that legal evidence upon which courts of justice are required to act. Such a mode of presenting an appeal is not in accordance with the rules of this court, and is open to grave objection. But as the counsel representing the state has not seen fit to interpose any objection, doubtless from

a desire that the defendant may encounter no obstacle, of what might be regarded as of a technical character (though in some cases it might assume a substantial character) in ob-

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taining the judgment of the court *of last resort as to whether he has been tried strictly according to law, we will waive the objection, and proceed to consider the case upon its merits, having alluded to this matter only for the purpose of calling the attention of the bar to the importance of observing the rules in the preparation of cases for this court.

The indictment charged the offence of assault and battery with intent to kill, and the Circuit judge was requested to charge that "if the prisoner really thought his life was in danger, or that he was in danger of great bodily harm, he is not guilty, provided he did not negligently come to his conclusion." This he refused to do, but charged "that the prisoner was not to be the judge as to the necessity to inflict the battery, but that the jury was to judge of the necessity." Exceptions were duly taken to the charge and refusal to charge, and they constitute the only matters for our consideration.

To make out a case of self-defence, two things are necessary: 1. The evidence should satisfy the jury that the accused actually believed that he was in such immediate danger of losing his life, or sustaining serious bodily harm, that it was necessary, for his own protection, to take the life of his assailant. 2. That the circumstances in which the accused was placed were such as would, in the opinion of the jury, justify such a belief in the mind of a person possessed of ordinary firmness and reason. It is not a question which depends solely upon the belief which the accused may have entertained; but the question is, what was his belief, and whether, under all the circumstances, as they existed at the time the violence was inflicted, the jury think he ought to have formed such belief. As we understand the charge of the judge, it conformed to the principles above-stated, and was, therefore, free from objection.

The request to charge, which was refused, was justified by the doctrine as laid down by Wharton in the second edition of his work on Homicide, which, however, as he admits in the preface to that edition, is one of the changes "which the last few years have wrought in the judicial conception of the law of homicide." This innovation upon what was previously understood to be the law in this respect does not seem to us to be warranted by the adjudicated cases, which, when

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closely examined, will not, with *the exception of the case of Grainger v. State, 3 Yerger 459, which has been the subject of much adverse criticism, justify the inference drawn from them, although there may be expressions used by judges in some of the cases which may seem to justify such an inference; and, as there certainly is no authority here for such a doctrine, we are not disposed to adopt it.

To give the instruction asked for in this case would have tended to convey to the jury the idea that the true test was the belief of the accused as to the necessity for his taking life, while we regard the true test to be the opinion of the jury, after hearing all the circumstances, whether the accused actually believed that such necessity existed, and whether, under all the circumstances surrounding the parties, at the time the violence was committed, he was warranted in forming such belief. There was, therefore, no error in refusing to charge as requested.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 467

(Case No. 881.)

HAND v. SAVANNAH AND CHARLESTON RAILROAD CO.

STATE, ex relatione ATTORNEY-GENERAL, v. SAME.

(April Term, 1880.)

[1. *Railroads* ⊂⊃192.]

Where the rights of the several classes of creditors of a railroad corporation have been declared, and the condition of the railroad demands an early sale, such sale will not be postponed until the interests of individual creditors have been adjusted, and the class to which their demands belong has been ascertained.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 637; Dec. Dig. ⊂⊃192.]

[2. *Railroads* ⊂⊃197.]

Upon the sale of a railroad, it is customary and reasonable to require cash sufficient to pay costs and other claims demanding immediate payment.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 662; Dec. Dig. ⊂⊃197.]

[3. *Railroads* ⊂⊃192.]

But the officer conducting the sale should not be authorized to exact a cash advance previous to the close of the biddings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192; Mortgages, Cent. Dig. § 1517.]

[4. *Railroads* ⊂⊃171.]

It is not error to order the payment of undisputed claims, having an undoubted priority, in advance of the adjustment of the rights of other creditors, whose claims are of an inferior rank.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 554; Dec. Dig. ⊂⊃171.]

[5. *Railroads* ⊂⊃191.]

The state, being a party in court, is bound as much as other parties, by the judgment in the cause.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 624–633; Dec. Dig. ⊂⊃191.]

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*Before Aldrich, J., Charleston, January, 1880.

For a full understanding of these cases, see the report of them in 12 S. C. 314. After the remittitur was filed in the court below, a motion was made in behalf of Hand and others, holders of six per cent. bonds of 1856, for a sale of the property and a reference to carry out the directions of the Supreme Court. Upon these motions, the Circuit judge filed the following order:

These cases come up on a motion to refer and for an order of sale. The litigation was commenced in 1870, and has been prosecuted with more or less vigor, from that time to the present. Sick and weary, I have labored through the mass of papers submitted, and at last do not see that I have anything to do but to carry out, as nearly as I can, the opinion of the Supreme Court on the appeal from the decree of Judge Wallace.

For the purposes of this inquiry, it is matter of no consequence who is responsible for the protracted litigation which has resulted so disasterously to the road and to all who have been so unfortunate as to put their money in it or its securities. It is full time to bring it to an end.

The main discussion seems to be whether the court shall order a sale.

After examining the numerous decrees and orders made in the causes, I do not think there is room for two opinions.

The receiver, the judges of the Circuit Court before whom these cases have been heard, and the justices of the Supreme Court, all concur in the conclusion that a sale is proper and necessary, to say nothing of the consent of the counsel in the case to a sale in May, 1875; and, indeed, it cannot be otherwise. Here is a large and valuable property, a highway connecting the commercial emporiums of the States of Georgia and South Carolina, literally going to ruin for the want of proper management. Here are creditors whose claims are undisputed, kept in abeyance for ten years, waiting the determination of a legal controversy in which they have no interest. Here are passengers, shippers on the road, and those living on the line,

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without *redress, if injury be done to their persons or property. The road is absolutely of no value but to the receiver and those employed by him. It pays not a dollar of debt or interest to those who advanced their money for its construction, while, as the debt grows, the security diminishes.

This is abundantly proved by the application to Judge Hudson, at the last term of the court, for leave to borrow money, on a preferred claim, to keep the road in running order, it being represented as unsafe.† Can there be a doubt that this ruinous condition of affairs shall be arrested? I have always supposed that when a receiver is appointed, it is to speedily wind up the affairs of the corporation, or the business committed to his care. It is not to make a soft place, where he and his friends and those he employs can make profit, but to save to the creditors the largest amount out of the insolvent concern in the shortest time. This receiver has been here since April, 1874, and the affairs of the corporation are no nearer a settlement than when he took charge. I do not attach blame to him, for in May, 1875, he asked the court for instructions as to sale.

Nor am I impressed with the argument that if a sale is ordered now, it will give an undue advantage to the smaller creditors, and enable them to buy the road at a greatly depreciated price. All that these lesser creditors want is their money, and so soon as the property is made to bring enough to cover their claims and the expenses of the litigation and sale, they will be satisfied. It will then be the fault of the six per cent. and seven per cent. bondholders, if they permit any combination with outsiders and those creditors to deprive them of their rights, under the acts of incorporation and the judgment of the court. They must protect themselves, and what prevents them from making a combination to obtain the full value of the property, leaving their rights to be litigated over the purchase money instead of the property, I do not see. The thing is in their own hands, and if they determine to let the property be sacrificed, it will be their own fault. I am not called upon here to pass judgment on the lien of

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those bonds, but, under the opinion of *the Supreme Court, do not see how there can be doubt on this question. A reference, however, is desired, and it will be so ordered.

It is therefore ordered, adjudged and decreed that all the property and franchises of the Savannah and Charleston Railroad Company, included and described in the several deeds and mortgages proved in these cases, and all the property of what kind soever the said company is seized and possessed, be sold by Mr. W. D. Porter, master, at public auction, to the highest bidder, at the post-office in the city of Charleston, in the State of South Carolina, on the first Monday in June next, at twelve o'clock m. So much of the permanent property of said company embraced in any of the liens or mortgages proved, or hereafter to be proved, as lies in the State of Georgia, to be sold subject to such liens as have been or may hereafter be established under the laws of that state.

It is further ordered that the said sale be made on the following terms and conditions — that is to say, cash enough to pay the undisputed claims to be reported by the referee

† See [Hand v. Savannah & C. R. Co.] 12 S. C. 83.

hereinafter to be named, and the costs and fees of the master and referee; the cash to be paid immediately after the close of the bidding, and the master may require of any bidder, during the progress of said sale, to deposit the said sum to be paid in cash, in a bank in the city of Charleston, subject to his order. In case of refusal to pay the cash or make the deposit, the bid to be disregarded and the sale to be proceeded with, as if the same had not been made; the balance of the purchase money to be paid in one year, interest from date, to be secured by the bond of the purchaser, with two or more approved sureties and a mortgage of the property sold; provided that the master have leave to dispense with the personal security, upon a deposit, by the purchaser, with him, of United States government bonds equal to one-half of the purchase money unpaid, as collateral security. * * *

It is further ordered that, after paying such costs, charges and disbursements of these proceedings, as may hereafter be determined to be a proper charge, the balance shall be applied to the payment of such un-

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disputed liens, claims and demands *as the referee, hereinafter to be named, shall report. Then to such liens, bonds and coupons as the Supreme Court of the state shall or may have decided are entitled to receive the same, ratably; the purchaser to have the privilege of paying the whole of the purchase money in cash, or to anticipate the payment at such time as he may desire. * * *

It is further ordered, if the referee fail to make his report in time for the sale, the cash portion of the same shall be $50,000.

It is further ordered that the master do make a report to this court of all his actings and doings under this order.

It is further ordered that Mr. W. Alston Pringle is appointed special referee to inquire and report:

1. What claims and demands against the Savannah and Charleston railroad are undisputed and entitled to immediate payment.

2. What bonds and coupons of said company, issued under the act of December, 1856, are entitled to priority of payment out of the property of said company, under the principles settled by the judgment of the Supreme Court, filed September 30th, 1879.

3. The amount of bonds issued under the act of March 2d, 1869.

4. The amount of bonds and coupons issued under the act of December 19th, 1856, not entitled to priority of payment.

5. The bonds and coupons issued under the act of March 2d, 1869, endorsed by the guaranty of the state.

6. What coupons of bonds issued under the act of 1856 have been funded under the third section of the act of 1869, the number and value of said coupons, by whom, when, and under what circumstances such coupons were funded.

7. That the said referee have leave to report any special matter.

It is further ordered that the master do tax the costs, charges and disbursements chargeable on the fund to be realized from the sale.

Notices of appeal from this order were duly served, as follows:

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*By the executors of Cutting—

1. Because these appellants are the holders of a large amount of bonds secured by mortgage of the Savannah and Charleston railroad and its appurtenances, claiming the first lien thereon; that there are also a large number of other bonds claiming a lien in preference to that of these appellants; that it is not expected or believed that the road can sell for enough to pay both these liens; that a reference has been ordered, to ascertain which of said bonds are entitled to preference, but no report has yet been made or judgment rendered; that it is the duty of these appellants, as executors, to protect the interest of their testator by bidding at the sale a sufficient sum to insure a fair price for the property, but this they cannot do unless it is ascertained to what portion of the sales their testator is entitled; that the sale being ordered in advance of this ascertainment, they cannot bid at all in the interest of the estate, and the said interest is thereby exposed to absolute sacrifice.

2. Because the estate of their testator is stripped still further of protection by the requisition that, in the progress of the bidding, these appellants, if bidders to protect the interest of their testator, may be required, although mere executors, to deposit in cash the amount of any bid made, even though eventually entitled to the whole proceeds of the sale, and on failure to make such deposit, the bid is to be rejected and the sale closed.

3. Because the bridge over the Savannah river and the section of the railroad in the State of Georgia are not embraced in the mortgage or lien of the state, under the act of 1856, and are not within the jurisdiction of the courts of South Carolina, and are now in the hands of a receiver appointed by the courts of Georgia; that the order of sale is erroneous and misleading in extending its operation to those portions over which this court has no jurisdiction.

4. Because the said order is erroneous in directing any distribution of the proceeds of sale before a final adjustment shall have been made of the claims under the various liens, and of the preferences claimed upon the same.

5. Because the State of South Carolina is liable for the six per cent. bonds, as guaran-

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teed under the act of 1856, and for *the

seven per cent. bonds, on her representation, made by the act of 1869; that the present suit is at the instance of the said state, and this sale, if carried out, must result in great loss to one or the other of these classes of bonds, for the payment whereof the state is bound; that it is therefore unjust and inequitable that an order of sale should be made at the instance of a plaintiff, before performance by him of his own contracts, in relation to the subject matter of the sale, or any final adjudication fixing the right of one party or the other to reclamation for its loss.

McBurney and others appealed upon the above grounds and the following additional:

1. That the power of the master to require payment in money or a deposit on every bid, of which cash may be required, is arbitrary, unusual and embarrassing, and must chill all bidding at such sale.

2. That there is no discrimination as to undisputed claims, when these claims have several and distinct liens on several and distinct pieces of property, and the sales of the whole road should not be charged with these payments in cash.

3. That the mode of sale is injurious to the interests of all and every party in the cause.

[For subsequent opinion, see 17 S. C. 219.]

Messrs. C. G. Memminger and J. B. Campbell, for appellants.

Messrs. Buist & Buist, T. M. Hanckel and W. H. Brawley, contra.

May 13th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This case was heard before this court upon an appeal from a final decree, (12 S. C. 314,) and decided so far as to determine the relative priorities of the different classes of creditors in respect of the fund to be produced by the sale of the road of defendant corporation. Pending that appeal this court passed an order to the effect that it was practicable and desirable that the railroad of the defendant corporation should be sold, but leaving the Circuit Court at liberty to determine when such sale should be made. The action of the Circuit

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Court, fixing the *time of sale, was not taken until the judgment of this court had been rendered on such appeal, and the remittitur filed in the Circuit Court.

The sale was ordered for the first Monday in June next, and from that order the present appeal was taken. The appellant urges no grounds of objection to an early sale that did not exist and apply with equal and even greater force at the time when the general instruction for the sale of the road was given by this court. At that time the relative priorities of the various classes of creditors entitled to participate in the fund to be made by such sale were not ascertained, while, at the present time, these priorities have been ascertained. The leading objection to the sale, at the present time is, in substance, that it has not been ascertained what individual creditors are entitled to be admitted to the several classes thus established. We see no reason why the sale should be postponed until all the parties know the precise interest they may have in the fund arising from the sale. It may be that they would, in some instances, be in a better condition to participate in the sale as bidders.

This consideration might have had some weight while the priorities of the respective classes were uncertain, but it would be going to an unreasonable extent to postpone the sale until the various individuals composing these classes had been ascertained by judicial orders. The primary duty of the court is to see that the property is sold at an early day, so as to prevent loss from deterioration caused by delay.

If the court have any concern with the situation of the individual creditors as it regards their capacity to become bidders at the sale, that must constitute quite a subordinate matter. We are satisfied with the conclusion of the Circuit judge that the condition of the road is such that an early sale is indispensable, and that to delay such sale to the prejudice of the fund for the mere purpose of facilitating some of the creditors who may desire to become bidders at the sale, would be without precedent and altogether unreasonable.

Objection is made to that part of the decree of sale that directs "that an amount of cash sufficient to pay the undisputed claims to be reported by the referee," "and the costs

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and fees of the *master and referees," to be immediately paid after the close of the biddings, and that "the master may require of any bidder, during the progress of said sale, to deposit the said sum, to be paid in cash, in a bank in the city of Charleston, subject to his order;" and in case of the failure to make such payment, the bid of the person so failing to deposit should be disregarded.

The sum to be thus advanced is fixed in another part of the decree at $50,000, in the event that the report of the referee on that subject should not be made in time for the sale.

It is fairly to be presumed, from the amount beyond which the cash advances is not to go, that what was called the "undisputed claims" to be reported, are claims of a character demanding immediate cash payment, upon which time could not properly be allowed. Viewed in this light, the provision for cash payment is customary and reasonable. The fact that this provision may work injuriously to the executors of Cutting,

cannot be assumed in the absence of proof to that effect, nor would, if established, afford ground for departing from a proper safeguard against spurious bidding. The personal inconvenience of a bidder, though resulting from the nature of his legal powers, is no ground for disturbing the arrangement looking to the bona fides of the bidding.

We see no reason for authorizing the master to demand a cash advance previous to the close of the biddings. Whatever convenience may result from possessing the means of eliminating spurious bids during the progress of the bidding, may be counterbalanced by a tendency to deter parties from bidding, and thus chilling the bids. The order must be modified by striking therefrom the words as follows: "Of any bidder, during the progress of said sale, to deposit." There is no proof before us that the sum of $50,000 is in excess of the amount reasonably required for the purpose indicated by the order, and no ground exists for interfering with that part of the order fixing such amount.

That part of the order describing the property to be sold follows the decree of this court, under which the sale is ordered.

The sale of the permanent property of the defendant corporation in the State of Georgia, as directed by the order of sale, was

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*adjudicated by this court in that decree, and this adjudication cannot be disturbed.

The order of sale is not defective in ordering the payment of the undisputed claims to be ascertained, even if it should happen that at the time of such payment there remains unascertained the interests of persons claiming admission to the several classes, provided that such claims, so paid, have a clear priority under the decree in this cause over those classes that remain to be ascertained, as it regards only the persons entitled to participate in them. The order, properly construed, is in harmony with the view just expressed, and no reason appears for disturbing it.

The objection, based on the supposed interest of the state, raised not by the state, but by the non-resident executors of an estate, existing and administered within another state, if properly represented before us, could not have weight, as the state is equally bound with all other parties to the decree under which the sale is ordered.

The exceptions presented in behalf of McBurney and others, and the Savannah and Charleston Railroad Company, are disposed of by what has already been said.

The order of sale must be modified in the manner hereinbefore stated, and so modified, is affirmed, and the appeal dismissed as to all other matters.

McIVER and McGOWAN, A. J.'s, concurred.

13 S. C. 476

(Case No. 882.)

CLAUSSEN v. FULTZ.

(April Term, 1880.)

[*Attachment* ⊜40, 113.]

A warrant of attachment should not be issued upon an affidavit which contains a general charge of fraud, made upon information and belief, but supported by no statement of facts or circumstances, except that defendant is selling his goods as agent, and has acknowledged, in writing, that he was running his business only as agent, so as to save trouble with his creditors until he could pay them.

[Ed. Note.—Cited in Ivy v. Caston, 21 S. C. 588, 589; Myers v. Whiteheart, 24 S. C. 202; Kerchner & Calder Bros. v. McCormac, 25 S. C. 465; Monday v. Elmore, 27 S. C. 131, 3 S. E. 65; Baum v. Bell, 28 S. C. 209, 5 S. E. 485; Wando Phosphate Co. v. Rosenberg, 31 S. C. 307, 9 S. E. 969.

For other cases, see Attachment, Cent. Dig. §§ 92, 311; Dec. Dig. ⊜40, 113.]

[This case is also cited in Darby & Co. v. Shannon, 19 S. C. 531, as an example of questioning by motion to discharge attachments irregularly issued.]

Before Aldrich, J., Charleston, November, 1879.

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*This was a motion to set aside an attachment issued by the clerk of the court upon the following affidavit:

J. C. H. Claussen, the plaintiff above-named, being duly sworn, says:

1. That J. E. Fultz, the above-named defendant, is justly and truly indebted to the deponent in the full and just sum of $621.90, with interest from September 9th, 1879, for goods, wares and merchandise, sold and delivered by the plaintiff to the defendant, at his request, and no part of which has been paid.

2. That the said J. E. Fultz is, as deponent is creditably informed and believes, disposing of his property and effects, with intent to defraud his creditors, and that he is now, the more easily to effect his fraudulent purpose, carrying on his business and disposing of his property as agent, without any declared principal, and that the said J. E. Fultz is so doing business as agent with the sole intent to defraud his creditors is fully shown by his written confession and acknowledgment, as follows: "I am running my business only as agent, so as to save trouble with creditors, until I can pay them."

3. That the said plaintiff has commenced an action in this court against said defendant, upon the cause of action above-stated.

J. C. H. Claussen.

Sworn to September 10th, 1879.

The motion was granted by the Circuit judge, and plaintiff appealed.

Mr. J. Ancrum Simons, for appellant, cited Code, § 252; 10 S. C. 469; 34 How. Pr. 66; 17 Ib. 559; 37 Ib. 272; 11 Ib. 221; 5 Ib. 386; 5 Rob. 599; 32 Barb. 604; 3 Seld. 500; 3 Sandf. 703; 1 Deady 469; 3 Bosw. 626.

Mr. Chas. Boyle, contra, cited 6 S. C. 169; 10 S. C. 467; 12 S. C. 122.

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*May 17th, 1880. The opinion of the court was delivered by

WILLARD, C. J. This is an appeal from an order dissolving an attachment, on the ground that the affidavit on which it had been granted was insufficient. The affidavit contained the general charge, stated upon information and belief, that the defendant was disposing of his property and effects with intent to defraud his creditors. This general charge, even if made upon positive knowledge, would not have been sufficient ground for issuing the attachment, unless supported by the statement of facts and circumstances warranting such allegation.

As it is only made upon information and belief, it requires the statement of such circumstances in its support as would enable the court to conclude that the causes warranting the issuing of the attachment existed. The only circumstance alleged is a statement claimed to have been made by the defendant, as follows: "I am running my business as an agent so as to save trouble with creditors until I can pay." The proof must bring the case within the provisions of Section 250 of the code to warrant the issuing of the attachment in the present case. The attachment is there allowed whenever the defendant is about to remove any of his property from the state, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete any of his property with intent to defraud creditors. It is not alleged that the defendant has removed, or intends to remove any of his property out of the state. It must then appear that he has either assigned, disposed of, or secreted his property, or is about to do so with intent to defraud his creditors. It must be assumed that the defendant is engaged in mercantile business, and is selling and disposing of his property in the manner usual in the course of such business. The fact that he is acting as an agent of another, whether properly or improperly, does not in itself warrant the conclusion that there is anything unusual in the manner in which he is making sales and deliveries of his stock in trade. The most that can be argued is that he has covered up and obscured his title to such property. The attachment law is designed to prevent parties from placing their property beyond the reach of an execution with the intent of defrauding their creditors. It was not intended to arrest the due and proper

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*conduct of mercantile or other fair business dealing, although such dealing may have the effect to place property beyond the reach of an execution. The statute looks to an act of fraud consummated by an actual disposition of the property such as to place it beyond the reach of creditors. The mere fact that one who is indebted has covered up and concealed his title to property is not sufficient ground for issuing an attachment against him; it must also appear that the motive with which he is disposing of his property is the intent to defraud his creditors. Even admitting that the evidence contained in the affidavit tended to show that the defendant was using the name of another as a cover to his business transactions, that would not in itself be sufficient. That might well be, and yet the property remain in his hands subject to an execution. The plaintiff must go further and show an actual disposition of the property made, or intended, with intent to defraud his creditors. This, in our judgment, he has failed to do.

The appeal must be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

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13 S. C. 479

(Case No. 883.)

McCOMB v. WOODBURY.

(April Term, 1880.)

[*Judgment* ⇐119.]

Where the time for answering expires after the day fixed for the opening of the Court of Common Pleas, but before such court is actually opened, the case may be put upon docket No. 6, and judgment by default taken upon the call of that docket on the first day of the term.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 209; Dec. Dig. ⇐119.]

Before Aldrich, J., Charleston, December, 1879.

The summons and complaint in this action were served October 21st, 1879. On November 12th defendant served notice of appearance, but never answered. On November 19th plaintiff's attorneys served upon defend-

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ant's attorney a notice that they *would apply for a judgment by default. Defendant objected to the docketing of the cause and to the order for judgment. The other matters and dates are given in the opinion of the court.

Mr. T. M. Mordecai, for appellant.

Messrs. Tiedeman & Marshall, contra.

May 17th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The question submitted in the present case involves the construction of Section 21 of the act of 1873, amending the code of procedure, (15 Stat. 502,) which is as follows: "That after the passage of this act no judgment shall be obtained in the Court of Common Pleas except during term time and in open court; and it shall be the

duty of the clerk to place all cases filed in his office, in which there is no defence, upon a docket to be prepared by him for that purpose, to be known as docket No. six, (6,) and this shall be called on the first day of the term," &c.

November 3d, 1879, was the day fixed by law for the opening of the Court of General Sessions for Charleston county. The presiding judge being prevented by sickness from attending on that day, the clerk opened the Court of General Sessions and immediately adjourned it to November 17th, then next ensuing. The Court of Common Pleas did not actually open for the transaction of business until December 5th, 1879, when docket No. 6 was called, the Court of General Sessions having continued from the day to which it had been adjourned until that day. The default of the defendant occurred after the day fixed for the opening of the court, but before December 5th, on which the business of the Court of Common Pleas actually commenced. The case was put upon docket No. 6, and called on December 5th, and judgment taken for the want of an answer.

It is contended on behalf of the defendant that by the true construction of the act of 1873, above recited, the motion for judgment could only be made upon the day appointed by law for the opening of the Court of Common Pleas, and that such day was prior to the day on which judgment was actually en-

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tered *and previous to the expiration of the time to answer. It is also contended, as a consequence of this position, that no judgment can be obtained for want of an answer unless such default had occurred previous to the time appointed by law for the holding of the court at which such judgment is demanded.

It is very clear that the statute intended to designate, for the purpose of calling docket No. 6, the day on which the Court of Common Pleas actually commences its business in accordance with the provisions of law regulating its proceedings.

By the act of June 9th, 1877, (16 Stat. 301,) it is provided as follows: "Should the business before the Court of General Sessions at any term be not completed on the arrival of the day fixed by law for the holding of the Court of Common Pleas for any county, the judge presiding may, in his discretion, adjourn the said Court of Common Pleas until the business of the Court of General Sessions shall have been concluded; but, in order to keep the business of the courts separate and distinct, the Court of General Sessions for any county shall be finally adjourned for the term before the opening of the Court of Common Pleas." The effect of this section is to make the final adjournment of the Court of General Sessions the means of fixing the day for the opening and commencement of the business of the Court of Common Pleas. Under that view, December 5th was the first day of the commencement of the Court of Common Pleas for Charleston county, and the proper day for calling docket No. 6.

Section 21 of the act of 1873, appears to have but two distinct objects in view. The first is to postpone the entry of judgment for want of an answer until there is a court in session at which such judgment may be taken. The second is to expedite the application for such judgment by assigning for that purpose the first day properly applicable to the business of the Circuit. The defendant reads the statutes as if it had in view a third distinct object, namely, to prevent judgment for want of an answer from being rendered at any time, unless the default on which it is sought to be obtained occurred on a day prior to that fixed for the holding of the court. It is assumed that because it is the duty of the clerk to make up docket No. 6, so that it may be called on the first day of term, that that day is fixed as a means of de-

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termining *what cases may be moved at that term for judgment for want of an answer. It is undoubtedly the duty of the clerk to have docket No. 6 in readiness so that it may be called on the first day on which the court enters upon the transaction of its business, but beyond that no specified day is prescribed for making it up. The statute gives no intimation of any intention to limit the right of the court to give judgment for want of an answer to cases where the default has occurred previous to the day fixed for the commencement of the term, nor is such a provision at all essential to carry out the obvious purpose of the statute, which, as has been just said, was to secure but two objects, namely, the granting of such judgment in term time only, and the expediting of such application in term time. On the contrary, the proposition which the defendant seeks to engraft upon the statute, as implied in its terms, is altogether foreign to the objects which the statute has in view, and, therefore, without the range of proper implication.

The judgment appealed from was properly entered, and the appeal must be dismissed.

McIVER and McGOWAN, A. J.'s, concurred.

13 S. C. 482

(Case No. 885.)

WESTFIELD v. WESTFIELD.

(April Term, 1880.)

[1. *Appeal and Error* ⇐107.]

An order recommitting for further proof a report upon claims presented against a decedent's estate, is not appealable. Semble.

[Ed. Note.—Cited in Lowndes v. Miller, 25 S. C. 122; Clayton v. Mitchell, 31 S. C. 204, 9 S. E. 814, 10 S. E. 390.

For other cases, see Appeal and Error, Cent. Dig. § 738; Dec. Dig. ⇐107.]

[2. *Executors and Administrators* ⇐227.]

Under an order calling in creditors to establish their demands against an estate which is being administered by the court, a claim must be presented in the name of the creditor himself, under his oath, that the amount is bona fide due, and that no part has been paid by discount or otherwise. Ex parte Hanks, Dud. Eq. 231, approved.

[Ed. Note.—Cited in Crane, Boylston & Co. v. Moses, 13 S. C. 577; Brown v. Brown, 45 S. C. 410, 23 S. E. 137.

For other cases, see Executors and Administrators, Cent. Dig. § 816; Dec. Dig. ⇐227.]

[3. *Executors and Administrators* ⇐228.]

[Cited in Branyan v. Kay, 33 S. C. 285, 11 S. E. 970, to the point that any creditor so coming in is a party to the action in every sense.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 819–826, 827½; Dec. Dig. ⇐228.]

[This case is also cited in Crane, Boylston & Co. v. Moses, 13 S. C. 561, and distinguished therefrom.]

Before Aldrich, J., Greenville, July, 1879.

This case is fully stated in the opinion of the court.

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*Mr. E. F. Stokes, for appellant.

Mr. J. W. Stokes, contra.

May 17th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was an action in the nature of a creditor's bill, brought by the plaintiff as administratrix of the estate of John Westfield, deceased, to call in the creditors and marshal the assets of said estate. Pending the action, creditors were enjoined from suing at law, and were called in by publication, in the usual form, to present and prove their demands against the estate. Among the claims presented, under the call, was one in the following terms:

"$4166.67. On the first day of September, 1860, we, or either of us, promise to pay to the order of A. M. Hamilton, guardian of E. F. Stokes, four thousand one hundred and sixty-six 67-100 dollars, value received, with interest payable annually from the first day of September last. Witness our hands and seals this ninth day of December, 1859.

"John Westfield. [L. S.]
"Thomas M. Cox. [L. S.]
"Thos. C. Gower. [L. S.]

"Received on the within three hundred and fourteen 33-100 dollars, this May 27th, 1861."

"$4166.67. On the first day of September, 1861, we, or either of us, promise to pay to the order of A. M. Hamilton, guardian of E. F. Stokes, four thousand one hundred and sixty-six 67-100 dollars, for value received, with interest payable annually from the first day of September last. Witness our hands and seals this ninth day of December, 1859.

"John Westfield. [L. S.]
"Thomas M. Cox. [L. S.]
"Thos. C. Gower. [L. S.]

"Personally comes before me Edward F. Stokes, and makes oath that the above are true copies of notes now in his hands for collection. Edward F. Stokes, Attorney.

"Sworn to, before me, this 25th of June, 1879. J. J. Douthit, Master."

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*Upon this affidavit alone, without any proof of the execution of the notes, or who was the real owner thereof, or whether they were subject to payments or discounts, the master, without notice to the other parties interested, who were not present, allowed the notes as proved claims against the estate of John Westfield, and so reported to the court. The plaintiff and other creditors excepted to the report upon the grounds: "First. That it did not establish the fact as to who is the real owner of said claims. Second. That it does not set forth all the credits to which said claims are subject, the fact being, as the plaintiff is informed, that sundry sums, amounting in the aggregate to $3000 or $4000, had been paid on the said notes, &c. Third. That proof to establish said claims was ex parte, and that the plaintiff had no opportunity of inspecting the same or cross-examining the witnesses, no notice having been given of the time and place of holding a reference herein."

On hearing the report of the master, and the exceptions thereto, Judge Aldrich ordered that the cause be recommitted to the master to take the testimony and report upon the questions raised by the plaintiff's exceptions, with leave to report any special matter, and especially that the notes presented by Edward F. Stokes, as attorney, be proved in the name of the real owner within thirty days from date, or, in case of failure upon his part to do so, that he be debarred from setting up the same, and that the master take testimony as to all credits which should be allowed upon said notes."

From this order Edward F. Stokes appeals to this court upon the ground that it was error to make such order.

The order to re-commit, for the purpose of further proof, was not appealable, and we would so hold if a motion had been made to dismiss the appeal. The order appealed from was neither a final judgment nor an order affecting a substantial right made in an action when such order in effect determines the action and presents a judgment from which

an appeal might be taken, nor does it involve the merits of the action. "An order to involve the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defence in the case in which the order is entitled."

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Henderson v. *Wyatt, 8 S. C. 112; Blakely & Copeland v. Frazier, 11 S. C. 122.

In this case the only matter determined was that the claim should be re-committed for further proof. Such an order is purely administrative. But as the matter is before us, and it is important to recall attention to a practice which is absolutely necessary in all proceedings in the nature of creditor's bills, we will dispose of the appeal.

It has long been well established in this state that in order to prevent multiplicity of suits, and for other good reasons, the executor or administrator of an insolvent estate may, when creditors are numerous, file a bill or a complaint against the creditors to enjoin them from proceeding at law, and to have the estate administered in equity; and when the representative of an estate files such a proceeding the practice is to select one or two of the principal creditors and to bring in the others by publication. None of them need answer formally, except when specially required or ordered by the court, the rest appear and litigate orally, but all are enjoined from suing at law. Thomson, Ex'r, v. Palmer et al., 2 Rich. Eq. 32.

In such case after the creditors have been called in, any one of them who presents his claim under the master's notice, becomes an actor in the proceedings and a party to the decree, and is entitled to any order to speed the cause or carry the decree into successful execution. Boyce v. Boyce, 5 Rich. Eq. 263.

It follows that any creditor so coming in is a party in every sense, as much so as if he had commenced the action for himself and other creditors, or was made a defendant by name, and filed a formal answer. An attorney, whose business it is to represent others, cannot prove a claim by swearing that he has such demand for collection, or in any way except in the name of the real party in interest, as if he were suing upon the same. There cannot be in such case an unknown party, for there could be no judgment for or against such party. The alleged debtor being dead he cannot speak for himself. There may be discounts or counter claims, and it is therefore eminently proper that there should be at least the security afforded by the oath of the proper party—the creditor himself—that the debt is really bona fide

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*due, and that no part of it has been paid by discount or otherwise. The practice on this subject has long been well defined and clearly stated. We think it should be followed as laid down by the court of equity in the case of Ex parte Hanks, Dud. Eq. 231.

We are satisfied with the rule of practice announced by Chancellor Dunkin, who, in delivering the judgment of the court in that case said: "In the course of the argument of the case at bar it seemed to be supposed that the creditor would not be obliged to make oath to the amount of his demand. According to the course of the English chancery, where assets are to be administered, all claims, including judgments, &c., must be rendered on oath, and this is also the approved mode in this country. A creditor presenting his claim to the commissioner, under notice, should make an affidavit of the debt, and that he is aware of no discount, or if there are mutual demands, a balance should be struck and sworn to. It need scarcely be remarked that this is not intended to supersede the necessity of the ordinary proof of the debt, but is supplementary thereto."

The order below has already been affirmed and the appeal dismissed in accordance with the principles herein announced. Appeal dismissed.

WILLARD, C. J., and McIVER, A. J., concurred.

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13 S. C. 486

(Case No. 887.)

MOORE v. PARKER.

(April Term, 1880.)

[1. *Homestead* ⇐150.]

Where a Circuit decree gives a homestead to a widow, this court will not assume that she was not the head of a family, the appeal-brief only showing that she had no children.

[Ed. Note.—Cited in Welch v. Gleason, 28 S. C. 249, 5 S. E. 599.

For other cases, see Homestead, Cent. Dig. § 305; Dec. Dig. ⇐150.]

[2. *Homestead* ⇐141.]

A widow without a family of her own, is herself the family of her deceased husband, and as such, is entitled to a homestead exemption out of his property as against his debts.

[Ed. Note.—Cited in Norton v. Bradham, 21 S. C. 381; Yoe v. Hanvey, 25 S. C. 97; Jeffries v. Allen, 29 S. C. 508, 7 S. E. 828; Moyer v. Drummond, 32 S. C. 168, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. Rep. 850; Broughton v. Broughton, 93 S. C. 28, 75 S. E. 1027.

For other cases, see Homestead, Cent. Dig. § 262; Dec. Dig. ⇐141.]

Before Fraser, J., Colleton, October, 1879.

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*This was a petition by Dora W. Moore to the Court of Probate, alleging that the estate of her deceased husband, R. T. Moore, was insolvent, and praying that a homestead might be admeasured to her out of her husband's lands, and an exemption of his personalty be also assigned her. This was resisted by the administrator, who was also a creditor. The Court of Probate ordered a writ of admeasurement to issue, and the administrator appealed to the Circuit Court.

The Circuit decree is as follows:

This case was heard by me at the term of the Court of Common Pleas for Colleton county, in October, 1879, on an appeal from an order of the judge of Probate, directing that a writ do issue to set off a homestead for the petitioner.

R. T. Moore died intestate, in the year 1878, leaving no children, but the petitioner, his widow, surviving him. The appeal has been taken by James H. Parker, the administrator of R. T. Moore, the intestate. No question was raised as to the jurisdiction of the judge of Probate. The only point made was, that a widow is not the head of the family unless she has children.

An unmarried man is not the head of a family, unless made such by having children, or perhaps other members of a household around him, constituting a family, and is not, therefore, if without a family, entitled to homestead. I can see no reason why a widow, or other unmarried woman, should be entitled to homestead, unless she have children, or perhaps other persons around her constituting a family.

But this disability exists as to the unmarried man only so far as his own debts are concerned; and so a woman who is unmarried, and not the head of a family, cannot claim homestead against her own debt. It is quite a different thing when an attempt is made to subject the property of the husband to his own debts. In this case, the wife, if there are no children, is the family, and if the husband be dead, then the widow is herself the family. The right of exemption attached to the property in the lifetime of the husband, and continues after his death, as well in favor of the widow as of the widow and children.

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*The mode of setting off the homestead for the widow is prescribed in Section 83, A. A. 1873, p. 372, and application was properly made to the judge of Probate. It is ordered and adjudged that the order of the judge of Probate be made the judgment of this court, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the same.

From this decree, the administrator, J. H. Parker, appealed.

Mr. T. M. Mordecai, for appellant, cited Thomp. on Homest. 44, 45; 31 Texas 680; 5 S. C. 500; 42 Geo. 406.

Mr. J. D. Pope, contra, cited the statutes upon the subject of homesteads. 2 S. C. 227, 311; 3 S. C. 227; 8 S. C. 97; 11 Nev. 260; 90 Ill. 250.

May 18th, 1880. The opinion of the court was delivered by

McIVER, A. J. This is an appeal from the judgment of the Circuit Court affirming a decree of the judge of Probate, granting the prayer of the petitioner that a homestead be assigned to her out of her deceased husband's insolvent estate. The judge of Probate states that her claim was resisted by Parker, the administrator and principal creditor, "on the sole ground of the petitioner being without child or children," and the Circuit judge says: "The only point made was, that a widow is not the head of the family unless she has children." In the case as thus presented, there cannot be a question of the correctness of the decision of the court below, as it is strictly in accordance with the decision of this court in the case of Bradley v. Rodelsperger, 3 S. C. 226, where it was held that the fact that a widow is childless is not, of itself, sufficient to deprive her of her right of homestead. The petitioner, though childless, might, nevertheless, have been the head of the family, and, as we are bound to assume that the judgment of the court below is correct until error is shown by the record as presented here, we would, if necessary, assume that it had been shown to the satisfaction of the court below, that the petitioner was the head of the family, inasmuch as the only question made in that court,

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as appears by the record presented *here, was whether it was necessary, in order to entitle a widow to claim a homestead exemption out of her husband's estate, against his debts, that she should have a child or children.

It is true that the counsel, in his notice of appeal, does state, as his ground for such appeal, that the petitioner "being without children, and not the head of a family," is not entitled to the homestead exemption, and in his argument, says that the only question in the case is whether the petitioner, "the childless widow of R. T. Moore, deceased, with no one—not even a servant—dependent upon her for support, is the head of a family," &c.; but these additional facts—that the petitioner is not the head of a family, and has no one living with her dependent upon her for support—not appearing in the "case," as prepared for this court, are not properly before us for consideration, and certainly should not be allowed to have the effect of reversing a Circuit decision, made, as we must assume, in the absence of such facts. If a statement had been inserted in the "case," to the effect that there was no evidence tending to show that the petitioner was the head of a family, or that she had any one living with her dependent upon her for support, the way would then have been open to consider the question argued by the counsel for the appellant. This court can only review the judgment of the Circuit Court for the purpose of ascertaining whether it has committed any error in applying the law to the facts as presented in that court, and these facts we can only learn from the "case" as agreed upon, or settled for argument here, and not from ex parte state-

ments made by counsel, either in their grounds of appeal or in their arguments.

But, even assuming the facts to be as represented, we are still of opinion that there was no error in the Circuit decision. It appears from the decree of the judge of Probate, that R. T. Moore occupied the premises in which the homestead is claimed as a family residence, up to the time of his death, and since that time his childless widow, the petitioner, has continuously occupied the same premises, carrying on the same business of keeping a private boarding-house. Under this state of facts, there can be no doubt that, at his death, R. T. Moore, as the head of a family consisting of his wife,

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was entitled to a right of home*stead for the benefit not of himself, but for the benefit of his family. By virtue of such right, his creditors would have been prevented from subjecting the homestead to the payment of their debts, and the same would have been protected from the process issued to enforce the payment of such debts. Does the fact of his death deprive his family, consisting, in this case, of his widow, of the protection which the constitution had secured to him for the benefit of his family? If so, then, upon the same principle, it might be argued that the death of a trustee would destroy the beneficial interests of the cestui que trust, for the protection of which the trust was created. If, as has been held in several of our cases, (In re Kennedy, 2 S. C. 227; Howze v. Howze, 2 S. C. 229; Ex parte Strobel, 2 S. C. 311), the object of protection which the constitution had in view was the family, the head of it being the mere representative, then it would seem to follow, necessarily, that the true intent of the constitution was, that this right of exemption, which undoubtedly existed in Moore at the time of his death, and which has since been adjudged to have been conferred for the benefit of his family, consisting of his wife, should continue after his death for the benefit of the same person. Such seems to have been the construction placed upon the constitution by the general assembly, at the first session held after the adoption of the constitution, who were required, by the express terms of that instrument, to enforce, by suitable legislation, the provisions relating to homestead; for by the act of 1868 (14 Stat. 20), it was provided that the right of homestead of the head of any family, existing at his death, should continue for the benefit of his family. Any other view would, it seems to us, manifestly violate the intention of the framers of the constitution, and lead to results which clearly were not contemplated or intended by them; for if the childless widow is denied the protection which was extended to her husband for her benefit, it is difficult to see how the same result could be avoided in case of a father dying, leaving no wife and only a single minor child.

As the Circuit judge has very properly remarked, if the claim set up here by the petitioner was a claim to a homestead exemption out of her own property, against her

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own debts, quite a *different question would be presented. But when she simply claims an exemption which the constitution undoubtedly secured to her husband for her benefit, against his debts, we do not see any ground upon which it can be resisted.

The judgment of the Circuit Court is affirmed.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 491

(Case No. 888.)

COLEMAN v. HELLER.

(April Term, 1880.)

[1. *Exceptions, Bill of* ⟸46.]

Exceptions to the orders and rulings of the judge may be taken at the trial, and if so taken, they need not be served within ten days after the rising of the court, as required by the act of 1878. 16 Stat. 698.

[Ed. Note.—Cited in Miller v. Newell, 20 S. C. 140, 47 Am. Rep. 833; Fore v. Berry, 94 S. C. 75, 78 S. E. 706.

For other cases, see Exceptions, Bill of, Cent. Dig. § 75; Dec. Dig. ⟸46.]

[2. *Appeal and Error* ⟸274.]

Where the judge is apprised of the intention to rely on the proposition advanced by way of exception, that is sufficient to constitute an exception, although there is no formal request to note an exception. Fox v. Railroad, 4 S. C. 543, approved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1607, 1624, 1631–1645; Dec. Dig. ⟸274.]

[3. *Parties* ⟸63.]

At the trial, the Circuit judge permitted the name of a sole plaintiff to be stricken out and another substituted in his stead, without time given to the defendants to answer such amended complaint. *Held* to be error.

[Ed. Note.—Cited in Tarrant v. Gittelson, 16 S. C. 235; Dunsford v. Brown, 19 S. C. 566; Griffin v. Griffin, 20 S. C. 489; Crane, Boylston & Co. v. Lipscomb, 24 S. C. 438, 439; Suber v. Chandler, 28 S. C. 386, 6 S. E. 155; Hall v. Woodward, 30 S. C. 575, 9 S. E. 684; Baker v. Hornick & Co., 51 S. C. 316, 28 S. E. 941; Pope Mfg. Co. v. Charleston Cycle Co., 55 S. C. 541, 33 S. E. 787; Sentell v. Southern Ry., 67 S. C. 231, 45 S. E. 155; Cauthen v. Cauthen, 70 S. C. 171, 49 S. E. 321; Greenwood Loan & Guarantee Ass'n v. Williams, 71 S. C. 425, 51 S. E. 272; Cousar v. Heath, Witherspoon & Co., 80 S. C. 471, 61 S. E. 973; Buist v. Williams, 81 S. C. 499, 62 S. E. 859; Citizens' Savings Bank v. Efird, 96 S. C. 22, 23, 79 S. E. 637.

For other cases, see Parties, Cent. Dig. § 99; Dec. Dig. ⟸63.]

Before Mackey, J., Williamsburg, March, 1879.

The case is fully stated in the opinion of the court, but it may not be amiss to add that when the Circuit judge ordered the case to the jury, the defendants still declined to answer or defend the new action.

Messrs. Barron & Lambson, for appellants.

Mr. J. A. Kelly, contra.

May 26th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was an action by George H. Coleman against Philip Heller and

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sureties on the bond of the said *Heller as treasurer of Williamsburg county. The breach of the bond, relied on for a recovery, was the refusal of the said Heller, as county treasurer, to pay certain county school certificates, amounting in the aggregate to $165, to the plaintiff, George H. Coleman, who, as alleged in the complaint, was the owner thereof. The defendant denied the breach and pleaded payment of the certificates in a settlement with the said George H. Coleman. At the trial it appeared by the testimony of the plaintiff himself that the school certificates, which were the foundation of the action, did not belong to him but to his wife, S. A. Coleman; whereupon the defendant moved for a non-suit on the ground that the plaintiff had not proved his case. The presiding judge refused the motion, but granted an order, moved by the plaintiff, to substitute on the record as plaintiff the name of S. A. Coleman, the wife, for that of her husband, George H. Coleman. Defendants then moved for reasonable time to prepare their defence to the action of the plaintiff, S. A. Coleman, which was refused. The presiding judge announced that he would hold that the defendants could set up the same defence against S. A. Coleman which they had proposed to set up against George H. Coleman. The defendant's counsel insisted that they could not make their defence in the new case without an opportunity for preparation, and still asked for time. The judge ordered the case to the jury, and they rendered a verdict for the plaintiff. The defendants moved for a new trial, and, failing in that, within ten days after the adjournment of court, gave notice of appeal, and within thirty days filed specific grounds for a new trial as follows:

1. "Because it is respectfully submitted that his Honor erred in refusing to grant the motion for a new trial.

2. "Because his Honor erred in ordering S. A. Coleman to be substituted as plaintiff, a substitution not being in the nature of an amendment.

3. "Because his Honor erred in refusing motion of defendant's counsel for twenty days time to answer the complaint of S. A. Coleman."

The plaintiff made a motion to dismiss the appeal on the ground that no exceptions were

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taken to the rulings of the presid*ing judge within ten days after the rising of the court by furnishing a copy of such exceptions. He insists that a general motion of appeal, within ten days, was not a compliance with the act of 1878, which requires "copy of exceptions," &c. 16 Stat. 698. This makes it necessary to give construction to that act, and to do so we must look to the law as it stood when the act was passed. According to the code, no error of law in a case tried by a jury could be considered in this court for the purpose of correction, unless it appeared from the record that exceptions, in the matter complained of, had been taken in open court. (§ 288.) But when the case was tried by the court, exceptions could be taken "within ten days, after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury." (§ 292.) Abrahams v. Kelley & Barrett, 2 S. C. 238, and many other cases.

The act of 1878 alters and amends the law in relation to appeals from the Circuit Court to the Supreme Court in the following particulars:

The first section allows ten days after the rising of the Circuit Court at which the case is tried "to except to the rulings of the presiding judge by furnishing a copy of such exceptions to the presiding judge, and by serving them on the attorney of the respondent within the time above limited." The only effect of this provision is to allow the same time—ten days—for exceptions in all cases as were before allowed in cases tried by the court. This, however, does not repeal the law requiring exceptions to be made, but merely, in a certain class of cases, extends the time within which they may be taken, and in such cases prescribes the mode and manner in which it shall be done. The section is not mandatory, but permissive. The words are: "Exceptions for the purpose of appeal to the Supreme Court may be taken," &c. The exceptions, as heretofore, may still be taken at the trial, and, if so taken, copy of such exceptions need not be served under the act.

The second section of the act of 1878 does alter the law in relation to appeals by requiring that in all appeals to the Supreme Court the appellant or his attorney shall, within ten days after written notice of the

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order, decree or judgment appealed from *has been granted, or, if rendered during term time, after the rising of the court, give notice to the opposite party or his attorney of his intention to appeal, and within thirty days after such notice the appellant, or his attorney, shall prepare and serve "a case," unless the judge shall extend the time, &c. This section does not touch the subject of exceptions in any way, but fixes definitely the term within

which must be given notice of appeal, and "the case" be prepared and served, unless the judge shall extend the time, &c.

In this case no question arises under the second section of the act, for the notice of intention to appeal was given within the ten days prescribed, and the objection that "the case" was not served within the thirty days required, was not insisted on. The objection is that the first section has not been complied with in regard to exceptions. It is insisted that no copy of exceptions to the rulings of the presiding judge were served within ten days, as required by the act. We have already seen that the first section was only meant to cover the case where no exceptions were taken at the trial. If they were so taken, then service of copy of exceptions under the act was unnecessary. Did the defendant, at the trial, except to the rulings of the presiding judge? To make objections sufficient to sustain an appeal, it is not necessary that the word "exceptions" should be used. The better practice, undoubtedly, is to give the court information at the time that the party "excepts," and have it noted on the record, so that there can be no question about it; but it has been held that "when it appears from the record that the judge was apprised of the intention to rely on the propositions advanced by way of exceptions, that is sufficient to constitute an exception, though there is no formal request to note an exception." Fox v. Railroad, 4 S. C. 543; South Carolina R. R. Co. v. Wilmington, Columbia & Augusta R. R., 7 S. C. 410; Clarke v. Harper, 8 S. C. 257. Here the propositions, by way of exceptions, were positive and unmistakable. The defendants moved for a nonsuit. When that failed they moved for further time to answer, and, after the verdict against their protest was rendered in favor of S. A. Coleman, they moved for a new trial. We think it appears from the record that the

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judge was "apprised of the *intention to rely on the propositions advanced by way of exception," and that is sufficient to constitute an exception, although there was no formal request to note an exception. The motion to dismiss the appeal is refused.

We will not consider the first ground of appeal that it was error to refuse the motion for a non-suit, as that is involved in the exception as to the substitution of the name of S. A. Coleman, as plaintiff, for that of her husband, George H. Coleman. Upon the subject of mistakes in pleadings and amendments, the code of procedure provides as follows:

"Section 193. Where the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

"Section 194. Where, however, the allegation of the causes of action or defence to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

"Section 196. The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting the name of a party, or a mistake in any other respect, or by inserting other obligations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved." Gen. Stat. 611–12.

It was in the discretion of the Circuit judge at the trial, in furtherance of justice, to grant an order striking out the name of one person and inserting that of another as plaintiff; but we think a change so fundamental, which, in fact, made a new case, was not merely correcting a variance, but making an important amendment, and could not be made without changing substantially the defence, which, upon the same state of facts, might be good against one plaintiff and not maintainable against another. Cleveland et ux. v. Cohrs, ante p. 397.

These provisions of the code, taken togeth-

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er, do not seem to *give to a Circuit judge greater power than that which was formerly exercised by the chancellors in this state.

In the case of Jennings v. Springs, Bail. Eq. 181, Chancellor De Saussure had granted an order permitting the complainant, Jennings, to amend his bill by substituting the names of the executors of Pressley for his own, the bill having been filed by him as their agent, and his own name erroneously inserted. Appeal was taken, and the Court of Appeals held that it was within the discretion of the court to permit a bill to be amended by substituting the name of a new for an original complainant, even after answer filed, but upon reasonable terms. And they further held, in that case, that it should be upon payment of all costs up to the time of the amendment, as well as of the amendment itself. We think the denial of the terms that the defendants should have reasonable time to answer the case as standing in the name of the new plaintiff, was error.

The judgment is set aside and a new trial granted.

WILLARD, C. J., and McIVER, A. J., concurred.

13 S. C. 496

(Case No. 889.)

COTHRAN v. KNOX.

(April Term, 1880.)

[1. *Arbitration and Award* ⟸3, 12.]

An award is not binding upon a party not accepting it, where there is no evidence of a previous dispute between the parties concerning the matters submitted, and it does not clearly appear what matters were submitted, or to whom.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 12, 45; Dec. Dig. ⟸ 3, 12.]

[2. *Arbitration and Award* ⟸64.]

An award will be set aside where the evidence shows that the arbitrators acted with partiality towards one of the parties.†

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 323; Dec. Dig. ⟸64.]

[3. *Partnership* ⟸253.]

In the absence of special contract, a partner has no right to commissions upon his collections and disbursements in the settlement of the partnership business. Cooper v. Reid, 2 Hill Ch. 549, followed.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 550; Dec. Dig. ⟸253.]

[4. *Appeal and Error* ⟸1022.]

A finding of fact by a referee, reversed by the Circuit judge, sustained upon a review of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⟸ 1022.]

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*Before Fraser, J., Abbeville, April, 1879.

McGowan, A. J., having been of counsel in this cause, did not sit at the hearing.

This is an action brought in August, 1870, by James S. Cothran, as executor of Joel J. Cunningham, deceased, against John Knox. The pleadings and facts of the case are stated in the report of Ellis G. Graydon, Esq., special referee, to whom it was referred to state the accounts. His report is as follows:

This action was originally begun by complaint on a sealed note dated August 26th, A. D. 1870, whereby the defendant promised to pay to plaintiff's testator one day after the date thereof, the sum of $5091.85, together with interest thereon from January 1st, of the same year, at the rate of ten per centum per annum. The complaint admits a payment of $966.65, made on September 1st, of the same year of its execution, and claims judgment for the balance.

The answer admits the execution of the note with the credit endorsed, and alleges—

I. By way of defence:

That on April 7th, 1873, the defendant and plaintiff's testator submitted their matters to T. B. Millford and J. C. Wosmansky, who made a settlement and delivered a copy to each of them, which settlement was accepted by them as correct and final, and by which the defendant was found to be indebted to the plaintiff's testator on that day in the sum of $749.73.

II. By way of counter-claims—

1. Draft in testator's favor drawn April 14th, 1873, for $60.

2. Draft in testator's favor drawn April 15th, 1873, for $90.60.

3. Note paid to Quarles & Perrin, May 22d, 1873, for $214.48, with interest from January 1st, 1873, at twelve per centum per annum.

4. Account for 1873 for $44.25.

The answer also offers to pay plaintiff $512 and costs in discharge and satisfaction of this claim.

The reply denies all knowledge of the matters set up by way of counter-claims in the answer.

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*The plaintiff, subsequently, by leave of the court first had and obtained for that purpose, amended his complaint so as to demand of the defendant an account of the partnership affairs of J. Knox & Co., which firm was composed of the defendant and plaintiff's testator.

The answer to the amended complaint alleges—

1. That the partnership began January 2d, 1868, and ended December 21st, 1869.

2. That soon after the close of the partnership, a settlement was made which adjusted everything relating to partnership matters, except uncollected assets and outstanding debts of the firm, and which resulted in the note for $5091.85 now in suit.

3. That defendant has collected assets and paid debts, and that he has on hand a number of notes and accounts deemed worthless, and that upon a fair adjustment, he thinks his late co-partner will fall in his debt.

4. That the settlement hereinbefore referred to made on April 7th, 1873, by T. B. Millford and J. C. Wosmansky, reduced the note for $5091.85 to $749.73.

5. That the hotel property mentioned in the complaint was held by them rather as joint owners than as partners, and that all matters relating to it had been fully adjusted between them, leaving a small lot of a half acre still unsold.

6. That defendant has paid taxes on said lot, and has been at considerable trouble and expense collecting assets, &c., and claims remuneration for the same.

I am of opinion, after careful consideration, that the defence set up in the answer of settlement and award made by Messrs. Millford and Wosmansky must be overruled for the following reasons:

1. Because of partiality in the arbitrators. They got all the books and papers used by them from the defendant Knox. They were attended by said defendant during the time they were making the settlement, but never

† The same doctrine has been recently declared by the Supreme Judicial Court of Massachusetts, September, 1880, in Hills v. Home Ins. Co. See 10 Reporter 698.

summoned the plaintiff's testator to come before them. They allowed the defendant to explain and contradict writings by his unsupported and parol testimony, and after the statement had been made, they signed it together in the presence of the defendant, with-

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out giving Cunningham *notice of the time and place of such meeting. Partiality to avoid an award need not be corrupt partiality; it is sufficient if the conduct of the arbitrators has been such as to give either party an advantage over the other.

2. Because of error apparent on the face of the settlement considered along with the papers on which it was based. In several instances due-bills and notes signed by the decedent and made payable to J. Knox & Co., were charged against him as if they had been made payable to defendant alone, upon defendant's unsupported testimony; that they ought to have been made payable to him, although the defendant still had in his possession the whole of the assets of J. Knox & Co. It was error in the arbitrators to allow the defendant to contradict these writings by parol testimony of any kind, and more especially by his own unsupported testimony.

3. Because the alleged settlement was never acquiesced in by the decedent. It is alleged in the answer that it was, but there is no proof of it, the only witness examined on that point testifying that it was not.

4. Because it professes to be a settlement of individual matters and not to include partnership matters, but includes matters which clearly relate to the partnership. In fact, all the transactions between the defendant and decedent were such as grew immediately or remotely out of their connection as partners.

I am of opinion that it is incumbent upon the defendant Knox, standing as he does in a fiduciary relation to the decedent, to show affirmatively that the settlement was fair and impartial; that it is free from error either in law or in fact; that it was acquiesced in by the decedent, and that it embraces all such matters, and only such, as it professes to embrace. This he has failed to do.

I further find that the counter-claims set up in the defendant's answer are valid claims against plaintiff's testator, and must be allowed as claimed.

I have deemed it best to keep individual matters and partnership matters separate and distinct as far as possible, and I therefore first give a statement showing the amount due on the note in suit. In making the statement I strike a balance on January

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*1st, of each year, considering all accounts made with the defendant by the plaintiff's testator during the preceding year as due on that day, and allowing the defendant interest on all notes and due-bills drawn in his favor by plaintiff's testator, and on all sums of money paid by him to or for said testator during the preceding year from their dates respectively to that day. The note is dated August 26th, 1870, payable one day after date, with interest from January 1st, 1870, at the rate of ten per centum per annum, and according to my view of the law I have computed interest on it from January 1st, 1870, to August 27th, 1870, at ten per centum. I then compute interest at seven per centum from August 27th, 1870, on the amount of principal and interest due on that day, and in like manner up to the date of this, my report, subtracting payment as above.

The account will stand as to the note as follows:

[Here follows a statement of accounts.]

In making up the foregoing statement, I have not allowed the defendant credit for certain accounts of S. W. Cunningham for 1870 and 1871, because there is no proof of a promise, verbal or written, by plaintiff's testator to pay them. The letters in the margin of the statement correspond with those made on the documents put in evidence. I next give a statement showing the amount due by the defendant to plaintiff's testator on account of the partnership affairs of the late firm of J. Knox & Co. This statement includes all matters in which the defendant and the testator had a joint interest, as well those not connected with the mercantile adventure as those that were. In making it I have considered it best to treat all moneys received each year as if received on January 1st of the ensuing year, and all payments made during the year as if made on that day. Applying the rule as to trustees, I think it but just that the defendant should have commissions of five per centum on all collections made by him, and I accordingly next allow them. I then divide the remainder, if any, by two, subtract from this quotient any sums of money due by the testator to the firm of J. Knox & Co., and compute interest on the residue to the date of this my report. The account will then stand as follows:

[Here follows a statement of accounts.]

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*The claim of plaintiff that the note to Eakin & Knox, marked "A," was included in a former settlement is not allowed. It does not anywhere appear, and the fact that it was still in the hands of defendant raises a presumption, conclusive to my mind, in the absence of proof to the contrary, that it has never been paid. * * *

Extracts from so Much of the Testimony as is Material to the Case Made in This Court.

The award is a bare statement of accounts between J. J. Cunningham and John Knox, below which is written:

The above is a settlement, individually, between J. Knox and J. J. Cunningham. Set-

tlement between J. Knox & Co. and J. J. Cunningham not included in the above.

7th April, 1873. J. C. Wosmansky,
T. B. Millford.

$326.00. June 15th, 1868.

One day after date I promise to pay Eakin & Knox, or bearer, three hundred and twenty-six dollars, value received, with interest from date.

[No. 1 of award.] J. J. Cunningham.

[Copy of note No. 8 of alleged award, with endorsement.]

Due John Knox four hundred and sixty and 21-100 dollars, to pay Dr. Brown on settlement, this 5th May, 1870.

John Knox & Co.,
$460.20. per Evans.

[Endorsement.]

This should have been signed J. J. Cunningham, per Evans, said Evans having made an error, as per statement of J. Knox.

T. B. M.
J. C. W.

[Copy of note No. 5 of alleged award, with endorsement.]

$86.61.

Due J. Knox & Co. eighty-six 61-100 dollars, to pay H. S. Cason for one (1) bale of cotton of J. M. Hudson's, this the 28th March, 1870. J. J. Cunningham,
per Evans.

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*[Endorsement.]

This should have been made payable to J. Knox, individually, which can be testified by Evans, as per statement of J. Knox.

T. B. M.
J. C. W.

Testimony of T. B. Millford.

The paper marked Exhibit O is in the handwriting of Mr. J. C. Wosmansky, and was signed by Mr. Wosmansky and myself; I recognize our signatures; Mr. Wosmansky is dead.

Mr. Knox first asked me to make a settlement between Mr. Cunningham and himself; I consented to make the settlement if Mr. Cunningham would come and ask me to do so, and both of them would consent for Mr. Wosmansky to assist; Mr. Cunningham afterwards came to me and asked me to make the settlement; I cannot say which selected Mr. Wosmansky first, but it is my impression that both parties agreed to Mr. Wosmansky assisting me; I would say positively that I would not have consented to make the settlement if I had not understood that both parties consented to Mr. Wosmansky assisting.

I think there was only one copy of the settlement, and that was left with Mr. Knox; Mr. Knox acquiesced in the settlement, but Mr. Cunningham never did; Cunningham never did say to me that he acquiesced in the settlement, but Knox appeared to do so—at least he never made any objection to it.

When I asked Mr. Cunningham for his papers he said that Knox had them all; Mr. Knox turned over to me a number of papers belonging both to Cunningham and himself, and the books of the firm, and from these settlement was made up; I cannot say whether all the papers necessary for the settlement were turned over or not.

This settlement was made up from the papers furnished to me by Mr. Knox, and on these data was correct and fair to both parties—I know nothing to the contrary.

I have no personal knowledge that Mr. Cunningham repudiated the settlement made by Mr. Wosmansky and myself.

I do not know what the note ($5091.85) was given for, and did not know of its existence until it was handed to me by Mr. Knox to make up the settlement; the note was includ-

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ed in the *settlement made by Mr. Wosmansky and myself; I know nothing of any settlement made prior to that exhibited, marked Exhibit O; when we made that settlement we allowed both parties such credits, and only such, as in our judgment they were entitled to.

I mean to say that the settlement is correct and fair to both parties, provided the data upon which it was made were correct; I had no other means of judging but from papers furnished.

Mr. Cunningham never acquiesced in the settlement.

I think I can safely say that Mr. Cunningham was never present while the settlement was being made up; I cannot say whether or not Mr. Knox was present at any time while the settlement was being made up, but after it was finished Mr. Wosmansky and myself carried it to Mr. Knox, read it over to him, and signed it in his presence.

J. F. C. Du Pre sworn.

Note produced ($5091.85) in witnesses' handwriting, except signature; credit in Cunningham's handwriting; Knox and Cunningham formed partnership, thinks, in fall of 1867; on January 2d, 1868, articles of partnership; first time they went together included profits of hotel business; witness clerked for Knox & Co.; they gave witness $600 and rent of hotel. [Articles of partnership read and offered in evidence.] Partnership lasted two years, 1868 and 1869; Cunningham sold to Knox in December, 1869; Knox gave to Cunningham a note in August, 1870; settlement and dissolution of partnership January 1st, 1870; settlement included stock of merchandise of all kinds, cash on hand, everything belonging to the firm in the mercantile adventure, and it includes all private claims between the parties up to January 1st, 1870; it left in Knox's hands accounts and notes of firm, and left debts of firm unpaid; full settlement of all matters, partnership and individual; they had not been equal partners in realty, but this set-

tlement made them so; everything was taken into the settlement.

H. S. Cason being sworn, says—

Knew Mr. Cunningham well in his lifetime; knew Mr. Bailey Millford; heard Mr. Cunningham say to Mr. Knox that he was willing to give over all books and papers to

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Mr. Millford to *make settlement; Cunningham and Millford were friends; conversation was at Kurz's after fire; thinks Cunningham and Millford were special friends.

Cross-examination.

Down at Kurz's building; don't know now conversation; Cunningham said to Knox, "Knox, Millford is an honest man, and I am willing to turn books and papers over to him to make a settlement between us." Witness did not hear Wosmansky's name called.

To the report of the referee exceptions were filed by both parties.

The defendant, Knox, excepts to the referee's report as erroneous in the following particulars:

1. That he has set aside the arbitration and award between the parties, made in writing by Messrs. T. B. Millford and J. C. Wosmansky, April 7th, 1873, Exhibit O of defendant's answer, which was error, said award being final and conclusive.

2. That in re-stating the accounts between the plaintiff's testator and the defendant, he has incorporated in the settlement of partnership matters a very large amount, over $3500, which had been considered, adjusted and settled by said award, in this way largely increasing, contrary to justice and equity, the liabilities of the defendant.

4. That two accounts embraced in the award against the plaintiff's testator are disallowed in the report, to wit, the accounts against S. W. Cunningham of $183.94, for 1871, and $38.45 for 1872.

The plaintiff excepts to the report so far as the account against John Knox is concerned, upon the following grounds:

1. Because the referee allowed the defendant, John Knox, commissions of five per cent. upon all receipts as survivor, which amount to over $600.

2. Because the referee allowed Knox credit for the Eakin & Knox note ($326,) bearing date June 15th, 1868, which had been settled in the note of John Knox for $5091.85, of August 27th, 1870.

So much of the Circuit decree as bears upon the questions decided by this court, is as follows:

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*So much of these cases as relates to the issues between the plaintiff, as executor of Joel J. Cunningham, and the defendant, John Knox, was heard by me at the special term of the Court of Common Pleas, held for Abbeville county, in April, 1879.

The case came up on a report of the special referee, Ellis G. Graydon, and exceptions thereto by the plaintiff and the defendant, John Knox.

The difficulty I have felt in coming to a satisfactory conclusion, especially as to the issues of fact raised by the parties, have been increased by the unavoidable circumstances to which it is due, that so long a time had passed between the hearing and the filing of this decree.

I will consider first the exceptions filed by the defendant, John Knox.

1. The first exception is, that the referee set aside an award made by J. C. Wosmansky and T. B. Millford, which purports to settle various matters between the deceased Joel J. Cunningham and the defendant, John Knox. The validity of an award, like the act of an agent, depends entirely upon the proof of the authority under which one man undertakes to dispose of the property or rights of another, even if everything is conducted fairly and properly by the agent or arbitrators, as the case may be. This proof must be made independently of the act of the agent or the mere statements in an award. The proof, to my mind, is altogether too vague as to what was referred to the arbitrators to justify the court in holding the parties bound by the award. The award professes to dispose of individual matters. The testimony does not show whether individual or partnership matters were referred, or both.

For this reason, as well as those given by the referee, I think the first exception should be overruled, and it is so ordered and adjudged.

2. The second exception falls with the first, and must be also overruled, and it is so ordered and adjudged.

4. I am not satisfied with the sufficiency of the evidence to show that Joel J. Cunningham was liable for the debts of S. W. Cunningham. There should have been some agreement in writing to transfer this liability from the person to whom the credit was

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*given to any third person, and a copartnership between Joel J. and S. W. Cunningham does not change the position of affairs. This exception—the fourth—is therefore overruled, and it is so ordered and adjudged.

As to exceptions filed by plaintiff.

1. The first exception refers to the allowance of five per cent. on collections to the defendant Knox, the surviving partner, as compensation. If I could find authority I would be willing to allow this as fair compensation. If, however, the personal services of a partner who is winding up the affairs of the firm, can be made a matter of charge against the assets, or the other partner, without some special agreement to that effect, it is easy to see how a selfish partner could very easily absorb, for his own services, a large part of the assets. If entitled to compensation at all, there is no rule to

confine him to five per cent. The rule, I take it, is laid down in Beattie v. Wray, 19 Penna. St. 519, (see note, Parsons on Partnership, p. 230,) and is, perhaps, a wise one. This exception is therefore sustained, and it is so ordered and adjudged.

2. Nothing which entered into the settlement which was the basis of the note of August 27th, 1870, for $5091.85, given by John Knox to the deceased Cunningham, ought to enter into this accounting, and this second exception is sustained, and it is so ordered and adjudged.

All questions raised and settled by the said report, except those herein referred to, are reserved; and it is ordered and adjudged that the report of the referee as to the issues between the plaintiff and defendant, John Knox, be recommitted to the referee to be reformed in accordance with this decree.

Defendant's Grounds of Appeal.—The Supreme Court will be asked to reverse the Circuit decree in this case in sundry particulars, on the following grounds:

1. The Circuit decree set aside the award, whereas it should have sustained it. There were no allegations and no proof that it was invalid by reason of partiality, mistake, nonacquiescence by Cunningham, or for any other reason sufficient in law to invalidate it. The death of Cunningham, of the arbitrators, and of Evans, the clerk, so altered the

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conditions and circumstances *relating to the matters between Cunningham and Knox, and besides depriving Knox of important witnesses, closed his mouth in regard to transactions between them, that the court should require exceptionally strong testimony to impeach the award, and such testimony is wholly lacking in the case.

2. That said decree should have allowed appellant's fourth exception to the referee's report, in regard to the two accounts of Knox against S. W. Cunningham, embraced in said award, amounting to $183.94 and $38.45.

3. That said decree should have allowed five per cent. commissions or compensation to Knox on collections and disbursements of partnership assets, allowed by the referee.

4. That it was error in said decree to refuse Knox credit for the Cunningham note payable to Eakin & Knox, (respondent's second exception to referee's report,) for $326, allowed by the referee. There was no evidence that it had entered into the $5091.85 note; on the contrary, there was evidence that it had not.

[For subsequent opinions, see 17 S. C. 207, 591.]

Mr. Edward Noble, for appellant.

Messrs. W. H. Parker and L. W. Perrin, contra.

July 8th, 1880. The opinion of the court was delivered by

McIVER, A. J. Upon all the questions raised by this appeal, except that raised by the fourth ground, we agree with the Circuit judge.

As to the alleged arbitration, we think it lacks one essential feature, which deprives it of the character claimed for it. It seems to us to be essential to the very idea of an arbitration that there should have been an antecedent dispute or controversy between the parties. As is said by Morse, in his work on Arbitrations and Awards, at page 40, quoting from Russell's work on the same subject, "a decision which precludes differences from arising instead of settling them after they have arisen, is, for many purposes, not an award." Or, as is said in Smith v. B. C. & M. R. R. Co., 36 N. H. 458, "if the parties have a difference or dispute, however trivial, or upon a matter however simple,

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*and in whatever mode the truth is to be ascertained, and they select an indifferent third person to be the judge between them, and bind themselves to abide his decision, that seems to us a submission to arbitration, and the decision to be an award." In the case now under consideration, there is no evidence whatever tending to show that the parties had had any previous dispute or difference, but, on the contrary, they seem to have been the best of friends, the one reposing so much confidence in the other as to leave in his possession a note for a large amount against that other. The most natural inference to be drawn from the testimony is, that so far from there having been any previous controversy between the parties, the only difficulty that seemed to be in their minds was the preparation of an account of their complicated transactions, from books which did not appear to have been kept with much accuracy or system, for the purpose of enabling them to ascertain how they stood towards each other. This would call for the services of a skilled accountant rather than for those of arbitrators, strictly speaking. If this was what was in the minds of the parties, then clearly the account prepared by the so-called arbitrators could at most only furnish the basis for a subsequent settlement between the parties, and, until accepted, would not be binding. So far as Cunningham is concerned, there is not only no evidence of his having ever accepted the statement, so prepared, as correct, but, on the contrary, the evidence tends to show that he never saw it, and never knew anything about it.

But even assuming that the foregoing objection is not well founded, there is another, fatal to the alleged award. While it is very true that a submission to arbitration may be by parol as well as by deed or rule of court, yet it is essential that it should appear clearly from the evidence what matters are to be submitted, and to whom. Here the testi-

mony is defective in both respects. The testimony of Millford is that he was asked by Knox "to make a settlement between Mr. Cunningham and himself. * * * Mr. Cunningham afterwards came to me and asked me to make the settlement;" but what matters were to be embraced in such settlement this witness did not state. The natural inference from the language used would be

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*that it was to embrace all matters between them, as well partnership as individual accounts, and yet it is not pretended that the partnership accounts were to be embraced, and the arbitrators expressly say that their award embraced only the individual and not the partnership accounts. The testimony of Cason is: "Heard Mr. Cunningham say to Mr. Knox that he was willing to give over all books and papers to Mr. Millford to make settlement. * * * Cunningham said to Knox, 'Knox, Millford is an honest man, and I am willing to turn books and papers over to him to make a settlement between us.'" Here again is the same uncertainty as to what matters were to be embraced in the settlement, and the same inference may be drawn from the language used, that all matters, as well partnership as individual, were intended to be embraced. If, therefore, the intention of the parties was to submit all matters, as well partnership as individual, to arbitration, and the arbitrators have confined their award, as they manifestly have done, to the individual transactions, this certainly would be a fatal objection to the award, because while Cunningham might have been willing to submit all matters, partnership as well as individual, to arbitration, it does not by any means follow that he would have been willing to submit only the individual transactions between himself and Knox to arbitration. For it was possible that an adjustment of the individual transactions might have brought Cunningham in debt to Knox, while if the partnership transactions had been brought into the arbitration, the balance might have been the other way. Be this, however, as it may, the basis of every arbitration is the consent of the parties, and where arbitrators make an award in which certain transactions embraced in the submission have been entirely ignored, such an arbitration cannot be said to have the essential element of the consent of the parties.

There is also the same uncertainty as to the persons to whom the matters were submitted for arbitration. The only evidence tending to show that Wosmansky was one of the persons selected is the vague impression of Millford that both parties agreed that Wosmansky should assist him in making the settlement for certainly the mere fact that Wosmansky signed the paper purporting to be the award cannot be regarded as evidence

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*that he was one of the persons selected as arbitrators; while the testimony of Cason, the only other witness relied upon to show the submission, not only fails to show that Wosmansky was agreed upon as one of the arbitrators, but, on the contrary, shows that his name was not even mentioned. This testimony is manifestly insufficient to show who were "the judges of the parties' choice," and this, therefore, constitutes another objection fatal to the award.

But, in addition to all this, the alleged award is clearly amenable to the objection that it is partial. As is said by Nott, J., in Shinnie v. Coil, 1 McC. Eq. 485: "When it is said that partiality on the part of the arbitrators is good ground for setting aside an award, it is not to be understood that it must necessarily be a corrupt partiality. Any ex parte proceeding, the effect of which is to give an advantage to one party over the other, is such a partiality as will avoid an award." In this case, while Cunningham was not only not called upon for any statement, so far as the testimony shows, but was not even notified of any meeting of the arbitrators, the other party, Knox, was either present or in some way communicated with the arbitrators, as it distinctly appears that upon his ex parte statement, certainly incompetent as to one of the notes, whether under oath or not does not appear, the arbitrators undertook to change very materially two written instruments—notes of hand—in both instances in favor of Knox. It is difficult to understand how such conduct could be regarded by a fair-minded person as impartial. For when arbitrators not only permitted a bare statement of an interested party to contradict the terms of a written instrument but actually undertook to alter the terms of another note, upon the bare statement of the party interested, that a third person, who was not examined as a witness, could testify that there was an error in drawing the note in the form in which it was written, without giving the other party an opportunity to be heard as to such an extraordinary proceeding, it looks very much as if the arbitration was the result of the mere dictation of one of the parties, without any regard to the interests of the other.

As to the second ground of appeal, it is very clear that there is no evidence whatever which would have justified the referee

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*in charging plaintiff's testator with the amount of the two accounts against S. W. Cunningham. The fact that Knox and J. J. Cunningham were partners, and that S. W. Cunningham was living on land belonging to J. J. Cunningham, would certainly furnish no evidence that the latter was to be liable for any account which the latter might see fit to contract.

As to the claim for commissions, we are unable to discover any ground upon which it can be sustained. As is abundantly shown in the authorities cited, commissions can only be claimed by virtue of some statutory provision or some contract between the parties. Where, as in this case, there is no statute allowing commissions and no evidence of any agreement between the parties to that effect, they cannot be allowed. But it is sufficient for us to say that in the case of Cooper v. Reid, 2 Hill's Eq. 549, the point has been distinctly decided adversely to the claim of the appellant.

We think, however, that the Circuit judge erred in refusing to give the appellant credit for the note of Cunningham to Eakin & Knox. He seems to base his judgment upon the assumption that this note was embraced in the settlement made by Du Pre in 1870. But we are unable to discover any evidence that such was the case, and, on the contrary, think that the evidence tends to show the reverse. There is no pretence that there is any direct evidence showing that the note in question went into that settlement, but the argument is that it must be presumed to have entered into that settlement, because the giving of the note for $5091.85 raises a presumption that all antecedent indebtedness had been settled. It is very true that the giving of a note furnishes a presumption of the liquidation of all antecedent accounts, yet this is a mere presumption, liable to be rebutted, as is said in Chewning v. Proctor, 2 McC. Eq. 15, "by very slight circumstances," or, as is perhaps more correctly said in Morse v. Ellerbe, 4 Rich. 606, "until explained or rebutted, the legal presumption from giving a note is that all precedent indebtedness of the maker is covered by it." Where, however, the note is given in a different right, it may well be questioned whether there is any room for such a presumption. A note given by Knox to Cunningham would not necessarily raise

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the presump*tion that a note previously given by Cunningham to Eakin & Knox had been liquidated, for in law they are totally distinct persons, and unless there was evidence showing that at the time the last note was given the first was in the possession and under the control of Knox, the presumption would not arise, for it might be that the first note had become the absolute, individual property of Eakin, and that Knox had thereby lost all control over it. But, in addition to this, the uncontradicted testimony of Knox is that the note in question did not go into the settlement, and all the circumstances tend, in our opinion, to corroborate his testimony. Hence, even if the presumption contended for could arise it is certainly rebutted by the evidence. We think, therefore, that the Circuit judge erred in sustaining plaintiff's second exception to the report of the referee, and that in this respect also the report should be confirmed.

The judgment of the Circuit Court, as modified herein, is affirmed, and the case is remanded to that court for such further proceedings as may be necessary.

WILLARD, C. J., concurred.

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13 S. C. 512

(Case No. 890.)

ALLEN v. ALLEN.

(November Term, 1879.)

[1. *Appeal and Error* ⇐120.]

No appeal lies to this court from a refusal by the Circuit judge to dismiss an appeal from the Court of Probate, where the motion to dismiss was based upon the ground that notice of appeal had not been served in proper time upon all the parties to the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 858; Dec. Dig. ⇐120.]

[2. *Wills* ⇐770.]

Where a parent advances a portion to a child to whom the parent has given a general pecuniary legacy by his will previously executed, the presumption of law is that the portion advanced was intended as an ademption of the legacy. But no presumption of ademption arises where the bequest is residuary, or in cases of grandchildren or other strangers.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1992; Dec. Dig. ⇐770.]

[3. *Wills* ⇐770.]

General pecuniary legacies to strangers, and a residuary bequest to children or strangers, will be adeemed by subsequently advanced portions, where an intention to adeem is shown to have existed; and extrinsic evidence may be received to prove such intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1992; Dec. Dig. ⇐770.]

[4. *Wills* ⇐766.]

The doctrine of ademption has never been applied to devises of real estate.

[Ed. Note.—Cited in Godbold v. Vance, 14 S. C. 475.

For other cases, see Wills, Cent. Dig. § 1981; Dec. Dig. ⇐766.]

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[5. *Wills* ⇐758.]

*The doctrine of advancements applies only in cases of intestacy, or where directed in the will.

[Ed. Note.—Cited in McFall v. Sullivan, 17 S. C. 512; Gregg v. McMillan, 54 S. C. 380, 32 S. E. 447; Miley v. Deer, 93 S. C. 70, 76 S. E. 27.

For other cases, see Wills, Cent. Dig. §§ 1957–1960, 1976, 1977; Dec. Dig. ⇐758.]

[6. *Release* ⇐13.]

A legatee, upon the receipt of money from testator during his lifetime, executed to the testator and the other legatees a release of all interest in the estate. *Held*, that the release was without consideration and a nullity.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 21; Dec. Dig. ⇐13.]

[7. *Wills* ⇐531.]

Where testator directs the residue of his estate to be converted into money and "equally distributed among his heirs-at-law, share and

share alike," *held*, that the distribution must be per capita and not per stirpes.

[Ed. Note.—Cited in Kerngood v. Davis, 21 S. C. 207; Dukes v. Faulk, 37 S. C. 266, 16 S. E. 122, 34 Am. St. Rep. 745; Brantley v. Bittle, 72 S. C. 183, 51 S. E. 561; Rembert v. Vetoe, 89 S. C. 210, 213, 71 S. E. 959.

For other cases, see Wills, Cent. Dig. § 1148; Dec. Dig. ⟸531.]

Before Fraser, J., Abbeville, April, 1879.

Petition filed in the Court of Probate for Abbeville county, by Charles P. Allen, as executor of the will of Bannister Allen, deceased, praying a construction of the will, and of other matters connected with the administration. Upon the hearing the judge of Probate rendered his decree, from which notices of appeal to the Circuit Court were given by several of the parties in interest. Notices of appeal, taken by plaintiff and some of the defendants, appear not to have been served upon three other of the defendants; and these last made their motion before his Honor, Judge Hudson, holding court at Abbeville, in September, 1878, to dismiss the other appeals, because of failure on their part to serve the moving defendants with a copy of their grounds and notice of appeal twelve days before the time when the appeal was to be entered in the Circuit Court. Judge Hudson simply ordered "that the motion to dismiss the appeals be denied."

All other matters necessary to a full understanding of the decision of this court are stated in the Circuit decree of Judge Fraser, which is as follows:

This case was heard by me on appeal from the judge of Probate at the term of the Court of Common Pleas held for Abbeville county in February, 1879.

It appears that Bannister Allen, late of said state and county, departed this life on September 4th, 1876, leaving in force a will executed by him on December 8th, 1871, of which Charles P. Allen, the petitioner, is sole qualified executor. Testator left considerable estate, real and personal, and as his heirs-at-law, a widow, and a number of chil-

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dren and grandchildren, all of *whom are parties to this proceeding, and who are all beneficiaries under said will. The pleadings in the case contain a full statement of undisputed facts and a copy of the will and are referred to when necessary for explanation of the statements herein contained. Between the date of the will and the death of the testator, there were various money transactions between the testator and his children and grandchildren, out of which have grown the conflicting claims of the parties now before the court for adjudication. These transactions are substantially as follows:

1. As to Charles P. Allen, son—

The will gives him $1200 in gold.

April 1st, 1874. Charles P. Allen gave testator a paper under seal by which he promised to pay him at one day $1200 in gold, and $1300 in currency, without interest, "in full for that much."

2. As to Byrd O. Allen, son—

The will gives no "special bequest."

July 3d, 1874. Byrd O. Allen gave testator a receipt under seal for $2000 "in full of his distributive share of the estate," and by it renounces and forever relinquishes all claims by inheritance or otherwise to the same.

3. As to James T. Allen, son—

The will gives $1200 in gold.

November 29th, 1875. James T. Allen gave testator a receipt under seal for $3741 "in part payment of his interest" in the estate, and June 20th, 1876, a note under seal for $20 for value received.

4. As to Bannister A. Davis, grandson—

The will gives two tracts of land, in all, three hundred and twenty-three acres, and $1000.

September 12th, 1864. Bannister A. Davis gave testator his note under seal at one day for $100; on December 23d, 1872, his note under seal at six months for $1145, for money received; and May 29th, 1876, his note under seal for $50, for value received, at one day. These notes are all payable to "bearer."

5. As to Ella Lee, granddaughter—

The will gives her $500.

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*July 4th, 1874. Ella Lee gave testator a receipt under seal, $1010, "in full of her distributive share" in his estate, and thereby renounces and forever relinquishes all claim by inheritance or otherwise to her part of his estate.

6. As to James B. Allen, son—

The will gives him $500.

October 15th, 1875. Joseph N. Brown, as guardian, received for him, from testator, a note on Stephen McCully, amounting with interest to the sum of $1313.85, and $15 in currency, on this testator endorsed and signed of same, "receipt against my grandson, James Bannister Allen, in full against my estate."

7. As to Indiana Barksdale, daughter—

The will gave her no special bequest.

September 7th, 1870. Indiana Barksdale gave to testator a paper under seal, acknowledging the receipt of $2000 in full of her distributive share of his estate, and thereby renounced and relinquished to the other heirs-at-law, devisees and legatees when their rights shall accrue, all claim by inheritance or otherwise to any part of the estate, and binds herself, her heirs, executors and administrators to the fulfillment thereof, in consideration of the said $2000. Also Indiana Barksdale gave testator, April 8th, 1869, and before the date of the will, a receipt under seal for $525, except four slaves, to stand good against her in the estate.

8. As to Charlotte Ann (Allen) Orr, grand-

daughter and John Earle Bannister Allen, grandson—

The will gives to each the sum of $500.

October 6th, 1874. John B. Moore, as their guardian, gave testator a receipt for $1000 each, to be managed and accounted for by him as guardian; also without date, and, I suppose, after coming of age, they gave a receipt jointly for $2000 in full of their distributive share and thereby renounced and forever relinquished all claim by inheritance or otherwise to the estate. On December 10th, 1875, Pet Allen Orr gave testator a receipt under seal for $1100 in full of her distributive share of his estate, and thereby renounces and forever relinquishes to the other heirs-at-law, devisees and legatees when

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their rights *shall accrue all claim by inheritance or otherwise to her part of the estate and binds her heirs, executors and administrators for the complete fulfillment of the above in consideration the said sum of $1100.

And John E. Allen, September 23d, 1875, gave a receipt to his grandfather (the testator) for $1000 in full of all demands against his estate.

Alethia Allen, Charlotte Ann (Allen) Orr and Pet Allen are assumed to be the same person, and John Allen, John E. B. Allen and John E. Allen also the same person.

9. As to B. Bollin Allen, son—

The will gives him a tract of four hundred and fifty acres of land, one mule, and $1200 in gold.

April 1st, 1874, B. Bollin Allen gave to testator a paper under seal, by which he promised to pay testator one day after date $1200 in gold, included in the will, and $1300 in currency, in full for that much, without interest.

10. As to B. Berrien Allen, son—

The will gives him land known as the Carother's and Mecklin's tracts, a horse, one mule and $1200 in gold.

April 1st, 1874, B. Berrien Allen gave testator a paper under seal, by which he promised to pay testator one day after date $1200 in gold, included in the will, and $1300 in currency, in full for that much without interest.

Also note without date, payable three years after date, for $700, for improvements on the "Home Place," including dwelling, ginhouse and other buildings, with the land belonging to them, without interest.

11. As to Mary A. McCalla, daughter—

The will gives the "Harkness Place," containing two hundred and twenty-five acres, and $1200 in gold.

March 18th, 1876, Mary A. McCalla gave testator a receipt for $3800, in part payment of her interest in the estate, and in consideration thereof she relinquishes her interest in the "Harkness Place," given to her in the will.

12. As to Elizabeth or Lizzie Watson, daughter—

The will gives her a remainder, after the

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death of the widow, *in the "Home Place," a tract of land described in the will, and the sum of $1200 in gold.

April 24th, 1876, Lizzie Watson gave to testator a certificate, under seal, that she that day received of him $200, making in all $4,000, given by him for the "Home Place," willed to her by him.

February 25th, 1876, she gave a certificate that in consideration of $3800, she relinquished all claims given and bequeathed to her by her father in his will; that being for part of the land, "Home Place," willed to her, &c.

February 16th, 1876, she gave him a paper under seal, by which she relinquished all claim to the "Home Place," no consideration being stated.

13. As to James A. Moragne, grandson; Mary Brady, granddaughter; Alice Brady, granddaughter—

The will gives them a judgment against their father, P. B. Moragne, and contains no estimate of its value. The testator gave them nothing after the execution of the will, so far as appears to the court.

14. As to Ann Elizabeth Allen, the widow—

The will gives her the "Home Place" and valuable personal property, consisting of furniture, plantation tools, implements, stock, provisions, &c., for life, with remainder as to the "Home Place" to Elizabeth S. or Lizzie Watson and as to the personalty to the four younger children, Bannister Bollin, Basil Berrien, Mary A. and Elizabeth S., share and share alike. Also, the will gives her $500 in gold absolutely, and directs that the provision made in the will shall be in bar of dower.

It is alleged, and not denied, that a settlement has been made with the widow by the executor and no question has been raised as to its correctness.

The will contains a residuary clause in the following words, to wit:

"It is my will, and I hereby direct that all my estate not hereinbefore disposed of be converted into money by the sale of the real and personal property and by the collection of the debts due to me, as far as possible, and that the proceeds be equally distributed among my heirs-at-law, share and share alike."

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*Upon the hearing before the judge of Probate, it was held:

1. That the division of the residuum under this clause should be made "per capita."

2. That whenever the amounts advanced "as shown by the receipts and notes be equal to or greater than the specific legacies, the latter will be wholly adeemed, and in cases

where they are greater, the excess shall be thrown into the residuum of the estate and considered as an advancement, the parties accounting for the same in the distribution.

3. "That the relinquishments are not renunciations of the whole interest of the parties who executed the same, but shall stand upon the same footing as the notes and receipts, adeeming the specific legacies when equal to them, and the excess, if any, to be an increase of the residuum of the estate; the parties accounting for the same as advancements in the distribution of the residue of testator's estate, and when the amounts so advanced do not equal the specific legacies, then the ademption will be only pro tanto in the case of all payments."

This decree was made in order to settle the principles upon which the estate is to be divided preparatory to an accounting, which the executor is prepared to make, having a large portion of the funds in bank. The exceptions put in issue every point decided by the judge of Probate and opens the whole case, for adjudication in this court.

Whenever property, by the terms of the instrument by which it is conveyed, is given to a class of persons as children or grandchildren, the distribution is to be made per capita and not per stirpes, but when the court is compelled to resort to the statute of distributions by the terms of the will or deed, for the purpose of ascertaining the objects of the gift, resort must also be had to the statute to ascertain the proportions in which the donees take unless the terms of the instrument itself indicate an intention on the part of the donor that a different rule of distribution shall be pursued. In the case before the court, the testator, in reference to the residuum of his estate, directs that it "shall be equally distributed among my heirs-at-law, share and share alike." The widow, children and grandchildren are the heirs-at-law, and the intention of testator cannot be

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more clearly *expressed that the distribution shall be per capita. The law has provided two modes by which the estates of decedents may be distributed.

1. By the statute of distributions, when all advancements are to be brought into the distribution and accounted for.

2. By the will of the decedent, when no advancements are to be accounted for otherwise than are directed by the will itself, executed in the presence of three witnesses and with other formalities provided by law. The only exceptions are in cases of parent and child, there is a presumption against double portions, and in other cases "if it appears in any legal manner it was the intention of the testator to have the legacy adeemed."

Devises of real estate cannot be adeemed by transactions in the lifetime of testator.

An interest in the residuum of an estate cannot be adeemed, on account of the uncertainty of the amount, by any payments in the lifetime of testator.

Wherever the legatee is the child of the testator, the law raises a presumption that the legacy was intended to be adeemed by the advancements, and if not in full then pro tanto, no difference of purpose in the object of the gift appearing on the will and the receipts given. 1 Roper on Leg. 409; 11 Redf. on Wills 545.

Whereas in this case, the parties sustain the relation of strangers (grandchildren) to the testator, it is held, with some hesitation, that as the papers, signed by the legatees as receipts and kept by the testator, refer the payments to the legacies, there was the same purpose in both and an intention to adeem, and that the legacies are adeemed. In all cases where the parties, in papers found in testator's possession and set out in the proceedings, promise to pay money to the testator, the same constitute a portion of the estate, and do not adeem the legacies or devises of land; and these promises to pay must be estimated as a part of the estate and adjusted by payments, as the balance may be. Cruise's Dig. 74, (Lord C. B. Gilbert); Ross on Com. Law 302.

"A release of a man's right supposeth that he has a right; for he cannot transfer a right which he has not; if he has nothing, nothing can pass by the conveyance, &c. Hence a son cannot release to his father's disseizor in

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the lifetime of the father, be*cause he has no right in the land then. And in such case the son might enter on the land against his own release."

Neither the children or grandchildren of testator had any rights in the estate until the death; and at the time the releases to testator were given there was no right upon which it could operate. It is true that where there is a warrant of title this would operate as an estoppel and prevent the warrantor from claiming. In all the cases where there is a simple release there is no warranty, and no title passed.

In the case of Indiana Barksdale and several others, there is a release to "the other heirs-at-law, devisees and legatees" of testator, "when their rights accrue," of "all claim by inheritance or otherwise," in the estate. If a conveyance of an interest in the estate of a living man to another person, with warranty, as in this case, binding "the warrantor, his heirs, executors and administrators for its fulfillment," can, as a matter of public policy, be sustained, there is an objection to them in this case, because of the uncertainty and confusion of the individuals to whom the release is made.

If the conveyance or release is to inure to the benefit of the heirs-at-law, then the widow will take one-third, and the children,

grandchildren, will take per stirpes, on the principle laid down in Templeton & Walker, and if it is to inure to the benefit of the legatees, they would take per capita; thus, in different aspects, the same persons would take in different proportions. The uncertainty and confusion would be still more apparent if the testator had gone outside of his heirs for his legatees and devisees. I conclude that all the releases are void and can have no effect as such, while the evident purpose apparent on their face will give them effect to adeem the legacies, not including, however, the interest in the residuum or operating to adeem the devises of real estate or legacies of chattels.

The statement was omitted at the proper time that the endorsement of testator on the letter of Joseph N. Brown shows his intention to adeem the legacy of $500 to James B. Allen, and the gift of note for the payment of money is sufficiently "ejusdem generis" to make it a case of ademption.

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*It may be that the note of B. Berrien Allen for $700 has been paid or otherwise discharged by the use of the money for testator's benefit, and testimony may be introduced to show this.

If it is claimed that the same amount of money paid by the testator by way of advancement is covered by more than one of the papers in Exhibit F or Exhibit H, testimony may be introduced to show it in order to prevent a double charge for the same sum.

It has not been deemed necessary to consider whether the legacies which are the subject of this litigation are specific or general, as the same rule will apply to all except the residuary legacies.

The questions raised in this case are very interesting, and the conclusions have been reached with many misgivings as to their correctness. And it is feared that the very unusual condition in which this estate is found, will work more or less hardships under any judgment either of this or the Supreme Court.

It is therefore ordered and adjudged that so much of the decree of the judge of Probate as holds that the distribution of the residue shall be per capita, be sustained, and that the balance of the decree be overruled, and that the case be remanded to the Court of Probate to be settled according to the principles herein announced.

That so far as money has been advanced by the testator on promises to pay money, the same shall be accounted for as a part of the estate and the legacies are not adeemed thereby.

That so far as money has been advanced by the testator on receipt of his children and grandchildren, or their guardians, the same shall be considered as ademptions pro tanto of the general or pecuniary legacies, called specific in the decree of the Probate judge, any surplus over such legacies not to be accounted for.

That so far as these receipts contain releases to the testator, or general releases, or to the heirs-at-law, devisees or legatees, of interest in the estate, the same shall be held to be void and of no effect.

That legacies of chattels, and devises of land shall be held as unaffected in any way by transactions in the lifetime of testator.

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*That the residuum of the estate be unaffected by these transactions in the lifetime, and shall be divided between the widow, children and grandchildren named in the will per capita.

That testimony may be introduced in the cases and for the purposes above indicated.

From this decree appeals were taken by several of the parties in interest, upon the grounds considered in the opinion of the court.

Mr. J. S. Cothran, for appellants.

The term "heirs" is used by the testator to denote succession or substitution, and must be taken in the sense of a legacy to A and his heirs, meaning such person or persons as would legally succeed to the property according to its nature and quality. 2 Wms. on Ex'rs (3d Am. ed.) 950.

The term "heirs" is distinguished from descendants, issue, family, relations, and if either of these latter terms had been used by the testator, instead of the former, with the qualifying words, "equally" and "share and share alike," it is admitted that unless the testator's intention otherwise appear from other expressions of the will, the distribution would be per capita, not per stirpes. Cas. Temp. Tal. 257; 3 Bro. C. C. 367; 3 Beav. 541. But see even where these terms are used and a contrary intent appears, the distribution was per stirpes. 4 Beav. 239; 1 Coll. 6; 2 Cox 187. The qualifying words, "equally" and "share and share alike," are not inconsistent with distribution per stirpes.

If the grandchildren, as heirs, take by purchase under the sixth clause of the will, which we do not admit, but maintain that they take under the act of 1791, and by succession or substitution, they must take per stirpes. * * * 3 Rich. Eq. 552; Ib. 556.

Grandchildren being two degrees removed, have no natural right to any part of the inheritance. They come in ex gratia, are hæredes facti, under Section 3 of the statutes of distributions, which determines at once who shall be heirs and distributees; and it is a logical consequence that the statute must be resorted to in order to ascertain their shares in the subject of the gift.

In strictissimi jure, they are not heirs-at-

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law, but lineal de*scendants, with rights secured to them, as a class, under Section 3 of the statute of distributions. Nor are they next of kin— next of kin are nearest of kin,

and children are nearer than grandchildren. See Roper on Leg., tit. "Next of Kin." It has been declared to be a rule of the affections that children are preferred to grandchildren, and nearer kindred to the more remote. 1 Rich. Eq. 141; 2 Jarm. on Wills 46; 5 Rich. Eq. 29.

In Evins v. Godbold, 6 Rich. Eq. 26, much relied on by some of the counsel in the cause at bar, the effort on the part of the grandchildren of the testator was to obtain the share of their deceased mother, which was denied to them on the Circuit, and this was all that they asked for. It was a devise upon the contingency of the mother's surviving the life tenant.

The releases made and given to the testator in his lifetime by the several legatees who executed the same, being for valuable consideration, are valid and effective. 2 Strange 497; 1 P. Wms. 64; 1 Id. 639; 2 Id. 273. Sed secus, if a mere voluntary release. 1 P. Wms. 399; 10 S. C. 354.

The principle of advancements cannot arise in cases of testacy, and, consequently, has no application here. Bail. Eq. 154; 1 Hill's Ch. 10.

The residuum of the estate is unaffected by any payments or advances of money by the testator in his lifetime; ademption of this is impossible. 2 Wms. on Ex'rs 1144; 1 Roper on Leg. 263.

Messrs. S. McGowan, M. P. De Bruhl and E. B. Gary, contra.

July 13th, 1880. The opinion of the court was delivered by

McIVER, A. J. A preliminary question has been raised in this case as to whether due notice of appeal was given by some of the parties from the decree of the judge of Probate, which must first be disposed of. The order of Judge Hudson, refusing to dismiss the appeal of certain of the parties, upon the ground stated, is not appealable (Henderson v. Wyatt, 8 S. C. 112,) but even if it were, we should be inclined to agree with him in the view which he seems to have taken, and we will therefore proceed to consider the case upon its merits.

Most of the questions raised are novel, at

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least in this state, *and not free from difficulty. The case has, therefore, demanded and has received the most thorough consideration and careful attention.

The object of the action, which was instituted by Charles P. Allen, as executor of the last will and testament of Bannister Allen, against his devisees and legatees, was to obtain the instructions of the court as to the proper mode of distributing the estate under the provisions of the will. Except as to the residuary clause, no question has been raised, and no difficulty is perceived in ascertaining the construction which should be placed upon the terms of the will, but the conflicting claims which the court is called upon to determine arise mainly out of various money transactions between the testator and his devisees and legatees during his lifetime. For a detailed account of these transactions reference must be had to the brief and to the decree of Judge Fraser, who heard the case on its merits, where they are very clearly and succinctly stated. In general terms these transactions may be classified as follows: 1st. Payments of money by the testator to the legatees, evidenced by simple receipts. 2d. Payments evidenced by receipts which are expressed to be in full or in part, of distributive shares of testator's estate. 3d. Ordinary notes given by several of the legatees to the testator. 4th. Papers in the form of notes under seal, by which the legatee promises to pay to the testator, one day after date, "twelve hundred dollars in gold, included in the will paid, and thirteen hundred dollars in currency, in full for that much, without interest," upon each of which is the following endorsement by the testator: "I give of the within note to my son [naming him] in part of my estate of the late will and testament, and dated 8th December, 1871." 5th. Papers in which the legatee signing acknowledges the receipt of a specified sum of money from the testator, "in full of my distributive share of the estate of my said father, and I hereby renounce and forever relinquish to the other heirs-at-law, devisees and legatees of Bannister Allen, my father, when their rights shall accrue, all claim, by inheritance or otherwise, to any part of said estate, and I bind myself, my heirs, executors and administrators, for the complete fulfillment of the above, in con-

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sideration of said sum of two thousand *dollars received by me;" the only difference in the papers belonging to this class being that in some of them the interest is not relinquished "to the other heirs," &c., as in the one above set out, but contain a simple relinquishment of "all claims, by inheritance or otherwise, to any part of said estate." 6th. Papers in which Mrs. Watson and Mrs. McCalla acknowledge the receipt of certain sums of money from the testator, in consideration whereof they renounce all claim to the lands devised to them by the testator.

The questions are: Whether these transactions shall operate as ademptions of the legacies given in the will. If so, whether they adeem only the pecuniary legacies of specific amounts, or the interest which each of the legatees may be entitled to under the residuary clause also. What effect the papers purporting to release the interests of several of the legatees shall have, and what effect the papers executed by Mrs. Watson and Mrs. McCalla shall have.

The general rule upon the subject of the ademption of legacies is that where a father or one who has placed himself in loco parentis gives a legacy to a child, or to one

toward whom he has assumed such a relationship, he is understood to give a portion, and, in consequence of the leaning of the courts against double portions, if the parent afterward advances a portion to such child, the presumption is that it was intended as a satisfaction of the legacy, either in whole or in part, as the case may be, and the legacy is adeemed pro tanto. But in case of a legacy to a stranger, (and in this respect even grandchildren are regarded as strangers,) no such presumption arises, and unless there is proof showing that the subsequent advance was intended as a satisfaction of the legacy there will be no ademption and the legatee will be entitled to both. Ex parte Pye, 18 Ves. 140; Richardson v. Richardson, Dud. Eq. 184. The question of ademption is a question of intention; as is well said in one of the cases, "intention is of the very essence of ademption." Thus, where the legacy is from a parent to a child, or from one who has assumed that relationship to the legatee, the intention to adeem is presumed merely from the relationship, and in the absence of any evidence to the contrary, such presump-

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tion is conclusive of the *intention. But where no such relationship exists, then no such presumption arises, and the intention becomes a matter of proof, for which purpose extrinsic evidence may be resorted to, not for the purpose of showing an intention to revoke or alter any portion of the will, but, as is fully shown in the cases, for the purpose of showing what was the intention of the testator in making the subsequent advance or payment—whether he intended it to operate as a satisfaction of the legacy or as an additional bounty to the legatee. Shudal v. Jekyll, 2 Atk. 516; Rosewell v. Bennet, 3 Atk. 77; Kirk v. Eddowes, 3 Hare 509; Richards v. Humphreys, 15 Pick. 133; Gilliam v. Chancellor, 43 Miss. 437, reported also in 5 Am. Rep. 498. The case of Richards v. Humphreys was, in some of its aspects, very much like the case now under consideration, and will be found full and instructive. In that case a brother, by his will, gave a legacy of $500 to his sister, who was a married woman, and afterward, at her request, advanced her something over $400 to aid her in the purchase of land, taking a receipt therefor, in which it was stated "that the money was given in part payment of the dowry given her in his will." The court held that this showed that the payment was made on account of the legacy, and that it was, therefore, adeemed to the extent of the amount paid. In that case the court used this language: "Ademption takes effect not from the act of the legatee in releasing or receiving satisfaction of the legacy, but solely from the will and act of the testator in making such payment or satisfaction or substituting a different act of bounty, which is shown by competent proof to be intended as such payment, satisfaction or substitute." Hence it makes no difference that the legatee was, at the time of receiving the payment, under the disability of coverture or infancy, as the ademption depends solely upon the will of the testator and not upon the ability of the legatee to give a valid discharge. It is very true that it has been held that no presumption of an intention to adeem arises where the bequest is of a residuum or of an interest therein, even where the bequest is from a person standing in the relation of parent to the legatee, and this because a residuum or an interest therein can never be regarded as a portion, strictly speaking, inasmuch as the amount is nec-

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essarily *of an uncertain character, and hence the presumption against double portions does not arise. Farnham v. Phillips, 2 Atk. 215; Freemantle v. Banks, 5 Ves. 85. But if, as we have seen, the question of ademption is a question of intention, we are unable to perceive any good reason why, where the proof shows an intention to adeem, not only a pecuniary legacy, but also an interest in the residue, such intention should not be allowed full effect. We have not been able to find any case in which an interest in the residue has been held to be adeemed by a subsequent advance, but we do find that in the case of Lady Thynne v. Earl of Glengall, 2 H. L. Cas. 131, upon a full review of the authorities, it was held that a bequest of a residue will, according to its amount, be a satisfaction of a portion, either in full or pro tanto, as the case may be, and it is difficult to understand how, upon the same principle, we can avoid holding that a portion by settlement or otherwise, shall, in like manner, be a satisfaction of a previous bequest of a residue to the extent that the former may cover the latter. We think, therefore, that where the evidence shows such to be the intention, an interest in the residue, as well as a general pecuniary legacy, may be adeemed by a subsequent advance of money to the legatee.

It would seem that, upon the same principles, devises of real estate ought likewise to be adeemed (if such a term can, with any propriety, be applied to devises) by subsequent payments to the devisees with the intention of producing that result; but it is conceded that the doctrine of ademption has never been applied to devises of real estate, and, in the absence of any authority, we do not feel justified in disregarding the well-established line which has for ages been drawn between real and personal estate, even though we may be thereby compelled to thwart the obvious intention of the testator and disturb that distribution of his property which he thought was proper and just to his descendants. For while the intention of the testator is the cardinal rule of construction of a will, yet such intention cannot be given effect where it is in conflict with the rules of law. A devise of real estate

cannot, like a pecuniary legacy, be affected by any subsequent transactions between the testator and the devisee, but must stand until

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it is revoked or altered in the *manner prescribed by law. The papers signed by Mrs. Watson and Mrs. McCalla cannot, therefore, operate, as they were doubtless intended, as ademptions of the devises to these ladies; they cannot, as we shall presently see, have any effect as releases, and they cannot operate to adeem the interests of these devisees in the residuum, for they were not so intended by the testator, but, on the contrary, are expressly declared to be intended for a different purpose, which, as we have seen, must fail because in conflict with an established rule of law. Nor can they be treated as advancements, for the doctrine of advancements applies only in cases of intestacy, or where, as in Manning v. Manning, 12 Rich. Eq. 410, the testator in his will has directed that property given to his children in his lifetime should be accounted for by them. Here, however, there is no such direction in the will, and to give the transactions evidenced by these papers the effect of advancements would, in effect, be an alteration of the will without the formalities required by law for such a purpose.

The next inquiry is as to the effect of the receipts in which some of the legatees have undertaken to release their interests in the estate of the testator during his lifetime. We agree with the Circuit judge that so far as they purport to be releases of any interest in the estate they are absolutely void, and it is scarcely necessary to add anything to what he has said upon the subject. It may be true that, in equity, a release of a mere naked possibility or expectancy of an heir to his ancestor's estate, or of a legatee of an interest under the will of a person then living, if founded upon a valuable consideration, might be carried into effect after the death of such ancestor or testator as a right acquired under a contract; (2 Story's Eq. Jur., § 1040, b,) but, certainly, without such consideration it would be a nullity. Morris v. Borroughs, 1 Atk. 399. In this case it is not pretended that there was any consideration for the so-called releases as between the parties who signed them and the other heirs, devisees and legatees of the testator, and it could not be said that there was any valuable consideration passing between the testator himself and those who undertook to release, for the testator having, up to the time of his death, absolute testamentary pow-

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er *over all of his property, could, by a simple stroke of his pen, have effected the very same objects by revoking any legacy or devise in his will. Hence these releases are, in our opinion, absolute nullities, as well those which purport to relinquish "to the other heirs," &c., as those which do not purport to relinquish to any particular person or persons, and can only have effect as acknowledgments of the receipt of so much money on account of interests in the estate. The cases which have been cited to sustain the validity of these releases, Lockyer v. Savage, 2 Strange 947; Ives v. Metcalf, 1 Atk. 63; Blunden v. Barker, 1 P. Wms. 639; Cox v. Belitha, 2 P. Wms. 272, and others of that class, prove, on examination, to be cases arising under the custom of London, by which a man's testamentary power did not extend to the whole of his personal estate unless he died leaving neither wife or child. If he left a wife and children, his personal estate was divisible into three equal parts, one of which, called the orphanage part, went to the children, another to the widow, and the third part was at his own disposal. 1 Wms. on Ex'rs 2, 3; Heron v. Heron, 2 Atk. 160. Inasmuch, therefore, as the father could not, by his will, deprive his child of an equal share in what was called the orphanage part, a release by the child to the parent of his interest in such orphanage part, in consideration of the payment of a sum of money, has been sustained, in the cases above-mentioned, as a transaction based upon a valuable consideration, because there the parent acquired something—the right to dispose of the child's share of the orphanage part—in exchange for the money paid to the child, while here, where there is no such restriction upon the testamentary power, it is very manifest that a parent obtains nothing by such a transaction, and it cannot be supposed that he pays his money in consideration of obtaining a right which he already enjoys.

We conclude, then, that so far as papers of the first class are concerned—ordinary receipts—they will or will not be regarded as ademptions of legacies pro tanto accordingly as the evidence adduced may show the intention of the testator; that as to papers in the second class—receipts which are expressed to be in full or in part of distributive shares or interests in the testator's estate—they will, without further evidence, be re-

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garded as *ademptions of legacies, residuary as well as pecuniary, to the extent of the amounts mentioned therein, as they bear upon their face evidence that such was the intention of the testator; that as to papers in the third class—ordinary notes—they are to be regarded as assets of the testator's estate, to be accounted for by the executor, and not as ademptions of legacies; that as to papers of the fourth class—papers in the form of notes promising to pay $1200 in gold, included in the will, paid, &c.—they are to be regarded as ademptions of legacies, residuary as well as pecuniary, without further evidence, as the terms in which they were written, taken in connection with the endorsements made thereon by the testator, satisfy us that such was his intention; that as to the papers in the fifth class—releases as they,

are called—they are nullities, except so far as they acknowledge the receipt of specific sums of money, and that they are to be regarded as ademptions of legacies, residuary as well as pecuniary, to the extent of the amounts so specified; and that as to the sixth class—papers signed by Mrs. Watson and Mrs. McCalla—they are to be regarded as nullities. We think, also, that the endorsement made by the testator on the letter of Joseph N. Brown, acknowledging the receipt of a note and a small amount in currency, as guardian of James B. Allen, is sufficient evidence of the intention of the testator to thereby adeem not only the pecuniary legacy to J. B. Allen, but also his interest in the residue pro tanto, and that the gift of the note was sufficiently ejusdem generis to bring it within the rule as to ademptions of legacies. Richardson v. Richardson, Dud. Eq. 194–5.

The only remaining inquiry is as to the manner in which the residue of the estate is to be divided—whether per stirpes or per capita. The language of the residuary clause is as follows: "It is my will, and I hereby direct, that all my estate, not hereinbefore disposed of, be converted into money by the sale of the real and personal property, and by the collection of all the debts due to me, as far as possible, and that the proceeds be equally distributed among my heirs-at-law, share and share alike."

The general rule is, that where there is a gift to a class of persons, without any direction as to the proportions in which the individuals of the class are to take, all who

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can bring themselves *within the class are entitled to participate in the distribution, which must be per capita. But where the gift is to a class, the individuals of which can only be ascertained by a resort to the statute of distributions, then the provisions of the statute must also be resorted to for the purpose of ascertaining the proportions in which the donees are to take, unless, in the instrument by which the gift is made, a different rule of distribution shall be prescribed. Templeton v. Walker, 3 Rich. Eq. 543 [55 Am. Dec. 646]. If, therefore, the gift is to a class of persons designated as heirs of a particular person, then, as it is necessary to resort to the statute to ascertain who are the individuals composing the class, resort must also be had to the statute to determine how or in what proportions such individuals shall take. This is upon the presumption that the donor having, by implication at least, referred to the statute as to the persons who are to take, also intended that reference should be had to the statute to determine the proportions in which they should take, unless he expresses a different intention. But when he prescribes a different mode of distribution, then no such presumption can arise, and the distribution must be made in the manner prescribed. Thus when, as in Freeman v. Knight, 2 Ired. Eq. 72, the testator directed that certain personal property "should be sold and the proceeds equally divided between my legal heirs," it was held that though a resort to the statute was necessary, in order to ascertain who were the persons embraced in the class to whom the bequest was made, there was no such necessity to refer to the statute to ascertain the mode of distribution, because the testator had himself determined that by directing an equal division, and hence the proceeds of sale should be distributed amongst the widow and children and the children of predeceased children, per capita and not per stirpes. In the case now under consideration the words are, if anything, stronger, for here the provision is that the proceeds shall be equally divided, share and share alike. It is difficult to conceive what language the testator could have used better adapted to prescribe the mode of distribution, and we do not feel justified in substituting, for the declared will of the testator, a mode of distribution by which one of his heirs—grandchild—should receive only a fractional part of an equal share,

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when the testator has ex*pressly directed that each of his heirs shall receive an equal share, and that all shall share alike. The case of Collier v. Collier, 3 Rich. Eq. 555 [55 Am. Dec. 653], does not, in our opinion, conflict with these views. There the testator, after giving various bequests to his wife and children by their names, and to his grandchildren by classes, designating them as children of a deceased child, viz.: "To my son John's children," and "to my son William's children," as well as a bequest to his grandson Oliver, who was one of John's children, directed that the residue of his estate "be equally divided amongst all my above-named heirs," and it was held that the residue must be divided per stirpes and not per capita, notwithstanding the word "equally." But this conclusion was reached by the court only because, as they say, "it seems to us that upon the whole will, and particularly by the manner and the amount of the several primary gifts to his son John's children, to his son William's children, to his daughter Margaret, his daughter Sophia and to his other children, and by the phrase 'above-named heirs,' the testator signified his purpose that his 'son John's children' shall be one of his heirs, his 'son William's children' shall be one of his heirs, and each of his own children one of his heirs; and that the words of equality are satisfied by equal distribution amongst those of the same degree, according to the statute. The testator's grandson, Oliver, is represented to be a son of John, and will it be urged that testator intended Oliver to take two full equal shares?" Here there are no such considerations to control the signification of the

words "equally" and "share and share alike," and we must, therefore, give them their usual signification.

The judgment of the Circuit Court, except as modified herein, is affirmed, and the case is remanded to that court for such further proceedings as may be necessary.

WILLARD, C. J., concurred.

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*(Case No. 891.)

FRASER & DILL v. CHARLESTON.

(April Term, 1880.)

[1. *Executors and Administrators* ⟸438.]

In a creditor's action a decree was rendered which removed the executor from his office for misconduct, appointed a receiver, and determined matters affecting the assets of the estate in the hands of one of the defendants. Afterwards, such defendant became the assignee of two of the legatees, and as such assignee, applied to be made a party, that a third legatee, who was an infant, be also made a party, and that meantime the receiver be restrained from distributing the estate. *Held*, that the motion should have been granted.

[Ed. Note.—Cited in Clyburn v. Reynolds, 31 S. C. 114, 9 S. E. 973.

For other cases, see Executors and Administrators, Cent. Dig. § 1775; Dec. Dig. ⟸438.]

[2. *Executors and Administrators* ⟸438.]

Legatees are necessary parties to a creditor's bill, where the executor has been removed from his office for misconduct.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1775; Dec. Dig. ⟸438.]

[3. *Executors and Administrators* ⟸122; *Receivers* ⟸81.]

The receiver of the estate, appointed in the stead of the executor so removed, does not represent the legatees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 495½; Dec. Dig. ⟸122; Receivers, Cent. Dig. § 150; Dec. Dig. ⟸81.]

4. This case distinguished from Rice v. Mahaffey, 9 S. C. 281.

[5. *Assignments* ⟸90.]

Where legatees make an absolute assignment of their legacies, the assignees become thereby invested with all the rights of the assignors, and are not affected by the motives which induced the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 156; Dec. Dig. ⟸90.]

[6. *Champerty and Maintenance* ⟸6.]

An assignment of a legacy is not maintenance, because that an action at law will be required to set aside a judgment before the legacy can be recovered.

[Ed. Note.—Cited in McSwain v. Atlantic Coast Lumber Corp., 96 S. C. 173, 80 S. E. 87.

For other cases, see Champerty and Maintenance, Cent. Dig. § 5; Dec. Dig. ⟸6.]

[7. *Wills* ⟸872.]

The infant legatee is a necessary party, and the other legatees may require that he should be brought in by proper proceedings.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2221, 2223–2225; Dec. Dig. ⟸872.]

[This case is also cited in Gadsden v. Whaley, 14 S. C. 214, as to facts.]

Before Fraser, J., Charleston, July, 1879.

For a full understanding of this case, see the reports of the case upon previous hearings in 8 S. C. 318; Ib. 344; 11 S. C. 486.

It was, in brief, an action brought by certain creditors of Joseph Whaley, deceased, to have his estate administered, and to have certain certificates of city stock, held principally by the city of Charleston, and transferred upon the books of the corporation after the death of testator, adjudged to be the property of testator.

It was held that many of these certificates were not endorsed by the testator; that his signature was forged. The person who passed these certificates was, afterwards, the

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sole qualified *executor of Joseph Whaley's will. The court removed the executor from his office and appointed a receiver in his stead.

This, together with the Circuit decree, is a sufficient statement of the case in its former stages.

After the decision, as reported in 11 S. C. 486, the city of Charleston procured an assignment from two of the legatees of city stock, as follows:

State of Connecticut.—We, the undersigned, being entitled to two-thirds of a legacy of $20,000 city of Charleston six per cent. stock under the will of our grandfather, Joseph Whaley, and understanding that said stock had been transferred by the city of Charleston after the death of the said Joseph Whaley, by virtue of his signatures endorsed on the scrips thereof; and said signatures having been questioned and decided by the courts, with one exception, not to be genuine; we, therefore, declining to take any benefit or advantage from any decision against the validity of said endorsements; and understanding further, that the endorsements being genuine, the city of Charleston would be justly entitled to said stock, hereby assign, transfer, and set over all right, title and interest which we now have or may hereafter become entitled to in said legacy of two-thirds of $20,000 city of Charleston six per cent. stock to the city council of Charleston, their successors and assigns.

Witness our hands and seals this 2d day of May, A. D. 1879.

Josephine M. Porter. [L. S.]
Sabina Morris. [L. S.]

In the presence of—
Johnson T. Platt.
John B. Reddan.

The city council then filed their information and prayed for an order, as follows:

And now comes the said defendant, the city council, and gives this court to understand and be informed, that since the commencement of this suit and quite recently, to wit, on the ——— day of May, 1879, the said defendant has become the lawful owner, by

free gift and assignment of and from Josephine M. Porter and Sabina Morris, of all their interest in and to a part of the estate of the late Joseph Whaley.

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*The said interest is created by the second clause of the will of the testator, Joseph Whaley, which is in these words:

"Item.—I give and bequeath unto my daughter, Maria Evans Morris, twenty thousand dollars in the city of Charleston six per cent. stock, to her, her heirs and assigns, absolutely and forever."

The legatee, Mrs. Morris, died before the testator, leaving three children, Josephine and Sabina, above-named, and a son, who also departed this life before the testator, Joseph Whaley, leaving an only child, a son, who is, it is believed, still a minor. Upon the death of Joseph Whaley, the bequest passed, by force of the statute, to his two granddaughters aforesaid, and to his great-grandson; to each one-third part of the above-recited bequest, and such were their rights and interests in the subject of this suit at its commencement, and they were each one of them necessary and indispensable parties to this cause, because that they had "an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." See 6 Wall.

That the city council of Charleston is entitled to stand and be in the place of the testator's granddaughters, and though already a party defendant in another right, the said city council respectfully asks permission to intervene for the rights of the said Josephine M. Porter and Sabina Morris, and to prove the allegations made in respect thereof, in the notice to Mr. Bacot, receiver, which is hereunto appended. To the end that their estate may not be destroyed without an opportunity to defend it.

Proposed Order.

On hearing the statement and petition of the city council, and argument of counsel for all parties before the court, and it appearing that the legal representatives of Maria Evans Morris, namely, Josephine M. Porter, Sabina Morris and ——— Morris, are and were, from the commencement of this suit, necessary parties materially interested in the subject matter, and in the object thereof, and that the city council, already a party defend-

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*ant, has succeeded to the rights of the said Josephine M. Porter and Sabina Morris.

It is ordered that the city council have leave to intervene for the rights and interests of the said Josephine M. Porter and Sabina Morris, as if the complaint were amended, to make them parties, with leave to contest the claims of claiming creditors, and by all lawful means to establish their just rights.

And it is further ordered that plaintiffs do amend their complaint, making ——— Morris, the grandson of Maria Evans Morris, a party defendant.

The receiver in this cause, T. M. Bacot, Esq., is hereby ordered and directed to abstain from the distribution of any part of the fund about to come into his possession, until the further order of this court.

The decree of the Circuit judge was as follows:

The above cases came before me at the regular term of the Court of Common Pleas for Charleston county, ending July 11th, 1879, upon (1) a motion to pay out funds to creditors, and, after argument had been heard on the same, upon (2) a motion to allow the city council of Charleston, as assignees of certain legatees of Joseph Whaley, to intervene for the purpose of contesting the claims of certain creditors; and also on (3) a suggestion of counsel that it is the duty of the court to order new parties to be made.

Joseph Whaley, the testator, whose estate is the subject of controversy in these cases, died January 26th, 1872.

The complaint in the principal cause was filed July 13th, 1874, and was a proceeding on behalf of creditors against William Whaley, as executor of last will and testament of Joseph Whaley. Neither heirs, devisees or legatees, were made parties to the proceedings. On April 13th, 1875, G. W. Dingle, special referee, made a report in the case, in which, among other things, he found:

That certain city stock, amounting to $86,342, constituted a part of testator's estate.

The report also contained a statement of judgments, and other claims against the estate, with the amounts due on each, besides other matters not necessary to be here stated.

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*This report was confirmed by Judge J. P. Reed, by order, dated June 29th, 1875.

From this order there was an appeal to the Supreme Court, in which the only question raised was as to the ownership of said city stock, and involved a question of evidence.

The order of the Supreme Court remanded the case to the Circuit Court, for the purpose of allowing the city council to offer evidence of their right to the stock, or to show how he, Joseph Whaley, may have been divested of his title thereto; the respondents to have the right to offer evidence "in rebuttal."

The order of Judge Reed, June 29th, 1875, above referred to, directed the sale of the plantation on Edisto island.

William Whaley, the executor of Joseph Whaley, who had not answered the complaint on behalf of himself and the remaindermen interested in the real estate, made an application to Judge Reed on November 8th, 1875, for leave to open the decree heretofore made, and this motion was refused.

On appeal to the Supreme Court, the ruling of the judge was sustained, but the court, of its own motion, made an order that the remaindermen, grandchildren of testator, interested in the real estate, should be made parties to the proceeding.

Thus the case was remanded to the Circuit Court with the decree of Judge Reed, modified only as to the claim to the city stock, and with the sale of the real estate suspended until the remaindermen could be made parties, and present their objections, if any. The case was re-opened before the referee as to the city stock, and on the coming in of his report on the testimony taken by him, as directed by the Supreme Court, the case was heard by Judge W. H. Wallace.

In the argument of the case before Judge Wallace, it was urged, as appears from his decree, that if the signatures of Joseph Whaley, on the transfers of city stock were not genuine, then the signatures of Joseph Whaley on notes, which were the foundations of some of the judgments proved in this case, were not genuine.

Judge Wallace by his decree of April 8th, 1878, held that a large amount of the city stock belonged to the estate of Joseph Whaley, to be administered as a part thereof, and

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that the re*ceiver to be appointed should have leave "to institute such proceedings as he may be advised may be proper and necessary to try "the validity of any claims against the estate of Joseph Whaley, and defend such proceeding as may be instituted against him."

From this decree there was an appeal to the Supreme Court, the same grounds being urged in the Supreme Court as to genuineness of the notes covered by the judgments, as were urged in the Circuit Court before Judge Wallace.

The Supreme Court refused to disturb Judge Wallace's decree, and in reference to these judgments uses the following language:

"To set aside what has already been fixed by judgment and not appealed from, or by consent of parties, can only be done by proper proceedings, for which the Circuit judge has made ample provision."

By proper proceedings, to which no exceptions have been taken, Thomas W. Bacot has been appointed receiver, and given his bond as such. In pursuance of an order made during this term of the court, to which the city council consented, a large part of the stock has been accounted for to the receiver, and the balance is to be turned over to him when some additional legislation can be made to authorize it on the part of the council.

W. D. Clancy, one of the masters, having, in pursuance of an order made at this term of the court, submitted his report, an order was made July 2d, 1879, directing the receiver to pay the fees of G. W. Dingle, referee, a counsel fee to the attorneys for plaintiffs, and certain other expenses. This order was made without notice to the corporation counsel, but in open court and by consent of the attorneys of all the creditors who had proved their claims.

W. D. Clancy, one of the masters, in pursuance of an order of reference, submitted a report on claims, dated June 19th, 1879.

While a motion to confirm this report and to pay out the fund to the creditors was under consideration by the court, two motions were made by the counsel for the city council above referred to, to wit:

1. That the city council have leave to intervene as the assignees of Josephine M. Por-

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ter and Sabina Morris, grandchildren *of Joseph Whaley, entitled under the will to two thirds (2-3) of a general legacy of $20,000, given in the will to their mother, Maria Evans Morris, with a view to impeach some of the judgments reported in the master's report, as valid and entitled to payment, and thereby save the legacy for the council as assignee, the assignment bearing date May, 1879.

2. That the matter having been brought to the attention of the court, an order should be made calling in all the legatees of Joseph Whaley as parties interested in the fund in court, and entitled to a hearing before any distribution is made. These motions were made without notice to counsel for creditors, but with notice to counsel for the receiver, and without any affidavits in support of them.

The order of the court above referred to, under which the funds have been turned over to the receiver, was made on the ——— day of ———, 1879, during term time, and some time after the date of the assignment from the two legatees to the city council, and it is now too late to set up any claim to this fund then held by the city council. Rice v. Mahaffey, 9 S. C. 281. But if this difficulty were out of the way, and such a right as this—a right to impeach judgments for fraud were assignable, (Story's Eq. Jur., § 1040, g,) the city council can stand on no higher ground under their assignment than the legatees themselves. Are they, then, necessary parties to this proceeding?

All the cases to which reference has been made by counsel and which are accessible, show that all parties interested in a fund before the court for distribution, are necessary and proper parties, when their rights are traced to a common source—as where all parties claim under a deed or under a will. Creditors and legatees do not claim from a common source; the latter claim under the will, and the former claim against it. The rights of creditors are paramount to the claims of legatees, whether specific, general or residuary. It is true that where the heir or devisee is interested, he should be made

a party, because in this state the legal title to the real estate is in the heir or devisee. It is for this reason that in this case in Ex parte W. Whaley, 8 S. C. 347, remaindermen have the legal title in the realty. The legal title to the personalty is in the executor

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or *administrator, and no such reason exists. A decedent has no right to embarrass and jeopardize the rights of creditors by dividing his estate amongst a number of persons, who can never be entitled to it until the debts are paid. The administrator stands in his shoes, and if he commits a devastavit, his surities can be held responsible, and the executor stands in the same relation, and it is the misfortune of those who are the objects of the testator's bounty if they are the victims of his misplaced confidence.

The personal representative of deceased debtor or testator, is the regular representative of all the persons who are entitled to the personal assets, and bound by his bona fide acts, so far as third persons are concerned. Story's Eq. Pl., § 140, note 4, § 141.

Where the real estate of the decedent is made by statute, personal assets for the payment of debts, the heir is not a necessary party to a suit for the administration of assets. Story's Eq. Pl., § 163. See Curtis' Eq. Prec. 46, 47.

I conclude, that in no point of view are these legatees, who have waited seven years after death of testator, and five years after the commencement of these proceedings, necessary or proper parties to them.

There has been simply a repetition of the arguments and views presented to the Circuit and to the Supreme Court, without any new showing on their part, and I do not think it necessary to call in the legatees or give any further direction to the receiver, than is given in the decree of Judge Wallace, which has been affirmed by the Supreme Court.

If the legatees have any rights, there is nothing in this case to prevent them from pursuing the proper remedies.

The motions to permit the city council, as assignee of two of the legatees, to intervene and to make a general order calling in the legatees of Joseph Whaley, are refused, and it is so ordered.

As to the distribution of the fund. The only estate applicable to the payment of creditors is that which remains after the payment of the necessary expenses of the administration, and I see no reason in this case why there should be any apportionment of these expenses amongst the creditors. They should be paid out of the fund, and

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then the balance distributed according *to law. By law, the order of payment of debts of a decedent is fixed, and is different from that which prevails in the lifetime of the debtor.

It is therefore ordered and adjudged, that after paying the fees and expenses heretofore ordered, the receiver do pay out the funds now or hereafter to come into his hands to the creditors entitled to the same. First, to the specialty creditors; and then after they are paid in full, that he do pay the simple contract creditors out of the balance pro rata, all necessary expenses, including commissions of the receiver, and fees for his counsel assigned by the court, be properly provided for before the final distribution of the fund; and that the receiver have leave to apply for an order of reference, to ascertain what sum is proper for these purposes.

From this decree the city council of Charleston appealed upon the following grounds:

1. Because his Honor, Judge Fraser, erred in holding that Josephine M. Porter, Sabina Morris and George Morris, the legal representatives of Maria Evans Morris, were not, from the commencement of this suit, or from the date of the order displacing the executor and appointing a receiver herein, necessary parties to the same.

2. Because his Honor erred in refusing to allow the city council of Charleston, successors to the rights and interests of the said Josephine M. Porter and Sabina Morris, to intervene for such rights and interests, and by all lawful means to establish the same in this cause.

3. Because his Honor erred in not ordering George Morris, grandson of Maria Evans Morris, to be made a party defendant.

4. Because his Honor erred in refusing to enjoin the receiver in this cause from distributing the funds to the creditors, then about to come into his possession, until the rights of the parties to the same could be fully determined.

[For subsequent opinion, see 19 S. C. 384.]

Messrs. G. D. Bryan and J. B. Campbell, for appellants.

Messrs. E. McCrady, Jr., C. R. Miles and S. Lord, Jr., contra.

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*July 17th, 1880. The opinion of the court was delivered by

McIVER, A. J. This is an appeal from an order refusing a motion, submitted by the city council of Charleston, to allow them, as assignees of certain of the legatees of the testator, Joseph Whaley, to intervene for the protection of their rights as such assignees, and to require that another legatee be made a party, and that in the meantime, and until the further order of the court, the receiver be restrained from distributing the funds in his hands belonging to the estate of said testator.

The first question presented is whether these legatees were necessary parties. This is a creditor's bill, and there is no doubt of the general rule that to such a bill legatees are not necessary parties. This, however, is

because the executor, being the representative of the legatee, is supposed to be capable and willing to protect their interests, and, therefore, there is no necessity for the presence of the legatees. Story's Eq. Pl., §§ 140, 141, 150. Where, however, the executor is insolvent, the rule is different, (Calvert on Parties 26,) and especially where, as in this case, the executor is not only insolvent, but has been removed from office, as it were, upon the ground of misconduct, and has been thereby declared not only incompetent, but has been rendered incapable of representing the legatees. The reason of the rule ceasing, the rule also must give way, and the general doctrine that all persons having an interest in the object of the suit ought to be made parties becomes applicable. As long as there was any one before the court capable of representing the interests of the legatees, no necessity existed for making them parties. But when there is no such representative before the court, and especially when, as in this case, the person appointed as such representative—the executor—has been declared unfit to be entrusted with the administration of the assets of the testator, not merely upon the ground of negligence or want of capacity, but upon the allegation and proof of the grossest fraud, he certainly cannot be regarded by a court of equity as the representative of the legatees, one of whom is a minor, and, therefore, peculiarly entitled to the protecting care of the court. In such a case the legatees must necessarily represent their own interests, and, for this purpose, must be brought before the court as parties. The re-

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ceiver, though *invested with many powers, and charged with many of the duties of the executor, cannot be regarded as the representative of the legatees. He is "the mere hand of the court." As to persons not parties to the case, even the court cannot, by any order it may make, affect their rights. The legatees, deriving their rights under the will, must, of course, take them subject to any restrictions or conditions contained in the will, and, therefore, when there is an executor duly appointed and qualified, the legatees take their rights subject to the right and duty on his part, derived from the will, to represent their interests. Where, however, he is displaced or otherwise rendered incapable of representing them, they must then represent their own interests, as there is no power, without their consent, authorized to appoint a person to represent them.

What steps they may or ought to take for the protection of their interests, after they have been made parties, we regard it premature to discuss now. Whether they may, under these proceedings, contest the validity of some or all of the claims brought against their testator's estate, or whether it will be necessary for them to institute separate proceedings against each of the judgment creditors, or whether they may not apply to the court for an order directing the receiver to contest some or all of such claims, as he was permitted to do by the decree of Judge Wallace, affirmed by this court, are questions which are not yet before us in a practical form, and cannot, therefore, properly be now considered. The legatees, undoubtedly, had a right to be let in as parties, and to have the receiver restrained from distributing the fund until they could have an opportunity of asserting their rights in such a form as they may be advised.

We do not think this motion comes too late. It may be true that it would now be too late for the city council, in its original character as one of the defendants, to interpose the objection of a want of proper parties, (Clark v. Tompkins, 1 S. C. 119; Featherston v. Norris, 7 S. C. 472,) but, as assignee of the legatees, it is a totally different person, in law, and entitled to the rights of its assignors, who, never having been made parties, never had the opportunity to make the objection. We are unable to perceive how

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the case of Rice v. Mahaffey, 9 S. C. *281, applies; for there the defendant sought, by a new action, to obtain the benefit of a defence which he had neglected to interpose to the previous action brought against him by the plaintiff, and the court held that this could not be done by a separate proceeding. But so far from holding that the desired relief could not be obtained in the original action, language is used which implies that, in a proper case and upon a proper showing, such relief might be obtained in the original action. The language referred to is: "If by any mistake he may have suffered injury, the court has extensive power, and, upon motion, can grant relief by leave to amend or otherwise, according to the nature of the case. Such proceedings are not separate, but are in their nature supplemental, and are part of the original action." The whole point of that case, therefore, is that a separate proceeding was not the proper mode of obtaining the relief desired, but, if obtainable at all, it must be sought under the original action.

It is said, however, that though the legatees might have had the right to be made parties for the purpose of contesting claims against the estate of the testator, yet the city council, as their assignees, have no such right. First. Because the assignment was not intended to give such right; and, second, because, if it did, it purports to assign a right to institute legal proceedings to set aside a judgment on the ground of fraud, and such an assignment would be void "as contrary to public policy, and as savoring of the character of maintenance."

According to the view which we take of this matter the motive which induced the legatees to make the assignment cannot affect its validity. They may have been prompted by the best or the worst of motives; the fact, nevertheless, appears that it is, in effect, an

ordinary assignment of their interest in a legacy, which, not being impeached for fraud, want of consideration or anything of the kind, must have the effect of an ordinary assignment of a legacy. It may be, and doubtless is, true that these ladies, actuated by consideration for the memory of their deceased uncle, highly creditable to them, would not have been willing, for the sake of mere personal gain, to engage in a contest which would render it necessary to cast discredit upon a loved though erring relative, and yet,

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from consideration for an *innocent third party who had suffered heavy losses by the misconduct of their uncle, they might have been willing to enable such third party, as far as lay in their power, to repair losses thus occasioned. At all events, they have made an absolute assignment of their interests under the legacy to the city council, who have thereby been invested with all the rights of the assignors.

Nor do we think that there is any ground for the position that the assignment is void as "contrary to public policy and as savoring of maintenance." The argument to sustain this position is based upon the assumption that the thing assigned was the right to institute proceedings at law to set aside a judgment for fraud, but according to our view, such an assumption is without foundation, for the thing assigned was the legacy, or the interests of the assignors (two-thirds) in the legacy, given originally to Maria Evans Morris, and we are unable to see why such an assignment is not just as valid as the assignment of any other chose in action. The fact that it may become necessary for the assignee to institute legal proceedings to protect the thing assigned from unjust claims brought against it does not invest the transactions with the character of maintenance, for the thing assigned is not the mere right to bring an action to set aside a judgment for fraud.

We think, also, that the grandson of Maria Evans Morris, who is entitled to the remaining third of the legacy originally given to her, is a necessary party, and that the motion requiring the plaintiffs to make him a party should have been granted. The fact that no motion to that effect has been made on his behalf cannot affect the question, for, when it is brought to the attention of the court that any person who is a necessary party, in order that a complete determination of all the matters involved in an action may be had, has not been made a party, the court may, of its own motion, require such person to be made a party in order that there may be a complete and final disposition of all matters involved in the case, (Neeley v. Anderson, 2 Strob. Eq. 262,) especially where, as in this case, the absent party is an infant.

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*The judgment of the Circuit Court is reversed, and the case is remanded to that court for such further proceedings as may be necessary in conformity with the principles herein announced.

WILLARD, C. J., and McGOWAN, A. J., concurred.

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13 S. C. 546

(Case No. 892.)

STATE v. WILLIAMS.

(April Term, 1880.)

[1. *Courts* ⟸90.]

This court will not follow a former decision standing alone, without regard to the grounds upon which such decision was based. The principle of stare decisis stated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 314; Dec. Dig. ⟸90.]

[2. *Criminal Law* ⟸93.]

The Court of General Sessions has jurisdiction of cases of petit larceny, as the punishment therefor provided by law is not limited to a fine of $100 or imprisonment for thirty days. Const., Art. I., § 19.

[Ed. Note.—Cited in State v. McKettrick, 14 S. C. 352, 353; State v. Padgett, 18 S. C. 319; State v. Jenkins, 26 S. C. 122, 123, 124, 1 S. E. 437; State v. Cooler, 30 S. C. 109, 8 S. E. 692, 3 L. R. A. 181.

For other cases, see Criminal Law, Cent. Dig. § 161; Dec. Dig. ⟸93.]

3. State v. Harper, 6 S. C. 464, overruled.

Before Hudson, J., Chesterfield, February, 1880.

The defendant, Jacob Williams, was convicted of petit larceny, under an indictment charging him with the larceny of two wagon wheels and two taps, of the value of $22, in October, 1879.

The report of the presiding judge is as follows:

There was conflicting testimony upon the question of the value of the property alleged to have been stolen, as well as upon the question of the guilt of the defendant. The weight of the testimony was, in the opinion of the court, in favor of a valuation above $20. The jury, however, being the sole and exclusive judges of the testimony, under full instruction from the court as to the law of the case, and the distinction between grand and petit larceny, rendered a verdict against the defendant for the latter. Whereupon his attorney moved the court in arrest of judgment and to discharge the defendant, upon the ground that the Court of General Sessions is without jurisdiction of the crime of petit larceny, and without author-

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ity to pronounce sentence *upon the defendant in this case. After full argument by the solicitor and counsel for the defendant upon the motion, it was overruled, and the de-

fendant was sentenced to six months confinement in the state penitentiary at hard labor.

In support of the judgment, I assign the following reasons: The case of State v. Harper, 6 S. C. 464, is relied upon by the defendant's counsel as conclusive of the law of this case. I am aware of the grave responsibility I have taken in disregarding that case, but I know that there is widespread dissatisfaction among the lawyers of the state with the law as therein announced, and a general desire that it be reviewed and re-affirmed or overruled. In no way can this be effected, so far as I can see, unless it be by appeal from a Circuit judgment in conflict with it. Such a judgment I have rendered in the present case, because the law of that case (State v. Harper) has never carried conviction to my mind, and is a fruitful source of embarrassment in administering the law of larceny in the state. After a careful examination of the constitution of the state and the law of the land, I can find nothing which prohibits the Court of General Sessions from pronouncing judgment upon a verdict like the one rendered in this instance. It is a well-established doctrine of criminal law and practice, that if one be charged with a grave offence, which includes one of an inferior degree, the jury may discharge the defendant of the higher crime and convict him of the less atrocious, and judgment will be pronounced for the lesser crime so found, unless authority so to do is denied the court by clear and binding negative enactment. Neither in the constitution nor the statute law does it appear that to the Court of General Sessions is jurisdiction of the crime of petit larceny denied; Section 18, Article IV. of the constitution, gives to it "exclusive jurisdiction of all crimes not otherwise provided for by law." Clearly, then, if the jurisdiction of a crime is otherwise provided for by law, the exclusive jurisdiction of the Court of General Sessions would be taken away, but not its jurisdiction; that would remain and be concurrent with that of the other tribunal, unless to the inferior tribunal exclusive jurisdiction should be given, or unless to the superior tribunal all jurisdiction should be in totidem verbis, denied. The Court of General Sessions retains

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exclusive juris*diction over any and all crimes, unless jurisdiction thereof be conferred upon an inferior court, in which event the two would hold concurrent jurisdiction. But if, in the enactment, jurisdiction is entirely denied to the Court of General Sessions, or exclusive jurisdiction is conferred upon the inferior courts, then, and not otherwise, does the Court of General Sessions lose its authority.

A statute, which simply confers jurisdiction of a crime on an inferior court generally and not exclusively, cannot be construed to deprive the Court of General Sessions of its jurisdiction, but the jurisdiction would remain concurrent with that of the inferior court. The language of the constitution in Section 18, Article IV., is broader and more comprehensive in preserving a general criminal jurisdiction to the Courts of General Sessions, than it is in Sections 15 and 16 of the same article, in conferring a general civil jurisdiction upon the Courts of Common Pleas, yet the Supreme Court has not hesitated to declare that the latter court has concurrent civil jurisdiction of contracts, in which jurisdiction has, by the constitution, been given to justices of the peace, and by statute to trial justices. See Burge v. Willis, 5 S. C. 212.

The reasoning of the court in this case is pithy, satisfactory and conclusive, and is in harmony with the uniform tenor of decisions of the courts of England and America in similar cases.

It accords with the judgment of our own Court of Appeals in State v. Walker, 14 Rich. 37, and State v. Sullivan, 14 Rich. 282, and the cases therein cited; and also accords with the reasoning and judgment of our Supreme Court in State v. Simmons, 4 S. C. 72. All these cases were relied upon by Attorney-General Melton in his able argument in State v. Harper, but they are summarily disposed of by the chief justice in the conclusion of the judgment, by the declaration that they have no application to the point presented in State v. Harper. These cases and the cases from England, cited by the court, all hold the doctrine as one unquestioned, that "nothing shall be intended to be without the jurisdiction of a superior court but that which specially appears to be so, and nothing shall be intended to be without the jurisdiction of an inferior court but that which is expressly alleged." In Burge v. Willis, it is declared that when a court is vested

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*with general original jurisdiction under the constitution, it cannot be divested of that jurisdiction by the legislature establishing another court with the same or a like jurisdiction. "Unless there be that in the constitution of the state which deprives the Court of General Sessions of jurisdiction of the crime of petit larceny, or which empowers the legislature to do so, it is clear, upon authority, that the jurisdiction remains. The most that can be said is, that the constitution, by Section 19, Article I., confers exclusive jurisdiction upon justices of the peace, or other officers authorized by law (to wit, trial justices,) of 'offences less than felony, and in which the punishment does not exceed a fine of one hundred dollars or imprisonment for thirty days;' and in Section 22 of Article IV., jurisdiction of prosecutions for assault and battery and other penal offences less than felony, punishable by fine only."

It certainly cannot be successfully contended that the crime of petit larceny is embraced in either of these sections, nor has the legislature, since the adoption of the constitution, by any enactment, so defined the crime of petit larceny, and limited its punishment as to bring it within the category of offences set forth in either of said sections. From a proper construction of the acts of the legislature in connection with the strong language of the constitution in Article IV., Section 18, I am more inclined to the opinion that courts of trial justice are entirely without jurisdiction of the crime of petit larceny, than I am to the opinion that they have exclusive jurisdiction of that grave offence, separated, as it often is, from the felony of grand larceny, by a distinction scarcely perceptible, and sometimes infinitessimal. For the crime of grand larceny, to wit, the stealing of goods of the value of $20, a convict may be and often is punished by confinement at hard labor in the state penitentiary for years, while, under the law of State v. Harper, one guilty of stealing goods of the value of $19, under the most aggravating circumstances, cannot be punished by imprisonment exceeding thirty days in the county jail, nor by fine exceeding $100, which fine, in ninety-nine cases out of a hundred, is nugatory, because of the poverty of the convict. It would require the law to be so written in the most explicit terms to convince a

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rational mind that the legisla*ture or the people in convention assembled, intended that it should be thus. A distinction so utterly at variance with common sense and justice, cannot be rectified by the law-making power of the land too soon, if it exists in the constitution or in the statute law. We are constrained to think that a correct interpretation of the constitution and laws of the state will remove this anomaly and bring order out of confusion, regarding the crime of larceny.

To justices of the peace represented by trial justices, the constitution gives jurisdiction of the crime of assault and battery, yet the Courts of General Sessions are constantly trying accusations of this offence. Original jurisdiction in cases of bastardy is also conferred upon this inferior tribunal, and yet numerous cases of bastardy are being tried in the superior court; and so of the whole catalogue of misdemeanors, except this most aggravated of all, petit larceny, and for its commission a premium is held out by making the punishment thereof a mere farce.

Chief Justice Moses, in delivering the opinion of the court in State v. Harper, on page 471, in speaking of the intention of the framers of the constitution, says: "Their purpose, it may well be supposed, was to create, by Section 19, Article I., of the constitution, an exclusive jurisdiction of such offences, less than felony, in regard to which the general assembly might, from time to time, annex as a punishment a fine not to exceed $100, or imprisonment not exceeding thirty days."

But this is just what the legislature has not done as to petit larceny, and having failed so to limit and define its punishment, it remains an offence cognizable by the Courts of General Sessions.

The grounds of appeal by defendant were upon the grounds that the motion in arrest of judgment was improperly overruled; that the court was bound to follow the decision in State v. Harper; that the Court of General Sessions had no jurisdiction to try or punish the offence of petit larceny, jurisdiction being exclusively vested in courts of trial justices; that the verdict was equivalent to an acquittal; and that the conviction was improper, as the indictment charged a common law offence.

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*Mr. W. L. T. Prince, for appellant.

1. The common law does not confer jurisdiction upon any particular courts, but merely makes an offence indictable, and the constitution and statute law fixes the forum before which it is to be tried.

2. The constitution vests the whole judicial power of the state in a Supreme Court, a Court of Common Pleas, a Court of General Sessions, a Court of Probate, and a Court of Justices of the Peace, at the same time authorizing the general assembly to establish such municipal and other inferior courts as may be deemed necessary. Art. IV., § 1.

3. To the Court of General Sessions which, by Article IV., Section 1, has "criminal jurisdiction only," the constitution gives "exclusive jurisdiction over all criminal cases which shall not be otherwise provided for by law." Art. IV., § 18.

The only jurisdiction, then, conferred by the constitution upon the Court of General Sessions, when, by that instrument, it was meant to distribute among the different courts the judicial power of the state, may be stated thus: "It shall have none other than criminal jurisdiction and that shall be exclusive, but its jurisdiction shall be restricted to cases which shall not otherwise be provided for by law."

4. Original jurisdiction in "penal offences less than felony punishable by fines only" is conferred on justices of the peace, and, therefore, are not cognizable by the Court of General Sessions. Art. IV., § 21.

5. Already jurisdiction had been given to "justices of the peace or other officers authorized by law" to try summarily "all offences less than felony, and in which the punishment does not exceed a fine of $100, or imprisonment for thirty days," and of such offences the General Sessions could have no jurisdiction. Art. I., § 19.

Here the constitution, having conferred no other criminal jurisdiction on the Court of Sessions than an exclusive jurisdiction in cases not otherwise provided for, and having

"otherwise provided" for cases less than felony, &c., ceases to speak, and we must turn to the statute law and the rulings of the Supreme Court to ascertain further and

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more certainly the extent of the *"criminal jurisdiction only," meant to be conferred upon the Court of General Sessions by Article IV., Section 1, and the subjects of the "exclusive jurisdiction" conferred by Section 18 of the same article of the constitution.

6. In 1866, before the adoption of the constitution, the general assembly had declared the simple larceny of property below the value of $20 to be a misdemeanor, and considered a petit larceny. 13 Stat. 407.

7. By authority of Article IV., Section 1, of the constitution, the general assembly did establish the inferior court of trial justice with "jurisdiction of all offences which may be subject to the penalties of either fine or forfeiture not exceeding $100, or imprisonment in the jail or work-house not exceeding thirty days." Also to "have jurisdiction of larcenies * * * if the property stolen does not exceed $20 in value." The jurisdiction of the Court of Sessions in no case being concurrent with any other court, but always exclusive, this legislation deprives it of power to hear and determine such causes. 14 Stat. 402–3.

8. Trial justices are the "other officers" referred to in Article IV., Section 1, of the constitution, and have all the jurisdiction conferred upon justices of the peace. State v. Fillebrown, 2 S. C. 404.

9. If the Court of Sessions had jurisdiction of petit larcenies, the constitution has taken it away by conferring it on another court, for where a new forum is created for the trial of offences which belonged to another, the old tribunal is deprived of authority. Righton v. Wood, Dud. 167; McIver v. State, 2 S. C. 1; State v. Fillebrown, 2 S. C. 408; State v. Harper, 6 S. C. 464.

10. The statute having created a misdemeanor of what was before a felony, the old law is gone, and the offender must be indicted under the new, and, of course, before the court to which jurisdiction of the new offence is given. State v. Wright, 4 McC. 358; Burton v. Watkins, 2 Hill 674; 1 Bish. on Cr. L. 210, 638; State v. Raines, 3 McC. 533.

11. The indictment should have been under the statute to warrant a conviction for petit larceny which is now only a statutory offence. 1 Bish. on Cr. L. 210, 638; 1 Bla.

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89; *State v. Ripley, 2 Brev. 300; State v. Wright, 4 McC. 358; Burton v. Watkins, 2 Hill 674; State v. McLain, 2 Brev. 443; State v. Fleming, 2 Strob. 470; State v. Gray, 14 Rich. 174.

12. There can be no conviction for a misdemeanor under an indictment for a felony. This is the well settled principle in English law. Otherwise a defendant might be deprived of privileges and advantages allowed in charges of misdemeanor, which are not allowed in cases of felony, and the charges are repugnant. 1 Bish. on Cr. L. 814–15–87. See, also, State v. Wheeler, 3 Vt. 344; State v. Smith, MS., Dec., 1813; State v. Fant et al., Brev., [MS.]; State v. Howe, 1 Rich. 260.

This common law rule is overturned by statute in some of the states, but not in this. It is only where there is a court for a misdemeanor as well as for a felony, that convictions for the former in the same indictment have been sustained; and before the cases of State v. Boise & Stuke, 1 McM. 189; State v. Posey, 7 Rich. 490, it was held in this state that felonies and misdemeanors could not be charged in the same indictment. State v. Smith, State v. Fant et al., State v. Howe, above noted.

13. To argue that because the greater includes the lesser offence, therefore, in this case, the defendant might be convicted of petit larceny, is to ignore the very question of jurisdiction which was raised before the Circuit judge—for want of jurisdiction may present an obstacle to such conviction. State v. Raines, 3 McC. 533; Nelson v. State, 10 Humph. (Tenn.) 518; People v. Abbott, 19 Wend. 192; State v. Nutting, 16 Vt. 261; 1 Bish. on Cr. L. 820.

14. The verdict was an acquittal of the offence charged as it did not conform to the indictment. State v. Lohnman, Riley Cas. 72; 3 Hill 67; Phil. Ev. 56; 1 Bish. on Cr. L. 814–15–20–87; Freeman on Judg. 318.

15. Judgment cannot be pronounced as written by the court. One convicted of misdemeanor for which no specific punishment is provided is only liable to fine and imprisonment without hard labor. Russ. on Cr. 92; Stephen's Dig. Cr. L. 15; Rex v. Dunn, 12 Q. B. 1041. The penitentiary is for the confinement of all offenders who shall have been convicted and sentenced according to law, to the punishment of solitary imprisonment or confinement therein at hard labor. 14 Stat.

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92. The judgment *is erroneous, being for a punishment to which defendant is not legally subject. 1 Bish. on Cr. L. 213, 711.

Mr. Solicitor Sellers, contra.

July 20th, 1880. The opinion of the court was delivered by

WILLARD, C. J. The appellant was convicted of petit larceny in the General Sessions upon an indictment for grand larceny and sentenced to six months' imprisonment, at hard labor, in the penitentiary. An appeal is taken from the refusal of the General Sessions to arrest this judgment. The question involved is whether the General Sessions had jurisdiction to pronounce sentence upon the conviction of petit larceny. As the indictment charged grand larceny there is no question of its proper pendency before the Court

of General Sessions. It is contended on the one hand, that, under the ruling of this court, in State v. Harper, 6 S. C. 464, the General Sessions was without original jurisdiction in cases of petit larceny and could not give sentence upon a verdict of guilty of petit larceny.

In behalf of the state, it is claimed that the General Sessions has jurisdiction in case of petit larceny, and, at all events, after an indictment for the higher offence of grand larceny, could receive and act upon a verdict of guilty of petit larceny.

It is unquestionable that State v. Harper stands as an authority for reversing the judgment appealed from, and it becomes necessary to examine the validity of the ground on which the judgment in that case was rendered. When the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated. There are three elements that enter into the authority of a case claiming to stand as a leading case on the general principles of the law: First, the unanimity with which its judgment was pronounced; second, the fact that it has been followed; and, third, the duration of time during which it has been openly followed or tacitly assented to. As, then, the authority of such a case is distinctly fortified by the next succeeding case, it is obvious that in

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the decision of the latter the *solidity of the grounds of the former conclusion should be inquired into, for it is only where resort is had to the original sources and a concurring result obtained that the first decision can be said to be fortified by that which follows it. An original case could not possibly gain authority by a mere perfunctory following on the principle of stare decisis. No less careful scrutiny is demanded by the nature of questions that involve the distribution of public authority among the principal agencies of government and the establishment of the limits of judicial authority. To misconceive the fundamental principles that underlie the great structural features of the government is attended with at least as great evils as a misconception of the principles of the law; for while the latter may be connected in the ordinary course of legislative action the former demands organic changes in the government itself; and, although the frequency with which such changes have been made in our country in the past has tended to inspire the opinion that little danger or inconvenience attends structural revision of the government, yet there is reason for believing that the instability that must inevitably result when frequent resort is had to the authority alone competent to revise that structure is an evil to be carefully guarded against. The present question involves a construction of the constitution, claimed to have the effect of depriving the Court of General Sessions of part of the jurisdiction which it has always exercised and which has been exercised by the courts of common law, from which the Court of General Sessions was derived. We feel bound then to re-consider the correctness of the conclusion reached by the court in the State v. Harper.

The decision in State v. Harper was, in effect, that the offence of petit larceny was defined and the punishment applicable thereto prescribed by Section 5 of the act of March 1st, 1870. 14 Stat. 402. That under the proper construction of that act, the punishment in case of the larceny of goods of or under the value of $20 was not to exceed a fine of $100 and imprisonment for thirty days. That cases of petit larceny were, under the operation of that act, within the meaning of Section 19, Article I., of constitution, cases to be tried

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summarily before a "justice *of the peace and other officer authorized by law" on information, under oath, without indictment, and of which a trial justice has exclusive jurisdiction, from the circumstance that he is the only officer authorized by law for that purpose, no provision having been made by the legislature for the election of justices of the peace. Under this conclusion the court held that the General Sessions was excluded from jurisdiction in all cases of petit larceny.

The section of the act of 1870 which was construed in State v. Harper is identical with the provisions of Section 12, Chapter XXV., of the general statutes, subsequently enacted. Gen. Stat. 195. That section is contained in the chapter prescribing the powers and duties of trial justices, and is as follows: "They shall have jurisdiction of larcenies by stealing of the property of another, of money, goods or chattels, or any bank note, bond, promissory note, bill of exchange, or other bill, order of certificate, or any book of accounts for or concerning money or goods due, or to become due, or to be delivered, or any deed or writing containing a conveyance of land or any other valuable contract, release or defeasance, or any writ, process or public record, if the property stolen does not exceed $20 in value." No punishment is prescribed by this section; but, apart from the correctness of the view presented in State v. Harper, that will be presently considered, this seeming omission is supplied by another provision of the general statutes, taken from the act of 1866, (13 Stat. 407,) which is as follows: "Any simple larceny of any article of goods, choses in action, bank bills, bills receivable, chattels, or any article of personalty, of which, by law, larceny may be committed; of all domesticated animals, and animals feræ naturæ, which have in any degree been subjected to the control of any owner, of all growing crops, or parts thereof,

of all annual products of the soil, whether severed from the soil or not, and of all such fixtures and parts of the soil as were severed from the soil by an unlawful act, below the value of $20, shall be a misdemeanor and considered a petit larceny." Here the designation of the offence as a misdemeanor makes applicable to it the punishment provided by law in case of misdemeanors. It is clear

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that, so far as the *cases contained in these two sections are identical, the two sections are to be read in pari materia, and, such being the case, independent of the effect of any other statute or constitutional provision, the offence of petit larceny is to be considered a misdemeanor, punishable in excess of the quantity of punishment contemplated in Section 19, Article I., of the constitution. If any case can arise under Section 12, Chapter XXV., that cannot be brought under Section 12, Chapter CXXIX., such a case is not presented by the present appeal, and was not presented in State v. Harper, and need not be considered.

The conclusion reached in State v. Harper, arose from reading Section 12, Chapter XXV., as enacted with special reference to the provisions of Section 19, Article I., of the constitution. The last named section is as follows: "All offences less than felony, and in which the punishment does not exceed a fine of $100, or imprisonment for thirty days, shall be tried summarily before a justice of the peace or other officer authorized by law, without indictment or intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher crime or offence unless on presentment of a grand jury, except in cases arising in the land and naval service, or in the militia, when in active service in time of war or public danger." It was thus held, in substance, that the intention of the act that the offense of petit larceny shall be brought within the jurisdiction of a trial justice is the key of the construction of the act, and, as that intent could be effectuated in no other way than by adjusting the provisions of the act to correspond with the intention of Section 19, Article I., of the constitution, that such an adjustment was demanded by sound principles of construction. That adjustment consisted in looking to Section 19 as the means of fixing the maximum of punishment for petit larceny, and as that section limited the jurisdiction of the inferior courts proceeding summarily to punishment not exceeding a fine of $100 and imprisonment not exceeding thirty days, these limits were to be taken as the proper limits of punishment in all cases of petit larceny.

The principle of the method of reasoning employed in State v. Harper to reach the

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conclusion just indicated is that the limit *of the powers of the legislature must be regarded as an implied limit to their intention in order to give their purpose efficacy within the limit of their powers. In construing a statute enacted by a legislative body of limited powers, such construction should undoubtedly be aided by the presumption that in its passage the legislature was looking to the terms limiting its powers. Where the language is doubtful this consideration should have weight in determining a preference for that interpretation that is agreeable to the restrictions of the fundamental law. It is quite a different matter to read such a statute and the clauses of the constitution affecting the legislative powers in pari materia, as was done in State v. Harper. Where enactments, separately made are read in pari materia, they are treated as having formed, in the mind of the enacting body, parts of a connected whole, though considered by such body at different moments of time and under distinct and separate aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and a consistent embodiment in a connected system. It is difficult to see how this principle can become the means of connecting, for the purpose of construction, clauses and provisions of a constitution established by an authority distinct from and independent of such legislative body, and proceeding by different methods with the enactment of a strictly legislative body. As the two bodies cannot in their nature unite to carry out a common purpose, it is difficult to see how their independent enactments can be treated as if they had such capacity and intention.

If the design and intention of Section 19, Article I., was to fix the punishment due to the offence of petit larceny, or to any class of offences to which that crime appertains, that effect would be accomplished independently of the statute, and even though it expressed an inconsistent intention. But it is not possible to construe that section as having any such intention. It is possible that a law may be so framed as to practically embody in it the language of some clause or provision of the constitution, and thus to permit such language to take an effect beyond that intended by its use in the constitution. In that case

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the clause *of the constitution so embodied would, for the purpose for which it was intended by the legislature, become a part of the act as effectually as if its language was recited as part of the act. It would no longer take effect merely as part of the fundamental law, but as the language of the statutory law. Independently of such a case the whole effect of a clause of the constitution must remain that which the framers of the constitution intended for it. The question then arises: "Has the legislature so embodied

Section 19, Article I., of the constitution, in the act conferring jurisdiction on trial justices as to give it effect beyond that intended by the framers of the constitution, and such as it could only have by being enacted as part of the language of a statute?" Unless this question can be solved in the affirmative, no ground exists for reading that section in pari materia with the statute, as was done in State v. Harper.

To answer the question just stated in the affirmative, it is necessary to find in the statute an intention that it should be construed as if Section 19, Article I., was embodied in it. It will not be contended that there is in the statute an expression of such an intent. Can it, then, be implied? The argument in State v. Harper is, in effect, that there is an omission in the statute that ought to be supplied from some source, and, as no competent source appears but Section 19, that resort should be had to that to supply such deficiency. Assuming, for the present, that there is a clear omission in the statute, the obligation on the courts to supply it is not absolute. If it is a defective omission they cannot supply it without supplementing the legislative will, which is beyond their competency. If it is an omission intentionally, looking to a particular source from which the supply may come, all the courts can do is to follow that intention, and, by means of it supply such omission.

But the conclusive view of this subject is that there is no omission in the statute. At the time of the passage of the act conferring jurisdiction in cases of petit larceny on trial justices, that offence was defined by the statute law as a misdemeanor, and certain penalties attached to it. The measure of punishment prescribed was in excess of that within the competency of trial justices under Section 19, Article I. If it had been the

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inten*tion of the legislature so to reduce the measure of punishment in cases of petit larceny as to bring all such cases within the competency of trial justices, they would naturally have repealed the pre-existing law that stood in the way of such a result. They did not do so, but, on the contrary, both of these acts were reenacted as part of the general statutes. It was, therefore, the clear intention of the legislature that they should stand together, and, such being the case, they must be read together, and so we find the offence fully defined, and its proper measure of punishment indicated by placing it in this class of misdemeanors. There is, therefore, no omission to be supplied.

It is said that there was a clear intent that trial justices should take jurisdiction, and that could not be unless the measure of punishment, as thus fixed by law, should be reduced. On the other hand, as we have seen, there was an equally clear intention that the antecedent statute penalties should not be reduced, evidenced, as we have seen in the first place, by failing to repeal the previous law; and, in the second place, by re-enacting it side by side with the act conferring jurisdiction on trial justices. How this incongruity is to be explained, is a matter of speculative opinion merely; possibly it was thought that Section 19 was a mere limitation upon the power of punishment by trial justices and not a strict test of their jurisdiction, and thus, practically, two grades might exist in the offence of petit larceny—one dependent on the statute, and the other on the measure of punishment within the competency of trial justices. This matter we cannot determine, but it is clear that we cannot raise an implication in favor of embodying the provisions of Section 19 in the statute without violating a much clearer implication—that they intended to leave standing the measure of punishment prescribed by the antecedent statute. This is conclusive of the question whether any ground exists in the intention of the statute for reading Section 19 in pari materia with it as part of the expressed will of the legislature.

It is clear that the trial justices have, by Section 19, Article I., no exclusive jurisdiction of cases of petit larceny, and thus there is no ground for excluding the jurisdiction of the Court of General Sessions.

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*The sentence of the Court of General Sessions is free from objection, as it was conformable to the punishment imposed in cases of misdemeanors under the operation of the act of March, 1878. 16 Stat. 453.

The judgment of the Court of General Sessions must be affirmed and the appeal dismissed.

McIVER and McGOWAN, A. J.'s., concurred.

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13 S. C. 561

(Case †No. 912.)

CRANE, BOYLSTON & CO. v. MOSES.

(November Term, 1879.)

[1. *Creditors' Suit* ⇨46.]

Where a creditor obtained judgment against the executor of his debtor, and then instituted a creditor's action, setting forth his judgment in the complaint, upon which an injunction was issued, and the answers did not deny the indebtedness, and the judgment was proved at the hearing—*Held*, that the claim was sufficiently established. This case distinguished from Westfield v. Westfield, ante p. 482.

[Ed. Note.—Cited in Brown v. Brown, 45 S. C. 410, 23 S. E. 137.

For other cases, see Creditors' Suit, Cent. Dig. § 182; Dec. Dig. ⇨46.]

†This case and the two cases following, are inserted out of their place in the order of filing, so as to complete, in this volume, the cases of November Term, 1879.

[2. *Executors and Administrators* ⇐308.]
Executors who, after having duly advertised for creditors, and having no knowledge of outstanding debts, pay legacies more than two years after testator's death, are not guilty of a devastavit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1263; Dec. Dig. ⇐308.]

[3. *Executors and Administrators*, ⇐84.]
Executors having no knowledge of a debt due by their testator, are not chargeable with notice of such debt from papers in their possession as executors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 323; Dec. Dig. ⇐84.]

[4. *Executors and Administrators* ⇐308.]
A creditor has no cause of complaint, if executors turn over pecuniary legacies to those who are entitled to hold for life only, upon the unsealed releases of the remaindermen.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1257, 1258, 1263, 1263½; Dec. Dig. ⇐308.]

[5. *Trusts* ⇐384.]
A surety upon a bond conditioned to hold negroes upon certain trusts, cannot be charged with a balance due by the trustee, as stated in his returns on file in the proper office; the breach must be judicially declared in action against the principal, and upon this subject the surety has a right to be heard.

[Ed. Note.—Cited in Fellers v. Davis, 22 S. C. 429.

For other cases, see Trusts, Cent. Dig. § 623; Dec. Dig. ⇐384.]

[6. *Trusts* ⇐234.]
A trustee having received confederate money in June, 1863, deposited it upon interest with bankers of high standing, and entered the Confederate army soon afterwards and died in March, 1864, and the bankers failed soon after the war—*Held*, that the trustee was not liable for the loss.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 342; Dec. Dig. ⇐234.]

[7. *Trusts* ⇐221.]
A trustee having received money for the
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trust estate in 1860 and 1861, *deposited it upon interest, with his individual funds, with bankers of high standing, and died in 1864, and the money was lost by the failure of the bankers after the war—*Held*, that he was not liable. McIver, A. J., dissenting.

[Ed. Note.—Cited in Gary v. People's Nat. Bank, 26 S. C. 547, 2 S. E. 568, 4 Am. St. Rep. 733.

For other cases, see Trusts, Cent. Dig. § 318; Dec. Dig. ⇐221.]

[8. *Executors and Administrators* ⇐227.]
[A judgment creditor need not establish his claim against his debtor's estate by affidavit, where he has made proof of his judgment.]

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 814; Dec. Dig. ⇐227.]

Before Hudson, J., Sumter, September, 1879.

The questions brought up by this appeal relate to claims of creditors of the estate of one deceased. The nature of those claims are fully stated in the opinion of the court, it being proper to add only, that the moneys received by Phillips, as trustee for Rose B. Quinn, were as follows: $4681.54, in January, 1860, and $1254.95, in February, 1861; and that the remaindermen, in 1866, by a paper not under seal directed the executors to turn over to Emily and Ellen Phillips, the moneys and other property left to those ladies for life by the will of N. Phillips, releasing the executors from all liability for so doing, and agreeing to look only to the life tenants for their interests in remainder. All other matters are fully stated in the Circuit decree, which is as follows:

The plaintiffs obtained judgment against F. J. Moses and M. Moses, executors of the last will and testament of N. Phillips, deceased, on October 11th, 1871, for the sum of $1566.31 principal, besides interest and costs. Fi. fa. was issued on the said judgment (which was the result of a trial by jury and verdict rendered in regular term time), and lodged with the sheriff of Sumter county on October 19th, 1871. A certified copy of said judgment was duly lodged in the clerk's office of Marion, and execution issued thereon. Levy was made on certain lands of the said N. Phillips, deceased, in the said county of Marion, but no sale was made thereof, by reason of some order restraining the sheriff, obtained in some manner not now made known to the court; but which must have been irregular, since it appears that no notice thereof was ever given to the plaintiffs or to the executors of Phillips, and no legal proceedings have ever been taken on which said order could have been granted. The plaintiffs then filed the complaint in this action, and obtained an order of injunction in the usual form on March 12th, 1872, which order provided, in the third clause thereof,
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that all persons having any *claims against the estate of the said N. Phillips do file and prove such claims under these proceedings. The executors were also called and required to account for their administration of the said estate, and suing creditors restrained from further proceedings, except under this case.

On May 19th, 1873, an order was taken out in the cause, extending the time for creditors to prove their demands until January 1st, 1874. The judge of Probate of Sumter county was ordered to take and state the account of the executors, and the issues, both of law and fact, were referred to him. The defendants (executors of N. Phillips) were both upon the bench at that time, and no accounting was had.

On January 18th, 1877, an order was obtained in the said cause transferring the reference to the judge of Probate of Marion county, with the powers and duties of referee as above. The judge of Probate of Marion county undertook to assume the entire disposition of the subject matter of the suit,

holding that the Court of Common Pleas for Sumter county was without jurisdiction over the cause; and in accordance with the view, he entertained a petition of one Richard Jordan against F. J. Moses and M. Moses (which petition was filed on January 9th, 1877), for an account from the executors and sale of the real estate of the said N. Phillips, etc. On August 2d, 1877, the said judge of Probate, John Wilcox, filed his decree upon the petition of the said Richard Jordan, who styled himself trustee for the estate of Rose B. Quinn and Margaret McNeill. An appeal was then taken from this judgment to the Court of Common Pleas for the county of Marion, and on November 5th, 1877, the whole proceedings were set aside and quashed by the judgment of the Hon. A. J. Shaw, who held that the said Court of Probate had no jurisdiction over the subject matter, by reason of the pendency of this action in the Common Pleas for Sumter county; in which county both executors resided at the time this action was commenced. An appeal was taken from this judgment of Hon. A. J. Shaw, and he was sustained by the Supreme Court and his judgment confirmed. 10 S. C. 431. Thereupon the said John Wilcox, judge of Probate for Marion county, filed a copy of his judgment above referred to, as his report

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under the authority of the order of ref*erence, made to him in this cause on January 18th, 1877, hereinbefore referred to. Counsel for plaintiffs and defendants in this cause both excepted to this report, and on March 30th, 1878, his Honor, Judge Pressley, made his order in the cause, after hearing argument from all parties, whereby he rescinded all the former orders of reference in the cause, and ordered that neither the said report of the judge of Probate of Marion county, nor any of the papers or testimony accompanying the same, be held as part of the proceedings in this cause; also referring the issues of law and fact in the cause to T. B. Fraser, Esq., who was also instructed to take and state the account of Montgomery Moses, as executor of N. Phillips, deceased—his co-executor, F. J. Moses, having died pending this action. The Hon. T. B. Fraser having been elected judge before the reference was held, an order was made on January 15th, 1879, by his Honor, Judge Mackey, whereby he rescinded so much of the order made by his Honor, Judge Pressley, as appointed T. B. Fraser, Esq., referee, and all issues of law and fact in the cause were referred to Charles Mayrant, Esq., master in equity for Sumter county, who held references—on September 8th, 1879, filed his report; and this cause came on to be heard before me on exceptions filed to the report of the said Charles Mayrant, Esq., master in equity for Sumter county.

To the proper understanding of the issues involved, it may be proper to state a few facts, as collected from the evidence submitted.

N. Phillips died March 4th, 1864. His executors named in his will were F. J. Moses and M. Moses. M. Moses seems to have acted mainly in the management of the estate. Legal advertisement was made by the executors very soon after the death of N. Phillips in 1864. None of the creditors now before the court gave notice of any claims. The plaintiffs obtained judgment against the executors October 11th, 1871. As before stated, December 4th, 1871, they sold, by the sheriff of Sumter county, the law library and some parlor furniture under their execution, which brought a small sum. The plaintiffs commenced this action for the settlement of the estate on March 11th, 1872. C. C. Law had then brought suit on a note, said

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to have *been lost, and which was made to one R. B. Fladger, and due on November 15th, 1863. No notice was given and no action taken on the claims said to be due to the estates of Rose B. Quinn and Margaret McNeill, until the year 1877.

The plaintiffs, Crane, Boylston & Co., except to the report of the referee (master):

First. Because the master has found, as matter of law, "that the liability of Fairlee having been established and in no way discharged, by payment or otherwise, it subsisted against the surety, Phillips, at the time of his death, consequently against his executors as a specialty debt." These words are quoted from the master's report. In the testimony reported it is difficult to perceive how the master has reached the conclusion that the liability of Fairlee had been established and in no way discharged by payment or otherwise. In fact there seemed to have been no evidence of any effort to collect the sums which are claimed to have been due by Fairlee, either from him or his estate, which, it is shown, has been under settlement in the court of equity for Marion county for a number of years past.

Before the estate of Phillips can be properly charged with the debt of Fairlee, it will be both proper and necessary that proof be made before the master that the liability of Fairlee existed at the date of the reference, and had not been paid or discharged, either in whole or in part, and this proof must be made by the party who brings forward the claim and seeks to establish it under these proceedings. It would be a proper part of such proof to show that the demand had been established against the estate of the principal debtor now in the course of settlement in the court of equity, and that no part of the same has been paid. The plaintiffs in this action have but one fund out of which they can be paid, to wit, the estate of Phillips; the creditors of Fairlee, upon his trusteeship have two or more funds—those of the principal

debtor and those of his two sureties, severally.

It is a well established rule of equity, that when one creditor has two or more funds out of which he can be paid, and the other creditor has but one, the first shall proceed first to exhaust that fund upon which he alone has a claim, before proceeding against the other, in which both are interested. In the

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absence *of sufficient evidence as to this claim, I deem it best and safest to re-commit it to the master, with instructions to have further testimony taken upon it. The creditor plaintiffs, as well as the executor, who is before the court, insist that before the estate of Phillips can be properly charged with a breach of the trust bond of Fairlee, there must have been an account had against the principal and a decree made against him. In Lining, Ordinary, v. Giles, 2 Tread. Const. R. 720, it is held that a surety to bond of administrator cannot be held liable until the administrator is cited and decree made. See, also, Ordinary v. Williams, 1 N. & McC. 587; Ordinary v. Powers, 2 N. & McC. 213; Anderson v. Maddock, 3 McC. 237; Harrington v. Cole, 3 McC. 509.

There is proof before the master that the estate of Fairlee is now before the court of equity, and that assets will come into the hands of his executors at the death of a Mrs. Shaffer, if there be none now; and there is no proof that this demand or claim has ever been rendered in as against his estate. For these reasons, so much of the report as is covered by the first exception of the plaintiffs must be referred back to the master for further testimony, and an additional report thereon.

The second exception of the plaintiffs charges error, both of law and fact, in this, "that the master has found as matter of law that the liability of Phillips, established by his own returns, has not been discharged, but that having retained the money, or deposited it along with his own, the question of imprudent or prudent investments or deposit does not pertain to the case, but that he was liable at the time of his death for the balance charged against him, as a specialty debt, consequently his executors, so far as they had assets, to the estates of McNeill and Quinn." In the report of the master just previous to the ruling above quoted, are to be found the following words: "The only facts testified to by the defence, for the purpose of discharging Phillips from this indebtedness, are those of his investments in Confederate bonds and his deposit with Kirkpatrick." "It is shown by the affidavit of Kirkpatrick that a considerable amount of money ($8182.79) was at Phillips' credit on July 1st, 1863, besides which he had invested $5000 in Confederate bonds. Indeed, I do not understand this to be disputed." Then

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fol*lows the conclusion to which exception has been taken, as stated above. It will thus be seen that in the opinion of the master, if a trustee retains money, or deposits it along with his own, no matter under what circumstances, no question of prudent or imprudent investment or deposit can be made. For example: if the master be correct, a trustee who had received for his cestui que trust £1000 sterling, and at the same time had on hand £100 of his own money, and who deposited both funds in the Bank of England until a safe investment could be found, would be liable to his cestui que trust if the bank should fail, provided the two funds had not been separated in some manner. I cannot assent to this proposition to the extent to which it is carried by the master.

Let us see what are the facts of the case at bar. And first, as to the estate of McNeill. There was but one fund collected for that estate by Phillips, the deceased trustee. That was the sum of $1800, received by him in Confederate currency, on June 20th, 1863. No blame is attached to him, either in evidence or argument, for having received that sum in the currency named. It is shown that on the next day he invested a large sum in bonds of the Confederate government; and that his cash book being in evidence, and his correctness of habits admitted, the sum so received must have been included in such investment, for the reason that he did not have sufficient for such purchase without including therein the sum collected for the estate of McNeill, as stated above. Nor did he draw from Kirkpatrick (who were his bankers)—and with whom he deposited all of his funds, whether his own or held by him as attorney or trustee—the sum to make such investment in Confederate bonds, or any part thereof. It is clear, that unless the sum of $1800 was so invested, it must have been retained in the currency in which it was received. It it was so held—if it had remained in his possession from June, 1863, until his death in the following spring of 1864—he would not be liable to his cestui que trust for its subsequent loss, a reasonable time being allowed him to invest. If invested in the bonds named, with no ear-mark or positive proof that such investment (if made) was for the use and benefit of the estate of McNeill,

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*the law would have protected him from liability for the loss thereof.

Now, as to the estate of Rose B. Quinn. In this estate Phillips received the bulk of the fund in the year 1860. It is shown by his cash book and by the account of J. & J. D. Kirkpatrick, his bankers, that the money was sent to them and deposited with them at seven per cent. interest, subject to his check and in his own name; that it was not separated from his other deposits, but went to the general credit of his account. It is

shown that for five years he had deposited all his own funds with those gentlemen, who were factors of the city of Charleston of high standing and credit, and that he had, in that period, had large sums of money in their hands. Was this deposit of these trust funds a breach of trust? The law allowed him a reasonable time in which to make an investment. Where were the funds to remain in the meantime? It is a matter of public history that at that period all the banks of the state were in a condition of suspension of specie payments. After a year had passed, when the duty of the trustee to make a proper investment would have existed, the state was convulsed by war, and no more prudent course was open to Phillips than to leave the fund in the place of deposit in which it had been first lodged, until the return of peace might enable him to secure a safe investment. Before that time arrived he was dead, and the house in whose hands he had placed these funds survived that catastrophe which involved every bank in the state. The house of Kirkpatrick was a banking-house for the deceased, Phillips; they received deposits, allowed seven per cent. interest, and permitted checks to be drawn on them. It is shown by the testimony of C. H. Simonton that they were in good credit up to 1868, when the executor obtained judgment against them. On March 11th, 1871, they took the benefit of the bankrupt act, and the debt was lost. It is also shown by the evidence that in 1863, Phillips was drafted into the second class of reserves of the Confederate army. That he made his will at that time, and that he required his bankers and factors to purchase for him $5000 of Confederate states bonds. That these bonds were found after his death among his personal assets. That this was

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*about the sum that would be due to the estate of Rose B. Quinn. That the state and Confederate government had both made the purchase of these bonds legal on the part of the trustees. The true rule is, that in all cases in which the fiduciary relations exists, the law requires the exercise of bona fides and discretion on the part of those who have the interest of others in their charge. Prudence and good faith are demanded; and where these appear, from all the circumstances of a case, equity will not enforce penalties upon those who have been unfortunate without fault. The rule that a trustee must not mix up the funds of his cestui que trust with his own, is one which arises from the custom of some fiduciaries to use trust funds for their own purposes; to speculate with them, to put them in their own business or trade, with a view to making profit therefrom. In all such cases, the trustee is held liable for the loss, if loss ensue. But it by no means follows that a trustee who deposits his trust funds and his own in the same place of safe deposit, and does not withdraw or use the trust funds so deposited, or reap therefrom any gain, would be held liable for a loss which should result from no imprudence on his part, either in making the first deposit, or afterwards in not removing it, provided that his good faith is clear, and his prudence and discretion apparent.

Under the facts of this case, I am constrained to sustain the exceptions of the plaintiffs to the ruling of the master, and to hold that the estate of Phillips is not liable for the loss of the funds of either the estate of McNeill or Rose B. Quinn. The true rule is, that a trustee is answerable only for losses resulting from acts or omissions, such as a prudent man could not do, or omit, in his own affairs. Taveau v. Ball, 1 McC. Ch. 464; Bryan v. Mulligan, 2 Hill's Eq. 361; Glover v. Glover, McM. Eq. 153; O'Dell v. Young, Ib. 155; Rowth v. Howell, 3 Ves. 565; Powell v. Evans, 5 Ves. 839, show that a trustee or executor should manage funds committed to his care with the same care and diligence that a prudent man would bestow on his own concerns. In the case of Rowth v. Howell it was held that the executor was justified in employing the customary means of safely keeping funds in his hands, and the trust funds having been lost by the failure of the banker with whom they were

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*deposited, the executor was free from responsibility, not having been charged or being chargeable with any want of due care. See also Boggs v. Adger, 4 Rich. Eq. 408. In Nance v. Nance, 1 S. C. 209, the court uses this language, referring to the fifth ground of appeal: "This proposition is not distinctly stated, but amounts to a claim that the investment made by a trustee for the joint account of two wards, without distinguishing their several interest in the same, are for this reason to be disallowed. We know of no principle from which such a conclusion can be deduced. If the estate has sustained a loss for any such reason, and that loss can be traced to culpable negligence on the part of the trustee, such a state of facts should be presented directly. It cannot be made out argumentatively in the absence of such a statement." In Twitty v. Houser, 7 S. C. 164, effort was made to charge the administrator with the loss of a fund, by him deposited in the Citizens' Savings Bank branch at Orangeburg. The court held that he was not liable for such loss, and use the following language: "To make the administrator liable for loss which followed from no fault on his part, would inflict on him a punishment for not foreseeing what others, having better opportunities, failed to perceive in time to save them from a consequent loss. And again, the proper inquiry is, was the act of the administrator, under the circumstances, induced by that reasonable care with which prudent men, looking to their own benefit, usually conduct their own business?"

In Fitzsimons v. Fitzsimons, 1 S. C. 413, the court say: "The sixth ground of appeal objects to the allowance of the credit to the defendant for a deposit in the Palmetto Savings Institution of the funds of the estate. This institution appears to have been in good standing until about the close of the war, when it became insolvent. It appears by the account stated by the master, that the administratrix was credited March 2d, 1860, with a check for the amount deposited in the savings institution." The court disallowed the exception taken, and discharged the defendants from payment even of interest on the annual balances. The court say, on page 414: "It does not appear that the administratrix received actual payment by way of interest on the savings deposit, and it

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must be assumed, as the *case stands, that the interest was, from time to time, credited by the bank on account, and that the accumulations of interest have been lost, with the rest of the deposit, by the failure of the institution. The complainant therefore is not entitled to the allowance of interest, forming the second ground of appeal." In Mayer v. Mordecai, 1 S. C. 394 [7 Am. Rep. 26], the chief justice says: "When a trustee is not limited or directed by the instrument under which he acts, and is left to the discretion of his own judgment, our cases hold, that his discretion must be exercised with the same care and diligence that a prudent man would bestow on his own concerns." And again, on same page: "The principle which is to be extracted from the cases in this state consists with what is said in Hovenden on Frauds 486. "He is bound to manage the property for the benefit of the cestui que trust with the care and diligence of a prudent man. What will constitute care and diligence thus exacted will depend on the attendant circumstances."

In West v. Cauthen, 9 S. C. 60, the court say: "It appears that the executor converted the Confederate currency in his hands, belonging to the estate of his testator, into interest bearing Confederate notes. The decision of this court in Hinton v. Kennedy, 3 S. C. 459, was in a case precisely parallel to the present, as it regards the claim under consideration. In accordance with that case, we must hold that the executor was guilty of no breach of the trust on such a change of securities. It fully appears that the entire estate, subject to the payment of the legacy to Milly West, was lost through the depreciation of Confederate securities. As it is not made to appear that the executor was at fault in retaining in his hands such securities down to the time when, by the course of public events, they became valueless, there is no ground for maintaining the complaint. The decrees of the Circuit Court and Probate Court must be set aside and the complaint dismissed."

Was the conduct of Phillips in sending the funds of the estate of Rose B. Quinn to his bankers, J. & J. D. Kirkpatrick, and placing them there on deposit, a prudent and proper act, under the circumstances surrounding him at the time? I think it was, nor can I perceive any breach of trust in his leaving them

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there; *when the state of the country is taken into consideration, as it existed at the end of the year, which is allowed him, in which to find investments. In accordance with these principles—

It is adjudged and decreed that the estate of Phillips is not liable for the amount of $1800 received from Fairlee's executors on June 20th, 1863, in Confederate currency for account of the estate of Margaret McNeill, and this conclusion is reached without reference to the question of investment in Confederate bonds, since the court is of opinion that if no such investment was made and the money was merely kept on hand, or left with Kirkpatrick and subsequently lost, in neither event has there been shown that want of care and prudence which would render the estate of Phillips liable to pay to the estate of McNeill such sum or any part thereof.

It is further decreed that the estate of Phillips is not liable for the loss of the funds received by him for the estate of Rose B. Quinn—the deposit with J. & J. D. Kirkpatrick of said funds being regarded as the act of a prudent man, and certainly as no breach of trust; and the subsequent failure of the house of Kirkpatrick in 1871, was not in any way evidence of their not having been fully responsible in 1860, when such deposit was made. There is evidence that in 1863, Phillips was drafted in the reserves of the Confederate army; that he caused his bankers, J. & J. D. Kirkpatrick, to invest $5000 in Confederate eight per cent. bonds, which bonds were found with his assets on hand after his death. It is contended on the part of the plaintiffs that these bonds represented the Rose B. Quinn estate. There is no positive proof that said bonds were purchased for the said estate. They were not marked in any way to designate such purpose. The similarity in the amount purchased and held to the amount due that estate, together with the fact that such investments were sanctioned by the law, are relied on as evidence to prove that they were so intended. It is also in evidence that Phillips did not invest his own funds in such bonds, as he had not much faith in them, and it is contended that this is another proof that the bonds held were as a protection to himself against the balance reported by him as being due said estate. It will not be necessary for me to decide this

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question, because I hold *that as it is not denied that the funds of the estate of Quinn were remitted to and deposited with Kirkpatrick when received, the estate of Phillips

is not liable for the loss thereof by the subsequent failure of Kirkpatrick, even if the funds were not invested in the bonds named; a fortiori said estate was not liable if so invested.

The executor excepts to the report because, he says, that the master has erred in charging the said executor with the value of the law library and furniture sold by the sheriff, and also because the master has not given credit to the said executor for the sums paid by him to Ellen and Emily Phillips, legatees under the will of the testator. It is not denied that the executors duly advertised for creditors, and that payments to the Misses Phillips were only made two years after the death of the testator. The authorities seem to be clear upon the duty of persons having demands upon an estate to make known such demands within the time allowed by the statute in which it is made the duty of executors to settle the estate. No exception is made in favor of minors, nor of other persons under disabilities. It is in evidence that none of the demands now set up under these proceedings were put in suit or brought to the attention of the executors until after the payments of the legacies had been made, although Margaret McNeill, as heir of her deceased children, was fully able to have made her demands at any time from the death of Phillips. It is contended that whilst no actual notice of the demands now made was given to executors, the possession of certain books of deceased and of a bond which was due the estate of Rose B. Quinn, were sufficient constructive notice to the said executors of the demands set up under these proceedings in favor of Rose B. Quinn's estate and that of Margaret McNeill. It is stated positively by the executor that he had no notice of these demands until 1876, ten years after the legacies had been paid by him. It is no where shown that the memorandum book or other evidences of those demands were known to the executors before the legacies were paid in 1866. The bond referred to bore no ear-mark of belonging to the estate of Quinn. It was assigned to N. Phillips, and nothing on its face showed that

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it *belonged to any other person. It was in the hands of Dozier for suit, and was assigned to Jordan, trustee, after the present action was brought.

Was it the duty of the executors to hunt up these claimants, or their duty to seek them? Let us see what the act says, (5 Stat. at Large 111): "That every executor or administrator shall give three weeks' notice by advertisement in the state gazette, or at three different places of most public resort in the parish or county for creditors to render an account of their demands, and they shall be allowed twelve months to ascertain the debts due to and from the deceased, to be computed from the probate of the will or granting letters of administration; and creditors neglecting to give a statement of their debts within the time aforesaid, the executors or administrators shall not be liable to make good the same." See, also, Sebring v. Keith, 2 Hill 340. An administrator, as against a creditor who has not rendered a statement of his debt within the time directed by law, is entitled to retain for his whole debt, if the assets are sufficient to pay all. See, also, Adam Walker v. Sam. Gill, Adm'r, 2 Bail. 105. A creditor having notice of the death of his debtor, and of the grant of administration, is bound to render a statement of his demand in twelve months, although the administrator may have neglected to advertise for creditors to render in a statement of their demands conformably to law.

It is contended that because the records show that Phillips was appointed trustee of the estates, such was constructive notice to the executor of this indebtedness. The conclusion does not necessarily follow the premises. I am therefore brought to the conclusion that the executor is entitled to credit on his account for the sums paid to Ellen and Emily Phillips, legatees of the testator, and

It is ordered and adjudged that the account of the executors be remanded to the master; that he allow credit thereon for the legacies paid to the aforesaid legatees; and that the value of the law library and furniture be stricken from the accounts, as I am of the opinion that the executor is not responsible for the low price which they brought at a public sale by sheriff under execution.

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*The claimant Jordan also excepts to the report of the master, because he has allowed the claim of the plaintiffs, without their oath being attached thereto. And, also, because he has allowed the claim of M. Iseman, when, as he insists, the proof before the master was that the claim was paid, or, if not paid, that the statute of limitations would apply thereto and bar the same. These questions were not seriously urged at the argument, as they seemed to be regarded as of minor importance. With reference to the claim of the plaintiffs, it would seem that if they had not a demand against the estate of Phillips, these entire proceedings would have to be dismissed, as the plaintiffs would be without right of action, since their status would be taken away, for this action is one which they only can take, being creditors of the estate which the complaint is filed to settle. Without doubt the defendant executor would cheerfully accede to this view, and the whole proceedings would fall through.

The plaintiffs set up in their complaint the judgment against the executor, and exhibit to the master the verdict of a jury in the case, followed by their judgment and the writ of execution, which shows the amount

now due to the plaintiffs. In the opinion of the court the record of the judgment was proof of the debt, and the execution of the sum due. The case may be different if the judgment was against the testator, for such judgment might have been paid or satisfied, in whole or in part, without such payment being known to the parties in this cause. In the case at bar, if the demand of the plaintiffs was disputed, the defendants could have denied it in their answer, and had their day to disprove it in court. I am of the opinion that the judgment against the executors established the debt. See Van Wyck v. Norris, 6 S. C. 305. As the whole matter must be referred back to the master, the plaintiffs may, if they deem it proper, supplement the proof of their judgment by the filing of an affidavit, showing the amount now due and unpaid on their judgment.

With reference to the small claim of Iseman, I find no proof made before the master and referred to by him. But such proof must have appeared, because the master reports in favor of the claim. I will therefore refer this claim back to the master, with instructions to report the proof made upon it,

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and with leave to *claimant to supplement such proof with any that he may be advised is necessary thereto.

The creditor, Richard Jordan, trustee of Rose B. Quinn and Margaret McNeil, and administrator and guardian of children of Mrs. McNeill, appealed upon the grounds considered by the court.

Messrs. Walsh & Evans, for appellants.
Messrs. Moise & Lee, for plaintiffs.
Mr. W. W. Harllee, for the executor.

September 1st, 1880. The opinion of the court was delivered by

McGOWAN, A. J. This was a complaint in the nature of a creditor's bill to marshal the assets of the estate of Napthili Phillips, deceased, against F. J. Moses and M. Moses, executors, the legatees, and C. C. Law and other creditors. Phillips, the testator, died in March, 1864, leaving a will. He died in Marion county, where he lived, and where his property was situated, but the executors lived in Sumter county, where these proceedings were instituted.

The history of the litigation, including a claim of exclusive jurisdiction in Marion county, would be long, but all the facts are so fully and clearly set forth in the Circuit decree that it will not be necessary to restate them here. The plaintiffs are judgment creditors, having obtained their judgment in 1871, against the executors upon a demand due by Phillips in his lifetime. They levied and sold personal property of small value—law library, furniture, &c.—but, finding obstacles in the way of collecting their debt, they filed this complaint in 1872 for an account against the executors, to sell land, pay debts, and to marshal the assets. The questions were referred to a referee, who stated the account and reported in favor of certain other claims presented. The Circuit Court rendered a decree, and the case comes up on exceptions.

One of the exceptions makes the point

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that the judgment of *the plaintiffs was not sufficiently proved for lack of an affidavit of plaintiffs as to the amount due. This is the claim upon which the complaint (which, as it asked for an injunction, must be presumed to have been sworn to,) is based, and if the objection is well taken the whole proceeding must fall to the ground. There is no allegation that the debt is not due, nor is it denied that it has gone into judgment against the executors, but the objection is that, as matter of proof, the claim was not established by affidavit, which it is insisted was necessary. This court has lately held, in the case of Westfield v. Westfield, ante p. 482, that "a creditor presenting his claim to the commissioner or master, under notice, should make an affidavit of the debt, and that he is aware of no discount," &c.; but the practice indicated in that case was intended to protect the estate of an insolvent debtor against claims presented under the call for creditors, and does not necessarily include the demand upon which the proceeding is instituted, especially when that is a judgment entered upon the verdict of a jury. This claim of plaintiff was specifically set forth in the pleadings. The complaint, which, as we have seen, must be presumed to have been sworn to, charged that there was such a judgment, and set forth particularly the amount of it. The answers did not deny the statement, and, therefore, by the rule of the code, without further proof, "it must be taken as true." Besides, both the referee and the Circuit judge held that there was sufficient proof of the judgment which was obtained against the executors after the death of the testator. This exception is overruled.

In reference to the exception as to the alleged devastavit of the executors in paying legacies to Ellen and Emily Phillips, leaving debts unpaid, the general facts are as follows: "The testator died in 1864, having given his entire property to his executors in trust for his sisters, Ellen and Emily, during their lives, and the survivor of them, and after the death of both of them then over to his surviving brothers and sisters. The testator seems to have considered that he owed no debts, as his will makes no reference to debts; but that omission could not excuse the executors as to their first duty of providing for creditors. The executors qualified

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immediately, M. Moses, March 11th, *1864, and F. J. Moses, April 1st, 1864, and advertised according to law for creditors to pre-

sent their demands. It seems that no claim was presented, and the executors, having assets in hand, made payments to the legatees, as follows: To Ellen and Emily Phillips, $2500; to same, September 29th, 1866, $1500; to same, December 20th, 1866, $1990; to Henry M Phillips, December 2d, 1867, $1000; and to Ellen and Emily Phillips, May 14th, 1869, $1000, making the aggregate sum of $7990. At that time the assets were ample for the payment of any debts of which they had knowledge or which were likely to come against the estate. The judgment of plaintiffs was not recovered until 1871, and this suit was not instituted until 1872. Were these payments wrongfully made, and should the executors be required to account for the same as assets to pay creditors whose claims have since come to light? No question is here made as to the right of the creditors to pursue the legatees who received the money. We have only to consider whether, in making such payments, the executors committed a devastavit, and are liable to account for the same. The law allowed the executors twelve months, reckoning from the probate of will, to ascertain the debts due by the testator. Within that time they were required to give three weeks' notice, by advertisement, for creditors to present their demands duly attested. "If any creditor shall neglect to give in a statement of his debt within the time aforesaid, the executors or administrators shall not be liable to make good the same." Gen. Stat. 457. The proof shows that when they made the payments, no claim of any creditors had been made, although the notice had been given, and several years had elapsed before the first payment was made. We think the executors are not liable for the legacies paid, and the account should be corrected accordingly. If the executors were now sued on their legal liability as the personal representatives of the testator, the plea of "plene administravit" could be maintained to the extent of these payments. Walker v. Gill, 2 Bail. 105; Sebring v. Keith, 2 Hill 340; Lanier v. Griffin, 11 S. C. 581.

The executors would be liable if they paid legacies with a knowledge of outstanding

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debts, even if those debts had not been *rendered under the act; and it is insisted that these executors had at least constructive notice of the trust claims represented by Jordan, trustee. It is said that, as executor, they had possession of the papers of Phillips, from which they might have ascertained the existence of at least the alleged trust debts. It is more than doubtful whether they could have done so from the papers in the possession of Phillips. If they saw the cash book and papers referred to, they might well have supposed that the account had been discharged by investment, as now claimed, or in some other way, especially as no claim in reference thereto had been intimated to them. But, be that as it may, the surviving executor states positively that the executors had no knowledge of these claims until years after the payment. It is not the duty of executors to hunt up doubtful claims against the estate which they represent. The law makes it their duty to advertise for creditors, and, when presented, to make provision for their payment, but makes it the duty of the creditors themselves to present their claims duly attested.

It is further urged that as the legacies to Ellen and Emily were for life only, with limitation over, the executors had no right to pay them more than the interest, reserving the corpus for the remaindermen, and that the release which the remaindermen executed of all their interest, not being under seal, was void. Assuming that some such question might possibly arise between executors and beneficiaries under the will, it is not perceived that it touches the point under consideration here. This exception is overruled.

Under the call for creditors, made in the proceedings in this case, Richard Jordan, as trustee, guardian and administrator, presented these claims against the estate, which he insists are valid bond debts, and entitled to priority as such. If these claims are established they will absorb all the assets which remain. They are as follows:

First. One George M. Fairlee was appointed trustee in regard to certain negro slaves belonging to Mrs. Margaret E. McNeill and her children, and gave bond July 21st, 1860, to C. D. Evans, Esq., then commissioner in equity for Marion county, in the penal sum of $8000, conditioned for the performance of

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cer*tain duties as such trustee, and upon this bond N. Phillips and Elly Godbold were sureties. Fairlee died in 1862. It is said his estate is being settled in the court, but neither his personal representatives nor any one interested in his estate are parties in this case. The referee could take no account of the estate of Fairlee or his liability as trustee, yet he charged as a bond debt against the estate of Phillips, one of the sureties, the whole amount claimed to be due by Fairlee, trustee, as taken from his returns, viz., $4067.95. The Circuit judge ordered the claim to be recommitted, and the creditor excepts.

It is doubtful whether that part of the decree which ordered the claim recommitted is appealable, but as it has been earnestly argued, and will have to be considered below, we will entertain it. The obligation on which the claim is founded is not an ordinary money bond, in which the terms are, we or either of us promise to pay a certain sum of money, but an official bond for the performance of certain acts. "Now the condition of the above obligation is such, that if the above bound George M. Fairlee shall hold the property (negroes) upon the trusts as above de-

scribed, &c., * * * then this obligation to be void and of none effect, otherwise to remain in full force and virtue," &c. The penalty is for a sum certain, but that is not to be paid as such, but was only intended to secure the performance of the covenants. The sureties promised to pay no sum of money, but that their principal would perform the duties specified in the bond, or, if not, that they would pay the damages which might result from his failure to do so. That is the extent of the undertaking of the sureties, who are in no way responsible until it appears that the principal had failed to perform the duties he had assumed. Originally it was held, in this state, that a surety upon an administration bond could not be sued until a breach of the bond had been shown; until the principal had been held to account, had been found to be in default, and had failed to pay the judgment. "Sureties on administration bonds are in no respect to be considered as trustees or accountable in this court (equity) as such. They are only parties to a law undertaking, and to be held responsible in damages for the default of their principal. They can be sued only after de-

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fault of their principal *has been established." McBee v. Crocker, McM. Eq. 488; Glenn v. Conner, Harp. Eq. 267; Teague v. Dendy, 2 McC. Eq. 209 [16 Am. Dec. 643], and other authorities in the Circuit decree. Even after judgment had been rendered against the principal, the surety, when sued, in certain cases had the right to surcharge and falsify the account stated against the principal, upon the ground that he was not a party to the proceeding. To avoid this seeming double litigation, and for other reasons, it was subsequently held in the case of Taylor v. Taylor, 2 Rich. Eq. 128, that in a suit for an account against the principal the surety might, and for certain reasons should, be included as a party, so that he might defend himself, and if a recovery was had, that the decree might run against both in the first instance and avoid the necessity of a second examination of the same accounts. We understand that the case of Taylor v. Taylor established the practice in equity that upon bonds for the performance of covenants the surety may be included in the original suit for account against the principal; but we know of no authority for going further. Phillips undertook that Fairlee should do certain things in regard to certain property. It does not appear that he failed to do his duty; that can only appear by an account against his representatives. There may be some defence to that account, and the executors of Phillips have a right to be heard upon that subject. No breach of the bond has been made to appear in that conclusive manner which is necessary before the estate of the surety will be charged with any amount. It is premature to hold that any debt has been established against the estate of Phillips, as one of the sureties of Fairlee. We concur with the Circuit judge in ordering this claim to be recommitted.

Second. George M. Fairlee died in 1862, and the testator, Phillips, was appointed his successor as trustee of Mrs. McNeill, and entered into bond to C. D. Evans, Esq., commissioner, in 1863, which was substantially a copy of the bond of Fairlee. Jordan, trustee, claims that the executors must account for the actings and doings of Phillips as trustee, and that this account is a direct liability covered by his bond. In this respect this claim does differ from the one just considered. But an objection is made to it that there is, in fact, nothing due under this bond.

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*Phillips was appointed trustee in 1863, and never received anything from any source, except one item of $1800 in Confederate money. Soon after it was received he was conscripted into the Confederate service, and died in March, 1864, less than a year from the time he received the money. He committed no breach in receiving the money. He was entitled to a reasonable time to invest, and, in the midst of war, it was difficult, if not impossible, to invest Confederate money. He deposited the money, along with his own, with J. & J. D. Kirkpatrick, factors of good character in Charleston, who had been used by testator as his bankers, and, soon after testator's death, it was lost, not from any negligence or want of care on his part, or the subsequent failure of the Kirkpatricks, but for the reason that the currency itself became worthless. We do not know any principle of equity which requires that the estate should be charged with this money, whether the Kirkpatricks exchanged it for Confederate bonds or not. In either case the result of loss would be the same. Waller v. Creswell, 4 S. C. 353. If the testator had used the Confederate money in his own private business, the estate would be properly chargeable with its value at the time it was so received and so used. But there is no such allegation. The money, or Confederate bills, were never used in any way except to deposit them. This exception is overruled.

Third. Rose B. Wheeler entered into a marriage settlement with John F. Quinn, of which E. B. Wheeler was trustee; afterwards, Phillips, the testator, was appointed in his place, and gave bond, in 1860, to the commissioner, conditioned for the performance of his duties. Some of the property had been sold by order of the court, and the proceeds were paid to Phillips, the testator, in the year 1860. The Circuit decree states that it was "shown by his cash book and by the account of J. & J. D. Kirkpatrick, factors of Charleston, that the money was sent to them and deposited with them at seven per cent. interest, subject to his check, and in his own name; that it was not separated from his other deposits, but went to the

general credit of his account. It is shown that for five years he had deposited all his own funds with these gentlemen, who were factors of the city of Charleston of high standing and credit, and that he had, in

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*that period, had large sums of money in their hands. It is also shown by the evidence that in 1863, Phillips was drafted into the second class of the reserves of the Confederate army; that he made his will at that time, and that he required his bankers and factors to purchase for him $5000 of Confederate States bonds, which were found after his death among his personal assets. J. & J. D. Kirkpatrick appeared to be solvent until 1868, when the executors of Phillips sued them and recovered a large judgment for money in their hands, but they went into bankruptcy and the entire debt was lost. Upon this state of facts, should the estate of Phillips be charged with this fund?

This is not a case where the trustee has caused loss to his cestui que trust by calling in good and safe securities and accepting for them a depreciated currency. What he received was a payment on account of the trust. There is no breach of trust in receiving the money. We regard it established that he deposited the money with the Kirkpatricks, who were in good standing and continued so until after the testator's death. The question must be determined by the inquiry whether that deposit, under the circumstances, was a prudent and judicious act. The money was received January, 1860, and February, 1861, when the war was imminent. The investments required in such cases could not then be promptly or safely made, if they could be made at all. The trustee had a reasonable time to make the effort, and before that time expired, the country was in the midst of war. As was said by the court in the case of Waller v. Creswell, before cited: "A civil war was raging fierce and devastating, when or how to terminate, human foresight could, with no approach to certainty, determine. Even if successful to the Confederacy, which was waging it, years of deprivation, toil and industry must probably have been endured to repair the broken fortunes of its people. Can we then say the act in question was an incautious or imprudent one?" So we say here, was the deposit with the Kirkpatricks, under the circumstances, whether we regard them as acting bankers or merely as factors in good standing, an incautious or imprudent act? The times made ordinary investments impracticable, and what was he to do with the money? Even after the event—looking back

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at this *distance of time—it is difficult to conceive how he could have acted more prudently. If he had placed the money in bank as was done in the case of Fitzsimons v. Fitzsimons, 1 S. C. 413, and, also, in the case of Twitty v. Houser, 7 S. C. 164, the failure would have come only sooner. The proof is that Phillips was a good business man, and he placed this money where he placed his own. We cannot resist the conclusion that this loss was one of the inevitable consequences of the war, and should not be shifted from the owner to the mere agent, who was without fault in causing the loss.

It is urged that the trustee mixed the money with his own. That would have charged him if he had used it in his own business and ventures, and that use had caused it loss. But that is not charged. His only use of it, mixed with his own, was the single act of deposit. It is said he did not keep it separate as trust property, and return it as such. As was said in the case of Nance v. Nance, 1 S. C. 209, "the failure to report the security is not in itself conclusive; it is only a circumstance to be considered among others."

This court concurs with the Circuit judge. The decree is affirmed and the appeal dismissed.

WILLARD, C. J., concurred.

McIVER, A. J. As I cannot concur in so much of the opinion of the majority of the court as exempts the estate of Phillips from liability for the money received by him as trustee for Mrs. Rose B. Quinn, deposited with the Kirkpatricks, and subsequently lost by their bankruptcy, I propose to state, very briefly, the ground of my dissent.

It appears from the return of Phillips that much the larger part of this money was received by him in January, 1860, long before the war between the states commenced, and that the balance of it was received by him in February, 1861, several months before the actual commencement of hostilities. As trustee, it was his duty to seek a proper investment for the fund as soon as practicable; and while he might have been justified in depositing this money for safe keeping

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where he was *in the habit of depositing his own money for a similar purpose, and allowing it to remain there for a reasonable time to enable him to look around for a suitable investment, I do not think he was justified in allowing the trust funds to remain on deposit for so great a length of time without some proof that he had made unsuccessful efforts to find a suitable investment.

As I concur fully upon the other points considered in the opinion of this court it is unnecessary for me to say anything as to them.

Appeal dismissed.

13 S. C. 585

(Case No. 924.)

CLARK v. SMITH.

(November Term, 1879.)

[1. *Bonds* ⟸116; *Clerks of Courts* ⟸65.]

The clerk of the Court of Common Pleas is the proper party to bring action upon a bond payable to the former commissioner in equity of his county, and also to foreclose the statutory lien upon lands sold for partition.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 148; Dec. Dig. ⟸116; Clerks of Courts, Cent. Dig. § 89; Dec. Dig. ⟸65.]

[2. *Husband and Wife* ⟸138.]

A wife's share in the purchase money of land sold for partition, was paid in 1863 by the purchaser to the husband, who gave his receipt, which the commissioner in equity refused to receive as a voucher, unless the wife gave an order in writing requiring him to do so, whereupon the wife, without consideration, gave an order directing payment to the husband —*Held*, that the wife had waived her right to a settlement and that her share was paid.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 524–537; Dec. Dig. ⟸ 138.]

[3. *Guardian and Ward* ⟸4.]

Money due to an infant was paid to her father, who was generally believed to be her guardian. Upon action brought by the infant after attaining her majority, against the original debtor, there could be furnished no proof that the father had ever been the guardian—*Held*, that the plaintiff was entitled to a recovery.

[Ed. Note.—Cited in Beard v. Stanton, 15 S. C. 167.

For other cases, see Guardian and Ward, Cent. Dig. §§ 4, 5; Dec. Dig. ⟸4.]

[4. *Payment* ⟸47.]

And moneys paid by such father to the daughter after she attained her majority, could be properly applied by her as credits upon other indebtedness of her father to her.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 127; Dec. Dig. ⟸47.]

[5. *Partition* ⟸104.]

The mere purchasing and taking possession of land covered by the lien of a mortgage, does not constitute adverse possession, which would give currency to the statute of limitations; and the same principle applies where there exists the lien given by statute in cases of partition. Daniels v. Moses, 12 S. C. 130, recognized and followed.

[Ed. Note.—Cited in Sullivan v. Latimer, 35 S. C. 431, 14 S. E. 933.

For other cases, see Partition, Cent. Dig. § 351; Dec. Dig. ⟸104.]

[6. *Vendor and Purchaser* ⟸229.]

A purchaser of property, which is covered by a statutory lien, of which he has no actual knowledge, is not a purchaser without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477–494; Dec. Dig. ⟸229.]

[7. *Limitation of Actions* ⟸72.]

In an action on a bond given for the purchase money of land sold for partition, it appeared that the purchaser had paid over a minor's share in the proceeds of the land to her father, who was believed to be her guardian, and acted as such, taking in return his receipt, which was filed with the bond. *Held* that, as 20 years had not elapsed, the minor's share should be considered as still unpaid, in the absence of evidence that her father had been appointed her guardian.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 390; Dec. Dig. ⟸72.]

[8. *Husband and Wife* ⟸9.]

[Where, in an action on a bond given for the purchase money of land sold for partition in 1860, it appeared that in 1863 the purchaser had paid over a married woman's share in the proceeds of the land to her husband, whose receipt was accepted by the commissioner who made the sale, on his producing an order from his wife to make payment to him, the bond should be credited with her share as paid, though there was no proof that she ever received the money or any consideration for her order.]

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 34; Dec. Dig. ⟸9.]

[This case is also cited in Smith v. Smith, 24 S. C. 305, as to facts.]

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*Before Wallace, J., Marion, April, 1879.

In this case Hon. B. C. PRESSLEY, judge of the First Circuit, sat in the place of Hon. HENRY McIVER, associate justice, who had been of counsel.

Action commenced September 22d, 1876, by Robert K. Clark, clerk of the Court of Common Pleas for Marion county. The facts and pleadings are sufficiently stated in the opinion of the court. The conclusions of law by the referee are as follows:

The lands in question were sold under proceedings in partition and for division amongst the distributees and heirs-at-law of the late Samuel Smith; and by the provisions of the act of 1791, (5 Stat. 164) stand pledged for the purchase money, and the lien must be enforced unless there be something in the grounds of defense set up by the defendants. Messervey v. Barelli, 2 Hill's Ch. 575; McQueen v. Fletcher, 4 Rich. Eq. 152; Allen v. Richardson, 9 Rich. Eq. 53.

This lien is denominated in the last two cases a statutory mortgage, and in the first (Messervey v. Barelli,) Chancellor Johnston regards it better than a mortgage; and the doctrine is there announced that the court can, by no order, deprive the parties of the statutory lien and security thus acquired. This adjudication puts an end, therefore, to the position of defendants' counsel, that the order of the court that the commissioner should take a bond and mortgage, and a confirmation of the sale on his report that such had been complied with, substituted the bond and mortgage for the statutory lien. The referee holds that the lien for the purchase money was complete at the time of the sale; that it was a legal and valid security to the parties interested conferred by the statute, and could not be defeated by any order of the court.

The defences relied upon are:

1. Adverse possession for the period required by the statute of limitations, by which the lien is barred so far as this land

is concerned. It is as well at once to say that with the exception of George W. Smith, R. Vampill and George W. Harrelson, there has been no such adverse possession by any

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one of the *parties as would entitle them to hold by the statute of limitations before the commencement of this action; that as to them the statute is no protection. And the defence of the statute as to them is overruled.

With respect to the three first named, to wit, George W. Smith, R. Vampill and George W. Harrelson, there is no question as to their possession for the statutory period before suit brought. But can this possession avail them under the circumstances of this case? The case of Drayton v. Marshall, Rice's Eq. 373 [33 Am. Dec. 84], is relied upon by the defendants, but the mortgage in that case was before the act of 1791, by which the mortgage was held to be a security merely; whereas, prior to that act the mortgagee was the owner of the legal title to the land, and authorized to sue after condition broken. In Thayer v. Cramer, 1 McC. Ch. 395, it was held that a mortgage was a mere security for the debt; that the mortgagor was a trustee for the mortgagee, and persons holding under him could occupy no better position. This authority is recognized in Drayton v. Marshall. In Wright v. Eaves, 5 Rich. Eq. 81, it is held that "to a bill filed to foreclose a mortgage of land against one who holds, through intermediate conveyances under the mortgagor, the statute of limitations is inapplicable, although the defendant and those under whom he claims have been in possession for more than ten years." In this case, Thayer v. Cramer is recognized, and the court say that that case and Smith & Cuttino v. Osborne, [1 Hill's Eq. 340.] may be regarded as law.

In the recent case of Norton v. Lewis, 3 S. C. 25, these cases are recognized, and it is there held that a purchaser holding possession for the period of ten years, with notice of the mortgage, cannot avail himself of the defence of the statute of limitations in bar of the right of the mortgagee to foreclose. In this case the mortgage was recorded in proper time. This notice was constructive merely by the recording of the mortgage, and it was held that the plaintiff was entitled to a foreclosure of the mortgage, notwithstanding the adverse possession.

It is insisted here, however, by defendants'

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counsel, that these *defendants had no notice; that the decree for sale for partition in 1860, was not required to be recorded, and is not sufficient to fix defendants with notice; and that their adverse possession is a valid defence. If, as has been supposed by the eminent jurists who have discussed the question as to the statutory lien, that it is equivalent to if not a better security than a mortgage, it is difficult to perceive how its efficacy can be impaired, and though not required to be recorded more than the proceedings of the courts, but open to all and binding all concerned, (Long v. Cason, 4 Rich. Eq. 60; Pettus v. Clawson, 4 Rich. Eq. 92,) how it should afford less protection than a mortgage recorded. It appears to the referee that such a conclusion would make the provisions of the act of 1791 defective and illusory. But how stand the facts with regard to notice? Stephen Smith, to whom the land was sold by his brother, S. S. Smith, the purchaser at the commissioner's sale, was a party to the proceedings in the court of equity for the partition of the lands, and is fixed conclusively with notice of the lien. But assuming that one purchasing without notice from a vendor who had such notice may acquire a valid title, how is it with these three defendants? As to George W. Smith, it would be difficult for any one to conclude that he had not notice. He did not say he had no notice that Samuel S. Smith had purchased this land at the commissioner's sale, or that he was not aware that it was sold as the property of his grandfather for partition; and certainly a knowledge of these facts would deprive him of the defence of want of notice, for it is a well recognized doctrine that notice of a fact which put one on inquiry, where he could learn the truth as to the title, is sufficient to fix notice upon him. But waiving this, is there not other evidence of notice in this case? The cause under which this land was sold was upon the docket of the court of equity, and the Court of Common Pleas after 1858 to 1869, and when these defendants became purchasers. True, the contest of title to this land was not pending, but it was the subject matter, amongst other matters (the accounts of the executor to the will of Samuel Smith, who acquired these lands subsequent to the execution of his will, which made them subject to distribution as intestate property.) This land was a portion of the subject mat-

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ter of pro*ceedings, which were acts done in a public office, open for information, notice to all parties concerned. Long v. Cason, 4 Rich. Eq. 60; Payne v. Harris, 3 Strob. Eq. 42; Pettus v. Clawson, 4 Rich. Eq. 92; Green v. Slaytor, 4 Johns. Ch. 38. Lis pendens is notice to the world, and binds the interest of all who purchase after suit brought and while pending. Murray v. Ballou, 1 Johns. Ch. 567; Heatly et al v. Finster & Muller, 2 Johns. Ch. 159. And the referee holds that the proceedings in the cause referred to continuing on the docket of the court as mentioned, was such lis pendens as fixed constructive notice on these defendants; for though the title to the lands was not litigated, there was evidence of a sale and the statutory lien, and also evi-

dence that the bond was not paid, or the fund not distributed. It is not every ignorance of title or facts which would put purchasers on their guard to protect them from the consequences of implied notice. A purchaser is bound to ordinary diligence in making inquiry as to the source of title which he is purchasing. All of these defendants, instead of resorting to such, seem to have relied on their warranty of title; and to this they must look for their indemnity in this case. Murray v. Ballou, 1 Johns. Ch. 576. Stephen Smith, from whom all these parties purchased, was a party to the proceedings in partition. He thought the bond paid, and that all was right, he said in his testimony, but the suit was as before, still pending when he sold. The order of sale, the report of sale, the terms of sale, were matters of record; the objects of the bill had only been partially obtained. The accounts of the executor, and the proper distribution of the proceeds of sale, where there was an infant without guardian, were matters still open before the court, when these purchases were made of Stephen Smith; and for the purpose of enforcing this lien, the cause was again docketed in 1876; and it is not deemed necessary to do more than to refer to the authority of Lord Hardwicke, cited by Chancellor Kent, 1 Johns. Ch. 587, where he says: "A purchaser pendente lite was bound by the decree in the suit. The pendency of the suit was itself notice." And he observed "that the rule was to prevent a greater mischief that would arise by people's purchasing a right under litigation." Goeth v. Ward, 2 Atk. 174; Warsely v. Scarborough, 3 Atk. 392. Lord Camden, in

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Walker v. Small*wood, Ambler 676, enforced the same rule. See, too, Bishop of Winchester v. Payne, 11 Ves. 194. It is deemed unnecessary to follow the mass of authorities on this point. Enough have been cited with their reasons to show the necessity of such a rule, and the importance to persons purchasing who wish to look beyond their warranty of title, making inquiry as to the title, which in these was easy of access, and the facts as to the encumbrance patent to any one inquiring to learn them. Besides this, the bond was in the possession of the court. It could not properly be sued for collection without its order or direction; and to hold the parties interested barred of their rights of foreclosure may be to bar their right of recovery of the bond itself. This result would be to impute to the court such laches as would destroy the security procured by its machinery; a consequence that is not consistent with law or justice.

2. The second defence relied on is, that the defendants are purchasers for valuable consideration without notice, and are, therefore, entitled to protection in this action.

This defence applies to all of the defendants, whether holding adversely for the statutory period or otherwise. And it is not intended to say more on the subject of notice than what has been stated above. The statutory lien in this case stands upon the footing at least, both in law and equity, as a mortgage, made by act of the parties. In that particular it has been held, as before stated as a statutory mortgage. And to a bill for foreclosure of a mortgage, it has been held in many cases that a purchaser cannot set up the defence of purchaser for valuable consideration without notice. It was so ruled in Finch v. Shaw, and Collier v. Finch, 19 Beav. 500; referred to in notes to 2 Lead. Cas. in Eq. 59; Collins v. Archer, 1 Russ. & M. 284; and Sir John Romilly and Lord Cranworth held, that when there was a legal right which had to be enforced by an equitable remedy, such right would be enforced, notwithstanding the party purchased for valuable consideration. This was a case of a mortgage where the defence was set up, but the foreclosure ordered.

It has been before held that the lien given by statute was a legal lien. The court of law had the right to sell for partition as well as the court of equity by the act of 1791, and

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it can in *no way be distinguished, so far as the right or remedy is concerned, from an ordinary mortgage; and it is only necessary to refer to the case of Blake v. Heyward, Bail. Eq. 208, and the authorities there cited, where it is held "that the plea of purchaser for valuable consideration cannot avail against a legal lien," etc., etc. So, here, the defendants purchased subject to a legal lien, and are liable to be divested by a sale. The fact that on account of the change of possession of the lands the equitable remedy has to be resorted to to enforce the lien, does not, in the judgment of the referee, alter the legal rights of the parties, or subject them to other defences than if the remedy was pursued at law.

The referee, therefore, holds the defence of purchaser for valuable consideration without notice, inapplicable in this case. On this point the cases of Snelgrove v. Snelgrove, 4 Desaus. 274; Donald v. McCord, Rice's Eq. 330; Schultz v. Carter, Speers' Eq. 542; Dillard v. Crocker, Ib. 26; Bush v. Bush, 3 Strob. Eq. 134 [51 Am. Dec. 675]; Zorn v. Railroad, 5 S. C. 90, are referred to as in consonance with the doctrine announced in Blake v. Heyward, from which extracts are above made.

The referee, therefore, holds that plaintiff is entitled to recover the amount due upon the bond, to wit, $4082.58, on January 2d, 1878, as per statement of the same accompanying this report; out of which sum Mrs. Elizabeth Allen and Mrs. Sarah F. Mullins are entitled, &c.

To this report exceptions were taken, all of which were overruled, and report con-

firmed by the Circuit judge. Defendants appealed upon the grounds considered by this court.

Messrs. W. W. Sellers and C. P. Townsend, for appellants.

Mr. W. D. Johnson and C. A. Woods, contra.

September 6th, 1880. The opinion of the court was delivered by

McGOWAN, A. J. Samuel Smith died intestate as to part of his property in 1858, leaving as his heirs-at-law his widow, Sarah, and children and grandchildren, John L.,

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Stephen S., *Samuel S., William H., Elizabeth, wife of Joseph W. Allen, Mary, wife of R. Q. Roberts, Jincey Ellis, widow, and a granddaughter, Mary Frances Moody, now Mullins, whose mother had pre-deceased. There was a will which disposed of part of the estate, of which John L. Smith was executor, and he filed a bill against the heirs, among other things, for partition of so much of the estate as was intestate. At the February Term of the court of equity, 1860, the court ordered the intestate lands sold, and they were sold by C. D. Evans, Esq., commissioner in equity, April 1st, 1860, and purchased by S. S. Smith, one of the distributees, who executed to the commissioner a bond for $2750, with E. J. Moody and William H. Moody sureties, received title for the same, and executed mortgage as required of the premises to secure the purchase money. The sale was confirmed by the court, and we suppose that at the same time the usual order for distribution was made, but it is not in the brief, and we are uninformed whether, if made, it was in the usual form to pay to the adult parties, to the guardians of minors, and the shares of married women, upon the joint receipt of husband and wife.

The mortgage, taken as required, was not recorded until January 6th, 1876. In the meantime, the purchaser undertook to pay the parties in interest their respective shares and to lodge their receipts with the commissioner, instead of paying directly to him. Several receipts were thus delivered to the commissioner, who, wishing time to make calculations, did not credit the bond, but placed the receipts in the record. The purchaser produced receipts in this way to about the amount of the bond, and he states that he thought it was paid in full.

Before the mortgage was recorded, and after it was supposed that the bond was paid, S. S. Smith sold the land to his brother Stephen, and he conveyed different parcels of it at different times to other persons who are in possession and have been made parties. The action was brought on the bonds in the name of the clerk of the court against S. S. Smith, obligor, and the parties in possession of the land to foreclose a statutory lien alleged to exist and for judgment on the bond for any balance after applying the proceeds of the land. It

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does not appear, *precisely, when the action was brought, but the order of court authorizing suit bears date March 22d, 1876, and it is supposed the action was brought soon after. The defendants all resisted the recovery on various grounds. They demurred, denying that the plaintiff was the successor to the commissioner, and that he had not legal capacity to sue, or, if so, that he had not the right to foreclose the statutory lien, and that these two separate causes of action on the bond and to foreclose the mortgage, were improperly united. If the demurrer should be overruled they insisted that there was no statutory lien in the case, that having been superseded by the mortgage required and actually executed but not recorded. That the bond had been settled in full by the payment of their respective shares to the distributees. That the persons for whose benefit the suit was brought were barred by laches, lapse of time, and the statute of limitations; and that the defendants in possession of the different parcels of land were purchasers for value without notice, and that they had title by adverse possession for more than ten years.

The issues of law and fact were referred to W. W. Harllee, Esq., as special referee, who overruled the demurrer and the pleas of purchaser without notice, and of the statute of limitations; found that all of the distributees had been paid except Mrs. Elizabeth Allen and Sarah Frances Mullins, the latter claiming her mother's share, and, also, the share of her grandmother by assignment, and that for these two shares, judgment should be rendered on the bond for the sum of $4082.51, with interest from January 2d, 1878, and, if not paid, that all the lands should be sold under the statutory lien. This report was confirmed by the Circuit judge, and from his order the appeal comes to this court.

The referee's report is so full as to make it unnecessary to state at length the arguments and authorities upon which the different questions are determined.

The first question is whether the clerk of the court had legal capacity to maintain the action to foreclose a statutory lien under the act of 1791. That act is now repealed, but these transactions occurred while it was of force, and this case must be considered as if it were still on the statute book. The

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bond *was made payable to the commissioner or his successor in office.

Upon the abolition of the office of commissioner, 1869, the bond was transferred to the custody of the clerk of the Court of Common Pleas, and was under the control

of said court. Judge Townsend ordered the clerk to place the bond in the hands of the attorney of Mary Frances Mullins for collection. That, itself, would seem to confer the authority to sue in the name of the clerk. The statutory lien, the existence of which is not controverted by the exceptions to the order of the Circuit judge, notwithstanding the execution of a mortgage, was only a security for the bond, and, as an incident, went with it. The authority to sue the bond carried with it the right to foreclose the lien. Billings v. Williamson, 6 S. C. 122; Code, §§ 134–136. The act of 1791 did not direct who should enforce the lien thereby given, but simply declared that the "courts shall direct a sale to be made on such credit and on such terms as to them shall seem right and proper, and the land so sold shall stand pledged for the payment of the purchase money." As the bond for the purchase money was payable to the commissioner or his successor in office we must consider that the pledge was to him in the same way, and that both were transferred to the clerk of the court, who was the proper person to bring the action. Daniels v. Moses, 12 S. C. 130.

Upon the subject of the alleged payment of the bond, the Circuit judge sustained the referee in holding that the share of Mrs. Elizabeth Allen, paid to her husband, Joseph W. Allen, according to her order, should not be considered a payment, for the reason that there is no proof that she received the money or other consideration for her order in favor of her husband. The referee reports as matter of fact that most of the distributees were paid, but "with respect to the amount due Mrs. Allen, wife of Joseph W. Allen, there is more difficulty. The proof by S. S. Smith was that he gave to C. D. Evans, commissioner in equity, the receipt of Joseph W. Allen, with others, in full of the bond, but it was not received, as the wife's signature was not on it. [So as to the receipt of R. Q. Roberts.] He states that the commissioner told him to get the

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order of the married *women, and he produces the order of Mrs. Allen (the only one contested) in these words:

"Mr. C. D. Evans, please pay to Samuel S. Smith all my interest in the depot lands.

(Signed) "Elizabeth Allen.

"April 13th, 1863."

"The referee concludes as fact that the order was signed by Mrs. Allen, but she then received no money for it. He also would hold that he did get Mr. Allen's receipt, and as he is fully sustained by the then commissioner in his account of the whole transaction he would hold that if he had a right to receive the money that that distributive share was paid. But Mr. Allen had no such right, and there is no evidence that any money was paid Mrs. Allen. She was under the disability of coverture at the time. Her order was not sufficient in the judgment of the referee to authorize the commissioner to credit the bond with such a payment or compel satisfaction for the amount due her unless it could be shown she received the amount."

Accepting this statement of the referee, we are to inquire whether his conclusion of law is correct; that no order or consent of Mrs. Allen that her husband should receive her share would authorize him to give a receipt and legal discharge for the same, unless Mrs. Allen received the money or some other valuable consideration for her consent. This must be determined by the law as it existed at the time. The constitution of 1868 secures to a married woman her separate estate in all respects as if she were sole and unmarried, but such was not the law in South Carolina before that time. By the old law, marriage imposed certain duties upon the husband, and in consideration therefor conferred on him some interest in all the property of the wife not settled to her sole and separate use. That interest was not the same in all kinds of property, realty and personalty, in possession and in action, but he did not stand as a stranger to any part of her property. As it was expressed by Chancellor Johnson in the case of Durr v. Bowyer, 2 McC. Eq. 372: "By the common law all the chattels which belonged to the wife before marriage, or to which she becomes en-

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titled in *her own right, are vested in the husband absolutely with respect to things in possession, and he may dispose of them as he pleases; but with respect to things in action, although the right to reduce them into possession is by law vested in him, the courts of equity have built up a system founded in good sense and common justice, which is intended to secure to the wife a suitable possession for her support and maintenance."

The interest which the wife has in choses in action, which belonged to her at the marriage, constitutes what is technically called the wife's equity, with respect to which it may be laid down as a general rule that if it be within the reach of the court it will not be permitted to be removed out of that jurisdiction until an adequate provision is made for the wife, unless she has already been sufficiently provided for, or on her own personal examination she thinks proper to waive the benefit of the provision. McCauley v. Phillips, 4 Yes. 17; Clancy's Rights of Married Women 188. When the land was sold, Mrs. Allen was divested of her interest in it and became the equitable owner of the money. This did not belong to her husband until he reduced it into possession. The commissioner had no right to pay it upon the single receipt of the husband, but it was the privilege of the wife not to insist on her equity, or to waive it. Such waiver, when made, even if she received no valuable consideration for it, was sufficient to authorize

the husband to receive the money and give a legal discharge. Waiver did not depend upon consideration paid, but upon its being actual, bona fide and without undue influence. To secure this, the practice at first was to subject the wife to personal examination. Later it was held that the court would not volunteer to set up the wife's equity, and it was finally settled that it was a discharge to pay the wife's money upon the joint receipt of husband and wife, and the chancellors generally ordered that it should be paid upon such receipt. It was considered sufficient evidence of the waiver of her right to join her husband in a receipt "or to do some equally significant and unequivocal act." Ex parte Geddes, 4 Rich. Eq. 302 [57 Am. Dec. 730]; Yeldell v. Quarles, Dud. Eq. 55; Edgerton v. Muse, Ib. 179; Gillett v. Powell, 1 Speers' Eq. 150.

Here the facts, as found by the referee, are

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that nearly twenty *years ago, Samuel S. Smith purchased at commissioner's sale a tract of land, in which his sister, Mrs. Allen, had an interest. Her husband, at the time, received her share from the purchaser, and gave his receipt. The commissioner refused to take that receipt unless the wife of Allen would signify her assent by giving an order in writing for the payment to her husband. She gave that order in writing. This was a compliance certainly with the requirement of the commissioner and with the order of distribution, if one was made in the usual form, and, we think, was a waiver of her equity in favor of her husband by "an act equally as significant and unequivocal" as if she had signed a joint receipt with her husband and he had drawn the money upon such receipt. The bond should be credited with the share of Mrs. Allen as paid.

The interest of Sarah Frances Mullins in the estate of her grandfather arose in two ways: first, her share in the land bond, which is claimed in this suit, and the other funds relinquished to her in the same way by the other distributees, which are not involved here. When these transactions took place she was of tender years, and lived with her father, E. J. Moody, who was believed by all parties to be her regularly appointed guardian. He acted as such. The commissioner in equity treated him as guardian, and to him, as such guardian, S. S. Smith paid the full share of Sarah Frances in the land bond, viz., the sum of $1100; took his receipt for the same in full and delivered it to the commissioner, who filed it in the office with the bond. The matter stood in this condition until Sarah Frances attained full age, married and brought this suit, when it was discovered that E. J. Moody was not her appointed guardian, or at least no evidence of the appointment could be found. Under these circumstances it is insisted that the court should presume that Moody was appointed guardian of his daughter, and that the payment to him should operate as satisfaction to that extent of the land bond. It seems that he held himself out as guardian, and that both Smith and the commissioner acted in good faith and were deceived; but in the absence of all proof of its existence, and as against one, then an infant, the court could not, from

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mere lapse of time, less *than twenty years, presume that E. J. Moody was appointed guardian of his daughter, Sarah Frances.

Besides the money paid to him, as above stated, by S. S. Smith, E. J. Moody received for his daughter other sums, given to her by the other distributees of the estate. This latter fund he also received without proper authority, by giving receipts in the following form: "Received of John L. Smith a conditional gift to my daughter, Sarah F. Moody. The conditions are as follows: If Sarah F. Moody lives to have lawful issue, and Samuel Smith's will is not protested or broken, then final," &c. The conditions were performed. It seems that after the marriage of Mrs. Mullins, E. J. Moody paid her in part of the money he had received from her, viz., about the sum of $2800. Clearly this should be a payment upon her claim against her father, and as he is unable to pay the remainder it becomes important to ascertain to which part of the money in his hands it should be credited—that received from the land bond, or the donation fund. The referee holds that the whole payment should be credited on the donation fund, and that no part of it should be set down to the money received for the land, upon the ground that, as to the donation fund, he had made himself "a self-constituted trustee to pay to the daughter," &c., while the appellants insist that the payment should be considered as made first from the land fund, or at least that the payment should be credited to both funds in proportion to their respective amounts. The whole evidence is not before us, but from what appears we can discover no error in the decree in this respect. The principle is well settled that the owner of the money—the debtor—has the right at the time of payment to direct the application, but if he does not make the application the creditor has that right. Heilbron v. Bissell, Bail. Eq. 430; Williams & Co. v. Vance & Mosely, 9 S. C. 348 [30 Am. Rep. 26].

Mrs. Mullins had a claim against her father, originating in two distinct sources, entirely different in character. One was a contract by which he assumed a trust, cognizable as such in equity, at the instance of the cestui que trust. The other was a payment by mistake, to her father as her assumed guardian, and as to which the only obligation imposed was to refund the sum to those from whom it came. By that wrongful payment

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no in*debtedness arose from Moody to his daughter which she was bound to recognize and set up. To have done so to any extent might have imperilled her recovery against

those who were her debtors. If the erroneous payment to Moody made him the debtor of his daughter, as it would have done if he had been in fact her guardian, the payment would have discharged those making it. Moody had the right to pay the money back to those who made the payment, which is inconsistent with the view that the payment itself made Moody the debtor of his daughter. Did the parties making the wrongful payment have the right to insist that the daughter should take a new debtor in discharge of them? If Mrs. Mullins were bound by any rule or principle of law or equity to receive part of the money on one account and part on the other, then we might hold that she received the money under that rule, and the credits should be applied to both in proportion to their respective amounts; but we know of no such rule, unless the parties have a right to say to her, you shall take your father as your debtor in our place. Not being under any such restraint by the law, she declares that it was Moody's money due her as a cestui que trust. She had a perfect right to say to her trustee, as you have not indicated how it shall be applied, I receive the money on account of the trust. As against the trustee she has the right to say so now; and we know of no equity to control that right upon her part as creditor. This exception is overruled.

It appears that at least three of the parties, George W. Smith, R. Vampill and George W. Harrelson, had been, at the time the suit was brought, in possession of their respective parcels of the land purchased from Mr. Stephen Smith more than ten years, and they insist that they have title under the statute of limitations. We agree with the referee and Circuit judge that this defence cannot avail. The lien bound the lands in the possession of S. S. Smith, and also that of Stephen Smith, as they, being parties, had actual notice. They conveyed and the purchasers took no higher right than they could give. They purchased property subject to an encumbrance, and their possession, like that of the vendor, was not adverse, unless, by some act or declaration, they gave notice that they

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did not hold subject to, but *adversely to, such lien; and we do not think that merely receiving title and holding possession without anything else, would be enough to prove such possession adverse. The case of McRaa v. Smith [2 Bay 339], relied on by the defendants, was the case of a purchaser from defendant in execution, in whose possession before the sale the land was bound by the lien. The principle on which that case is placed is not clearly perceived, as the statute of limitations refers in terms to title claim for the land itself, and does not expressly include the case of a lien or mere power. But the case has been recognized and we do not propose to disturb it. We are not, however, disposed to extend that construction of the statute beyond the actual case.

In reference to a purchase from a mortgagor, a different doctrine has been held and sustained by a long line of decisions from Thayer v. Cramer, 1 McC. Eq. 395, down to Gillison v. S. & C. R. R. Co., 7 S. C. 181. We think the correct doctrine is stated in the case of Wright v. Eaves, 5 Rich. Eq. 81, where the court say: "To a bill filed to foreclose a mortgage of land against mortgagor, the statute of limitations is not applicable, although the defendant and those under whom he claims has been in possession for more than ten years." It was also held in the late case of Norton v. Lewis, 3 S. C. 25, that a purchaser holding possession for the period of ten years, with notice of the mortgage, cannot avail himself of the defence of the statute of limitations in bar of the right of the mortgagee to foreclose."

But it is urged that a statutory lien is a secret lien—that it is never recorded, and in such case parties cannot be chargeable with constructive notice. The declaration of the statute, of which all are presumed to have knowledge, and the record in a public office open to all, taken together, are considered equivalent to recording. McQueen v. Fletcher, 4 Rich. Eq. 164. This precise question was decided in the case of Daniels v. Moses, before cited in which Judge McIver, as the organ of the court, says: "We do not see how a purchaser of property, covered by a statutory lien of which he has no express notice, can stand in any better position than the purchaser of property covered by a formal mortgage duly recorded, of which he has no express notice. In the former case no record-

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ing is required, the pro*ceeding under which it arises being regarded, doubtless, as a substitute for such recording, and which, therefore, operates as notice, just as the formal recording does in the other." This, also, disposes of the alleged laches on the part of the commissioner as the agent of the parties in interest.

The only remaining exception is "because the referee erred in overruling the plea of purchaser for valuable consideration without notice." We have already determined that the defendants had the knowledge of such facts as should have put them upon inquiry, and, therefore, were not without notice. The statutory lien must be considered on the same footing as a regular mortgage, which, although generally enforced by proceedings equitable in their character, gives a legal right, and it is so well settled that against such right the mere equity of a purchaser for value cannot prevail; that it cannot be necessary to do more than refer generally to some of the authorities upon the subject. Finch v. Shaw, 19 Beav. 500; 2 Lead. Cas. in Eq. 59; Collins v. Archer, 1 Russ. & M. 284;

Blake v. Heyward, Bail. Eq. 208; Donald v. McCord, Rice's Eq. 340.

The judgment of the Circuit Court, except as herein modified, is affirmed, and the case is remanded to that court for such further proceedings as may be necessary.

WILLARD, C. J., and PRESSLEY, A. J., concurred.

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13 S. C. 601

(Case No. 925.)

GODBOLD v. GODBOLD.

(November Term, 1879.)

[1. *Executors and Administrators* ⇐416.]

A, administrator of his father's estate, was indebted to three of his brothers for their shares in said estate, and the three brothers died intestate, leaving A one of their distributees, and afterwards A died insolvent—*Held*, that his interest in his brothers' estates was exhausted by his indebtedness to them, and was not distributable among his creditors generally.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1652; Dec. Dig. ⇐416.]

[2. *Wills* ⇐832.]

A legatee can be required to refund only to the extent of the value of the property at the time of action brought, and cannot, therefore, be held liable for slaves received where the suit is commenced after the emancipation of the slaves in 1865.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2139; Dec. Dig. ⇐832.]

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*Before Townsend, J., Marion, March, 1876.

In this case the Hon. B. C. PRESSLEY, judge of the First Circuit, sat instead of Hon. HENRY McIVER, associate justice, who had been of counsel in the cause. Chief Justice WILLARD was present at the hearing, but his term of office expired before the opinion was filed.

The facts bearing upon the points decided are sufficiently stated in the opinion of the court. Ann Godbold, mentioned in the opinion, was the widow of Thomas Godbold. She first administered upon his estate, and upon her death Asa Godbold, son of Thomas, became administrator de bonis non. The action was for a general accounting and settlement of the estates of Thomas, Ann and Asa, and of the three brothers of Asa, who had died intestate after their father.

Mr. W. W. Harllee, attorney for the administrators of Thomas Godbold and of Asa Godbold.

Mr. W. D. Johnson, contra.

October 5th, 1880. The opinion of the court was delivered by

PRESSLEY, A. A. J. The plaintiffs applied to the Probate judge of Marion for settlement of the estate of Thomas Godbold, and of the shares therein of his three sons, who died after him, leaving their brother Asa one of their distributees. He administered on the estate of his father, and received its income, for which he is in debt to the other shares more than his share in the estates of his father and deceased brothers. He died insolvent, and his creditors claim that his share in said estates are to be applied pro rata to his debts and not exclusively to the amount due by him on the money received from his father's estate. The Probate judge decided that the money so received exhausted his share in the said estates. The Circuit judge sustained that decision, and the creditors of Asa Goldbold appeal.

This court decides that the money so re-

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ceived and not distrib*uted by the said Asa, was retained by him in his right as a distributee of said estates, and so exhausted his shares therein.

Ann Goldbold died intestate, bequeathing slaves to each of five of her children. They received and kept said slaves until they were emancipated, which happened before this suit commenced. The remainder of her estate failed to pay her debts, and her other legatees claim that those who received said slaves must, in that behalf, contribute to such payment. The Probate judge decided that they were not so liable, but the Circuit judge overruled that decision, and the legatees, who received said slaves, appeal.

This court sustains the decision of the Probate judge, and holds that a legatee who receives property is liable to the creditors of the testators only for the value of the property at the commencement of the suit. The language of our court in McMullin v. Brown, 2 Hill's Ch. 457, is that "he is liable only for the legacy in specie." Before that decision, Chief Justice Marshall, in the case of Backhouse v. Jett, 1 Brock. 516 [Fed. Cas. No. 710] held that a voluntary donee of slaves from an insolvent donor was not liable to his creditors for the value of some of said slaves who died before suit, and he expressly assigns as the reason of his decision that it had always been so ruled in cases of property received by the heir from an ancestor whose other property failed to pay his debts.

It is therefore ordered and adjudged that this case be remitted to the Probate Court for settlement of said states according to this decision.

McGOWAN, A. J., concurred.

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